NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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332 N.C.

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THE SUPREME COURT
OF
NORTH CAROLINA

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H. JAMES HUTCHESON

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1. Elected Associate Justice 3 November 1992 and took office 11 January 1993.
2. Retired from Judicial System 10 January 1993.
3. Appointed by Chief Justice Exum effective 15 February 1993 to replace Franklin E. Freeman, Jr. who resigned 31 January 1993.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

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1. Elected and sworn in 11 December 1992.
2. Appointed and sworn in 31 December 1992 to replace David E. Reid, Jr. who died 27 December 1992.
3. Resigned and sworn in Court of Appeals 10 January 1993.

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30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed as Chief Judge and sworn in 7 December 1992 to replace Kenneth W. Turner who retired 6 December 1992.
2. Elected and sworn in 7 December 1992.
3. Appointed as Chief Judge and sworn in 1 December 1992 to replace Nicholas Long who retired 30 November 1992.
4. Elected and sworn in 7 December 1992.
5. Elected and sworn in 7 December 1992 to replace Allen W. Harrell who retired 30 November 1992.
6. Elected and sworn in 7 December 1992.

7. Elected and sworn in 7 December 1992 to replace Edmund Lowe who retired 30 November 1992.
8. Appointed and sworn in 1 September 1992 to replace L. Stanley Brown who retired 1 July 1992.
9. Elected and sworn in 7 December 1992 to replace William H. Scarborough who retired 30 November 1992.
10. Elected and sworn in 7 December 1992.
11. Appointed and sworn in as Chief Judge 7 December 1992 to replace Daniel J. Walton who resigned 6 December 1992.
12. Elected and sworn in 7 December 1992.
13. Elected and sworn in 7 December 1992.
14. Appointed and sworn in as Chief Judge 7 December 1992 to replace Thomas A. Hix who resigned 6 December 1992.
15. Elected and sworn in 7 December 1992.
16. Elected and sworn in 7 December 1992.

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30	Charles W. Hipps	Waynesville

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CASES REPORTED

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

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

GENERAL STATUTES CITED AND CONSTRUED

GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

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 23rd day of October, 1992 and said persons have been issued certificates of this Board:

RALPH JACOBSON ..... Pinehurst
Applied from the State of Illinois
JOHN J. J. JONES ..... Wilmington
Applied from the State of New York
CLAUDE WOOD ANDERSON, JR. ..... Virginia Beach, Virginia
Applied from the State of Virginia
DONNA RIEFBERG COHEN ..... Raleigh
Applied from the State of New York
JEFFREY ERIC COHEN ..... Charlotte
Applied from the State of New York
HARRIS MILLER LIVINGSTAIN ..... Washington, District of Columbia
Applied from the District of Columbia

Given over my hand and seal of the Board of Law Examiners this the 30th day of October, 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 13th day of November, 1992 and said persons have been issued certificates of this Board:

ELAINE M. GORDON ..... Raleigh
Applied from the District of Columbia
HENRY MOSS ABELMAN ..... Davidson
Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners this the 23rd day of November, 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 18th day of December, 1992 and said persons have been issued license certificates.

CABELL M. ADAMS ..... Mt. Airy
NEELAM BHARDWAJ ..... Greensboro

LICENSED ATTORNEYS

CATHERINE N. BONNIN ..... Gastonia
SUZANNE X. CONGER ..... Accident
DEIRDRE CALISTA COURY ..... Chapel Hill
MARIANA LANDIS COX ..... Greensboro
JAMES THOMAS DUCKWORTH, III ..... Durham
KAREN ELISE EADY ..... Chesapeake, Virginia
MAURA KATHLEEN GAVIGAN ..... Charlotte
PATRICIA KAY GIBBONS ..... Raleigh
JOHN DAVID MANSFIELD ..... Chula Vista, California
ALBERT NALIBOTSKY ..... Charlotte
DONNA LORRAINE PRIMROSE ..... Silver Spring, Maryland
FRANCIS X. ROONEY, JR. ..... Allentown, New Jersey
NICHOLAS PETER VALAORAS ..... Raleigh

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 18th day of December, 1992 and said persons have been issued certificates of this Board:

ANN HARMAN CIULLA ..... Cary
Applied from the State of Virginia
CHRISTOPHER ANTHONY CONNELLY ..... East Quoque, New York
Applied from the State of New York
NORMAN GREGORY DURHAM ..... Sanford
Applied from the State of Tennessee
CHRISTINE GUARASCIO ..... Howard Beach, Queens, New York
Applied from the State of New York
DOROTHY LANGE MOYER ..... Flat Rock
Applied from the State of Pennsylvania
JOHN G. PERICAK ..... Henrietta, New York
Applied from the State of New York
LAURA JEAN JOHNSON WETSCH ..... Raleigh
Applied from the State of North Dakota

Given over my hand and seal of the Board of Law Examiners this the 22nd day of December, 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 22nd day of January, 1993 and said person has been issued certificate of this Board:

AGNES MARIE ELIZABETH SCHIPPER ..... Chapel Hill
Applied from the State of Minnesota

Given over my hand and seal of the Board of Law Examiners this the 8th day of February, 1993.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

ROWAN COUNTY BOARD OF EDUCATION v. UNITED STATES GYPSUM CO.

No. 339A91

(Filed 17 July 1992)

1. Limitation of Actions § 2 (NCI3d) — asbestos in schools — action for fraud — statutes of limitation and repose — applicability to State

The trial court correctly denied defendant USG's motion for summary judgment based on various statutes of limitation and repose in an action in which plaintiff school board alleged fraud and misrepresentation by defendant in the sale of products containing asbestos for use in schools. The doctrine of *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State. Moreover, the political entity in question must be pursuing a governmental function; if the function is proprietary, time limitations run against the State and its subdivisions unless the statute at issue expressly excludes the State. Plaintiff was acting in a governmental capacity when it brought suit to recover lost tax money expended in the construction of public schools, an activity incidental to and part of the State's constitutional duty to provide public educa-

tion, and to abate a potential health hazard to students, teachers, staff, administrators, parents, and others using school buildings.

Am Jur 2d, Fraud and Deceit § 407.

2. **Fraud, Deceit and Misrepresentation § 18 (NCI4th)— asbestos—fraud and misrepresentation in promotional literature—reliance**

The trial court correctly denied defendant's motions for directed verdict and judgment notwithstanding the verdict as to plaintiff's fraud and misrepresentation claims where plaintiff clearly presented evidence in support of the existence of a false representation or the concealment of a material fact, defendant contended that plaintiff failed to identify a specific misrepresentation upon which it relied, and a jury could reasonably find that the agent of plaintiff responsible for ordering the material containing asbestos relied on defendant's promotional literature and the representations in it.

Am Jur 2d, Fraud and Deceit § 482.

3. **Appeal and Error § 451 (NCI4th)— appeal from Court of Appeals to Supreme Court—preservation of issue**

An argument was not properly before the Supreme Court and was not considered where it was not presented in either the brief to the Court of Appeals or the petition for discretionary review.

Am Jur 2d, Fraud and Deceit § 487.

4. **Damages § 85 (NCI4th)— asbestos—action for fraud and misrepresentation—punitive damages**

There was no error in a punitive damages award in an action for fraud and misrepresentation in supplying building materials containing asbestos to plaintiff school system where there was a question as to the legal sufficiency of the evidence of fraud as to two of the three schools involved and the jury made one combined award for punitive damages. The wording of the verdict was agreed upon by the parties and was sufficient to support the award of punitive damages regardless of whether the evidence was sufficient to support a finding of fraud as to two of the schools. Defendant will not be heard

to complain on appeal where it did not object to the verdict form and, indeed, consented to it.

Am Jur 2d, Fraud and Deceit § 347.

Justice WEBB dissenting.

ON appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 103 N.C. App. 288, 407 S.E.2d 869 (1991), affirming a judgment entered by *Washington, J.*, at the 3 January 1990 Special Session of Superior Court, ROWAN County, as well as an order of *Washington, J.*, entered 14 February 1990, denying defendant's motions for judgment notwithstanding the verdict or, in the alternative, for a new trial. Defendant's petition for discretionary review as to additional issues was allowed by the Supreme Court 2 October 1991. Heard in the Supreme Court 14 April 1992.

Woodson, Linn, Sayers, Lawther, Short & Wagoner, by Donald D. Sayers; Ness, Motley, Loadholt, Richardson & Poole, by Edward J. Westbrook; and J. Wilson Parker for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman, by William C. Livingston; and Morgan, Lewis & Bockius, by James D. Pagliaro and Rebecca J. Slaughter, for defendant appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Michael W. Patrick, for Forsyth Memorial Hospital, Inc. and Carolina Medicorp, Inc., amici curiae.

WHICHARD, Justice.

On 30 July 1985, the Rowan County Board of Education ("Rowan") brought suit against United States Gypsum Company ("USG") to recover costs associated with the removal of asbestos-containing ceiling plasters from certain of its schools. After a three-week jury trial in 1990, a jury awarded Rowan $812,984.21 in compensatory damages and $1,000,000.00 in punitive damages. The trial court entered judgment in those amounts and denied USG's motions for judgment notwithstanding the verdict and for a new trial.

On appeal to this Court, USG raises three issues:

1) Whether the Court of Appeals erred in refusing to reverse its prior ruling that USG was not entitled to summary judg-

ment based on the defenses of the statutes of limitation and repose?

2) Whether the Court of Appeals erred in affirming the trial court's order denying USG's motions for directed verdict and judgment notwithstanding the verdict as to Rowan's fraud and misrepresentation claims?

3) Whether the Court of Appeals erred in affirming the trial court's decision not to instruct the jury on the issue of the "state of the art"?

As to the first issue, we hold that the common law doctrine of *nullum tempus occurrit regi* protected Rowan from the running of any potentially applicable statutes of limitation or repose. As to the second issue, which contains three sub-issues, we hold that the trial court did not err in denying the motions for directed verdict and judgment notwithstanding the verdict. Finally, we conclude that discretionary review was improvidently allowed as to the issue regarding the "state of the art" jury instruction.

This controversy has its roots in 1980 communications and publications from the federal Environmental Protection Agency and the North Carolina Department of Public Instruction that alerted Rowan to possible dangers posed by the presence of in-place construction materials containing asbestos. Rowan alleged that between 1950 and 1961 it bought and installed two brands of asbestos-containing ceiling plasters from USG, marketed under the names of Audicote and Sabinite. According to Rowan, Audicote was placed in the ceilings of South and East Rowan High Schools, while Sabinite was installed in Cleveland and Granite Quarry Elementary Schools and Corriher-Lipe High School. After consulting experts in government and the private sector, Rowan decided to remove the asbestos-containing materials. Prior to beginning the removal process in 1983, Rowan offered USG the opportunity to perform air samples; USG declined.

On 30 July 1985, Rowan filed a suit against USG sounding in negligence, fraud and misrepresentation, and breach of implied warranty. On 18 June 1986, USG moved for summary judgment on grounds that Rowan's claims were barred by the applicable statutes of limitation and repose. On 10 October 1986, the trial court granted the motion. The Court of Appeals reversed, holding that statutes of limitation and repose do not run against a political

subdivision of the State when it is pursuing a governmental purpose. The Court of Appeals further held that Rowan's "action to recover lost tax dollars expended in the preservation and maintenance of school property and necessitated by a potential health hazard to our school personnel and children" was a governmental function in pursuit of a sovereign purpose. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 87 N.C. App. 106, 115, 359 S.E.2d 814, 819 (1987) ("*Rowan I*"). On 7 December 1987, this Court denied USG's petition for discretionary review of the Court of Appeals decision. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 321 N.C. 298, 362 S.E.2d 782 (1987).

On remand, the case was tried before Washington, J., from 3 January to 26 January 1990. The trial court directed verdicts for USG on all claims as to Cleveland Elementary School and Corriher-Lipe High School. The trial court also directed verdicts for USG on the claim of breach of implied warranty as to all schools. On the remaining claims, the trial court denied USG's motions for directed verdict. The jury returned a verdict for Rowan on the claims of fraud and negligence as to the Granite Quarry Elementary School and East and South Rowan High Schools projects, and it awarded compensatory and punitive damages. The trial court entered judgment on the verdict and denied USG's motions for judgment notwithstanding the verdict and a new trial.

USG appealed to the Court of Appeals, where a divided panel affirmed, with Greene, J., concurring in part and dissenting in part. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 103 N.C. App. 288, 407 S.E.2d 860 (1991) ("*Rowan II*"). USG appealed as of right on the issue raised by Judge Greene's dissent, and this Court granted USG's petition for discretionary review as to additional issues. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 330 N.C. 121, 409 S.E.2d 601 (1991).

[1] The first issue, which is before us on discretionary review, is whether USG was entitled to summary judgment because Rowan's suit was time-barred pursuant to the following statutes of limitation and repose: N.C.G.S. §§ 1-15(b), -50(5), -50(6), -52(5). Until its repeal in 1979, N.C.G.S. § 1-15(b), a professional malpractice statute of repose, provided for a ten-year repose period. N.C.G.S. § 1-15(b) (Supp. 1971) (repealed by 1979 Session Laws, c. 654, s.3). N.C.G.S. § 1-50(5), a real property improvement statute of repose, and N.C.G.S. § 1-50(6), a products liability statute of repose, both establish a

six-year repose period. N.C.G.S. §§ 1-50(5), -50(6) (Supp. 1991). N.C.G.S. § 1-52(5) prescribes a three-year limitation period. N.C.G.S. § 1-52(5) (Supp. 1991).

Rowan alleged that USG's asbestos-containing products were installed in Rowan County schools from 1950 to 1961. Clearly, if USG is correct that the statutes of limitation and repose apply to Rowan, Rowan's suit, which was brought twenty-four years after the last installation, was time-barred. Rowan contends, and the Court of Appeals held in *Rowan I*, that as a political subdivision of the State which was performing a governmental function, Rowan escaped the running of the statutes of limitation and repose under the common law doctrine of *nullum tempus occurrit regi*. The doctrine, which is translated as "time does not run against the king," developed at common law under the reasoning that the king, who was preoccupied with weighty affairs, "should [not] suffer by negligence of his officers" in failing to pursue legal claims. *Armstrong v. Dalton*, 15 N.C. (4 Dev.) 568, 569 (1834). While *nullum tempus* "appears to be a vestigial survival of the prerogative of the Crown," the source of its continuing vitality " 'is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers.' " *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132, 82 L. Ed. 1224, 1227-28 (1938) (quoting Story, J., in *United States v. Hoar*, Fed. Cas. No. 15,393, p. 330); *accord Mt. Lebanon Sch. Dist. v. W.R. Grace and Co.*, --- A.2d ---, ---, 1992 WL 84074, at *3 (Pa. Super. Apr. 29, 1992).

USG presents a multi-tiered argument against application of the doctrine of *nullum tempus* in this case. First, it contends that our legislature abrogated *nullum tempus* in 1868 when it passed the statute now codified as N.C.G.S. § 1-30. That statute, which retains its original language unchanged, provides that "[t]he limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties." N.C.G.S. § 1-30 (1983). As evidence that N.C.G.S. § 1-30 abrogated the common law doctrine of *nullum tempus*, USG cites several cases spanning a forty-year period from 1885 to 1924: *Manning v. R.R.*, 188 N.C. 648, 655, 125 S.E. 555, 565 (1924); *Tillery v. Lumber Co.*, 172 N.C. 296, 297-98, 90 S.E. 196, 197 (1916); *Threadgill v. Wadesboro*, 170 N.C. 641, 643, 87 S.E. 521, 522 (1916); *Hospital v. Fountain*, 129 N.C. 90, 92-93, 39 S.E. 734, 735 (1901); *Furman v. Timberlake*, 93

N.C. 66, 67 (1885). According to USG, the legislature's abrogation of *nullum tempus* means that the State and its political subdivisions are subject to the running of time limitations, unless the pertinent statute expressly *excludes* the State. *Manning*, 188 N.C. at 665, 125 S.E. at 565; *Threadgill*, 170 N.C. at 643, 87 S.E. at 522.

In response, Rowan contends that N.C.G.S. § 1-30 did not work a complete abrogation of *nullum tempus*, that the doctrine survives in North Carolina, and that under the doctrine no time limitation applies against the State or its political subdivisions unless the pertinent statute expressly *includes* the State. See the following: *State v. West*, 293 N.C. 18, 25, 235 S.E.2d 150, 154 (1977); *Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 229, 166 S.E.2d 671, 680-81 (1969); *Miller v. McConnell*, 226 N.C. 28, 34, 36 S.E.2d 722, 726 (1946); *Raleigh v. Bank*, 223 N.C. 286, 293, 26 S.E.2d 573, 577 (1943); *Charlotte v. Kavanaugh*, 221 N.C. 259, 266, 20 S.E.2d 97, 101 (1942); *Asheboro v. Morris and Morris v. Asheboro*, 212 N.C. 331, 333, 193 S.E. 424, 425-26 (1937); *Wilkes County v. Forester*, 204 N.C. 163, 168, 167 S.E. 691, 693 (1933); *Shale Products Co. v. Cement Co.*, 200 N.C. 226, 230, 156 S.E. 777, 779 (1930); *New Hanover County v. Whiteman*, 190 N.C. 332, 334, 129 S.E. 808, 809 (1925); *Wilmington v. Cronley*, 122 N.C. 383, 387-88, 30 S.E. 9, 10 (1898).

As can be seen, we have two contrary lines of cases. Under the first, "the State is to be considered the same as a private citizen when applying a time limitation, unless the pertinent statute contains an express statement *excluding* the State from its strictures." *Rowan I*, 87 N.C. App. at 109, 359 S.E.2d at 816. Under the second, all of which (except *Cronley*) are later cases, *nullum tempus* survives, and the State is not subject to the running of time limitations except in those cases where the pertinent statute expressly *includes* the State. USG characterizes the second line as a narrow exception developed by the Court for tax cases. *See Guilford County v. Hampton*, 224 N.C. 817, 819, 32 S.E.2d 606, 608 (1945) (recognizes the existence of two lines of cases and states that "[t]he trend is, at least, to limit [the doctrine's] application to matters of taxation"). While most of the cases in the second line involve matters of taxation, they do not represent a mere exception to abrogation of *nullum tempus*; the doctrine was applied in those cases because the power to tax is "an attribute of sovereignty." *Whiteman*, 190 N.C. at 334, 129 S.E. at 809; *accord Raleigh v. Bank*, 223 N.C. at 293, 26 S.E.2d at 577; *Kavanaugh*, 221 N.C.

at 266, 20 S.E.2d at 101. The latest case applying the doctrine shows that the second line of cases does not represent a mere narrow exception to abrogation of *nullum tempus*, but rather reveals the continuing vitality of the doctrine in this jurisdiction. There, this Court applied the doctrine in a suit brought by the State to recover possession of historical documents. *West*, 293 N.C. 18, 235 S.E.2d 150.

Our review of the case law persuades us that the second line of cases overrules, *sub silentio*, the earlier line. In fact, we cannot speak of two monolithic lines of cases, one earlier, the other later, because the second case that addressed the issue, *Cronley* (1898), clearly stated, "[i]t needs no citation of authority to show that statutes of limitation never apply to the sovereign unless expressly named therein." *Cronley*, 122 N.C. at 387, 30 S.E. at 10. Further, not only is the first line of cases not uninterrupted, but it rests at least in part on a misreading of *Cronley*. In *Threadgill*, the Court incorrectly cited *Cronley* for the following proposition: that *nullum tempus* no longer applies in North Carolina "unless the statute applicable to or controlling the subject provided otherwise." *Threadgill*, 170 N.C. at 643, 87 S.E. at 522. As is clear from the above quotation from *Cronley*, *Cronley* stands for the opposite proposition. Unfortunately, the misreading was not caught and was passed on in the next two cases in the anti-*nullum tempus* line. *Manning*, 188 N.C. at 665, 125 S.E. at 565; *Tillery*, 172 N.C. at 297-98, 90 S.E. at 197.

We now clarify the status of this doctrine in this jurisdiction: *nullum tempus* survives in North Carolina and applies to exempt the State and its political subdivisions from the running of time limitations unless the pertinent statute expressly includes the State.[1] The General Assembly has acquiesced in this interpretation of N.C.G.S. § 1-30. In the latest case addressing *nullum tempus* prior to the litigation at hand, this Court in effect invited the legislature to correct the Court's understanding of N.C.G.S. § 1-30 if the legislature intended that statute to remove the State's protection from the running of time limitations. *West*, 293 N.C. at 25, 235 S.E.2d at 154 ("[W]hether there ought to be a statute of limitations applicable to suits by the State is a matter for the Legislature, not the courts."). In the fifteen years since that invitation, the

1. A second qualification, explained *infra*, is that the political entity in question must be pursuing a governmental function.

General Assembly has not acted upon it. Indeed, in almost a century since *Cronley*, and in the sixty-seven years since the emergence of a solid, uninterrupted line of cases starting with *Whiteman*, the legislature has not taken issue with the Court's interpretation of N.C.G.S. § 1-30. The legislature's inactivity in the face of the Court's repeated pronouncements that *nullum tempus* continues to apply in North Carolina can only be interpreted as acquiescence by, and implicit approval from, that body. *See Hewett v. Garnett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375-76 (1968) (where the General Assembly had convened in seventeen regular and a number of special sessions and had failed to make any change in a statute, the Court assumed that "the law-making body [was] satisfied with the interpretation this Court ha[d] placed upon [it]"); *Raleigh v. Bank*, 223 N.C. at 292, 26 S.E.2d at 576 (noting that the General Assembly had made no change to the statute of limitation at issue during the legislative session intervening between *Kavanaugh* and *Raleigh v. Bank*, the Court stated that "[o]bviously the law on this point was regarded as settled").

Nullum tempus does not, however, apply in every case in which the State is a party. If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State. *See Rowan I*, 87 N.C. App. at 113, 359 S.E.2d at 818. This approach is consistent with the language of N.C.G.S. § 1-30, which provides that limitations apply to the State "in the same manner as to actions by or for the benefit of private parties." When the State or one of its political arms acts in a governmental fashion, it does not act in the same manner as a private party.

As its second-tier argument, USG contends that the Court of Appeals inappropriately imported the governmental/proprietary concept from the unrelated area of sovereign immunity and that this concept previously had not been applied in the context of *nullum tempus*. We conclude that the Court of Appeals followed precedent in applying the governmental/proprietary test. As early as 1945, this Court employed the same distinction to determine when the State benefits from the protection of *nullum tempus*. *Kavanaugh*, 221 N.C. at 265-66, 20 S.E.2d at 101 (statutes of limitation apply "in an action brought in the name of the State or for its benefit . . ., when the action is not brought in the capacity

of its sovereignty"); *see also West*, 293 N.C. at 27, 235 S.E.2d at 155; *Hampton*, 224 N.C. at 820, 32 S.E.2d at 608; *Raleigh v. Bank*, 223 N.C. at 293, 26 S.E.2d at 577. In fact, several of the cases USG cites in support of its position that *nullum tempus* has been abrogated can be explained by the governmental/proprietary dichotomy. Both *Fountain* and *Hampton* involved suits by state entities to recover the costs of maintaining nonindigent patients. In *Tillery*, a state board of education and the holders of timber rights on land to which the board held title sued the defendant in trespass for entering the land and cutting and removing lumber. The activities at issue in these cases, pecuniary activity or activity of a type historically performed by private individuals, are proprietary in nature. *Sides v. Hospital*, 287 N.C. 14, 22-26, 213 S.E.2d 297, 302-04 (1975); *but cf. In re Erny's Estate*, 337 Pa. 542, 546, 12 A.2d 333, 335 (Pa. 1940) (maintenance and treatment of an indigent patient is governmental in nature).

USG argues, however, that even if the Court holds that *nullum tempus* survives in this state, and that its application turns on the governmental/proprietary dichotomy, the doctrine does not apply here because the construction and maintenance of local public schools by a local school board is not a governmental function. We disagree. *Cf. Seibold v. Library*, 264 N.C. 360, 361, 141 S.E.2d 519, 520 (1965) (holding that operation of a free public library is a governmental function, as "[a]n adequate library is essential for the dissemination of knowledge"; rejecting plaintiff's argument that operation of the library by a municipality makes the operation a proprietary function, as that argument would apply equally to "the operation of public schools"); *Board of Education v. Allen*, 243 N.C. 520, 523, 91 S.E.2d 180, 183 (1956) (condemning of property as the site of a public school "is a political and administrative measure"); *Benton v. Board of Education*, 201 N.C. 653, 657, 161 S.E. 96, 97 (1931) (in performing the statutory duty of transporting students to school, "the county board of education is exercising a governmental function").

Education is a governmental function so fundamental in this state that our constitution contains a separate article entitled "Education." N.C. Const. art IX. Section 2 of that article mandates that the General Assembly "provide by taxation and otherwise for a general and uniform system of free public schools" and provides that the General Assembly "may assign to units of local government such responsibility for the financial support of the free public

schools as it may deem appropriate." *Id.* art. IX, § 2. Section 6 of Article IX requires that state revenues "shall be faithfully appropriated and used exclusively for establishing and maintaining a uniform system of free public schools." *Id.* art. IX, § 6. Pursuant to this constitutional mandate, the General Assembly created the State Board of Education and propounded a state policy "to provide from State revenue sources the instructional expenses for current operations of the public school system as defined in the standard course of study." N.C.G.S. § 115C-408 (1991). The General Assembly also assigned to local school boards, "in order to safeguard the investment made in public schools," the duty to "keep all school buildings in good repair to the end that all public school property shall be taken care of and be at all times in proper condition for use." N.C.G.S. § 115C-524 (1991). The General Assembly further legislated that:

> A local board of education shall institute all actions, suits, or proceedings against officers, persons, or corporations, or their sureties, for the recovery, preservation, and application of all money or property which may be due to or should be applied to the support and maintenance of the schools.

N.C.G.S. § 115C-44(a) (1991).

Given that the State (1) has undertaken the responsibility to provide free public schools, (2) has delegated day-to-day administration and operation of those schools to counties and local school boards, including the power to bring suit to recover money or property "which may be due to or should be applied to the support and maintenance of the schools" and (3) has retained the duty of providing those local entities with considerable operating funds from state revenues, we hold that Rowan, in the matters at issue, was acting as an arm of the State and pursuing the governmental function of constructing and maintaining its schools. Rowan also pursued a governmental function in bringing this suit to recover costs associated with the abatement of a potential health risk to school populations incurred as a result of the presence of construction materials containing asbestos. *Rhodes v. Asheville*, 230 N.C. 134, 137, 52 S.E.2d 371, 373 (a municipality acts in its sovereign capacity when it acts on behalf of the state "in promoting or protecting the health, safety, security or general welfare of its citizens"), *reh'g denied*, 230 N.C. 759, 53 S.E.2d 313 (1949); *see also District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d 394, 407,

410 (D.C. App. 1989), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 173 (1990) (District's claim for removal of widespread contamination of public buildings, including schools, from asbestos vindicates public right to health and safety and is in pursuit of a governmental function); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 474-75, 546 N.E.2d 580, 601-02 (1989) (health concerns and safety of a large segment of school populations and users, the facts that the buildings were owned by the government, maintained with tax revenues, and used for public purposes, and the statutory duty placed on school districts to cooperate in efforts to abate asbestos, all supported the court's characterization of the board's suit as governmental). Other jurisdictions involved in like litigation, and with similar constitutional and statutory provisions, have held likewise. *See County of Johnson, Tenn. v. U.S. Gypsum Co.*, 664 F. Supp. 1127, 1128 (E.D. Tenn. 1985); *Mt. Lebanon Sch. Dist.*, --- A.2d at ---, 1992 WL 84074, at *5-6; *Livingston Bd. of Educ. v. United States Gypsum Co.*, 249 N.J. Super. 498, 505, 592 A.2d 653, 656-57 (1991) ("[I]t is beyond doubt that school districts are state agencies fulfilling a state purpose.").

The majority of jurisdictions that have addressed the issue appear to apply *nullum tempus* on behalf of local school boards and other political subdivisions in both asbestos and other school construction cases. *See* **Federal:** *Tucson Unified Sch. Dist. v. Owens-Corning Fiberglass Corp.*, No. CIV 87-975-TUC-WDB (D. Ariz. Sept. 25, 1991), slip op. at 5-7 (construction of schools is a governmental function); *City of Philadelphia v. Lead Inds. Ass'n*, 1991 WL 170810, at *8-9 (E.D. Pa. Aug. 26, 1991) (where federal law requires plaintiff to abate lead-based paint and where no private plaintiff may sue directly to obtain the same relief, the function is governmental); *Altoona Area Vocational Technical Sch. v. U.S. Mineral Products Co.*, 1988 WL 236355, at *3 (W.D. Pa. Apr. 13, 1988) (where school had legal, statutory duty to abate asbestos, plaintiff exercised governmental function in bringing suit); *County of Johnson v. U.S. Gypsum Co.*, 664 F. Supp. at 1128 (where State has constitutional responsibility to provide public education, has delegated school administration to counties, and provides counties with considerable operating funds, operation of public schools is a governmental function); **District of Columbia:** *District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d at 407, 410 (District's claim to remove asbestos from schools is in pursuit of a government function); **Illinois:** *A, C And S., Inc.*, 131 Ill. 2d at 474-75, 546 N.E.2d at 601-02 (where school

buildings are owned by the government, maintained with tax revenues, and used for public purposes, board of education's suit to abate asbestos hazard is governmental); **Kansas:** *Unified Sch. Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 351, 629 P.2d 196, 203 (1981) (as construction of a school building is incidental to and part of the state's duty to provide public education, operation of a high school building by a local school board is a governmental function); **New Jersey:** *Livingston Bd. of Educ.*, 249 N.J. Super. at 505, 592 A.2d at 656-57 (although public schools are supported locally and school boards are chosen locally, schools receive state funding, so there "is no doubt that in constructing and maintaining public schools, a school district is acting in a governmental and not a proprietary capacity"); **Pennsylvania:** *Mt. Lebanon Sch. Dist.*, --- A.2d at ---, 1992 WL 84074, at *6 (a school district is an agency of the legislature and acts in a governmental capacity when it enters into contractual relations with private parties to construct and maintain suitable school facilities); **Washington:** *Bellevue Sch. Dist. No. 405 v. Brazier Constr. Co.*, 103 Wash. 2d 111, 116, 691 P.2d 178, 182 (1984) (statute of limitation does not run against school district because construction of school buildings is incidental to and part of state duty to provide public education); **Wyoming:** *Laramie County Sch. Dist. Number 1 v. Muir*, 808 P.2d 797, 802-04 (Wyo. 1991) (construction and maintenance of school buildings are sovereign functions); *cf. New Jersey Educ. Facilities Auth. v. Gruzen Partnership*, 125 N.J. 66, 71-76, 592 A.2d 559, 560-64 (1991) (while the activities of the state agency in bringing suit to address defective design and construction of a student center were governmental in nature, New Jersey's abrogation of sovereign immunity works a prospective abrogation of *nullum tempus* as well as to contractual claims).We find the reasoning of these cases more persuasive than the reasoning of the following cases cited by USG. **Federal:** *Anderson County Bd. of Educ. v. Nat'l Gypsum Co.*, 821 F.2d 1230, 1232-33 (6th Cir. 1987) (where the subordinate political body was primarily involved in normal commercial activity not inextricably connected to a state function, where the state did not regulate the type of roofing to be used, and where no state monies would be substantially affected by the suit, the board did not enjoy immunity from the running of the statute of limitations); *In re Asbestos Sch. Litigation*, 768 F. Supp. 146, 152 (E.D. Pa. 1991) (in asbestos litigation, while school districts may be acting in a governmental role, they are not acting in a role that is "exclusively governmental"); *West Haven Sch. Dist. v. Owens-Corning Fiberglas Corp.*, 721 F. Supp.

1547, 1551-52 (D. Conn. 1988) (suit by school district to abate asbestos was a purely local function without statewide implications); *Kelley v. Metropolitan County Bd. of Educ.*, 615 F. Supp. 1139, 1152 (D.C. Tenn. 1985) (dicta from a school desegregation case to effect that maintenance of physical structure and land of public schools is a local function), *rev'd on other grounds*, 836 F.2d 986 (6th Cir. 1987); **Connecticut:** *Bd. of Educ. v. Dow Chemical Co.*, 40 Conn. Supp. 141, ---, 482 A.2d 1226, 1228 (Conn Super. Ct. 1984) (where maintenance of school property is not encompassed within educational activities of the state and where the funding source for such building and maintenance is primarily local, local school board is not acting as an agent of the state).

Further, while USG correctly notes that this Court has expressed an intent to restrict rather than extend application of sovereign immunity, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 529-30, 186 S.E.2d 897, 908 (1972), our treatment of that doctrine does not affect our view of *nullum tempus*, which serves a different purpose. While the two doctrines share a similar "philosophical origin and have a similar effect of creating a preference for the sovereign over the ordinary citizen," *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 460, 451 N.E.2d 874, 875-76 (1983), retrenchment on the one does not require retrenchment on the other. While limiting sovereign immunity diminishes the government's escape of its misdeeds, the same concern for the rights of the public supports retention of *nullum tempus*, as that doctrine allows the government to pursue wrongdoers in vindication of public rights and the public purse. *District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d at 409; *see also Muir*, 808 P.2d at 803 n.3; *cf. Hardbarger v. Deal*, 258 N.C. 31, 35, 127 S.E.2d 771, 774 (1962) ("The statute of limitations, although not an unconscionable defense, is not such a meritorious defense that either the law or the facts should be strained in aid of it."); *but see City of Colorado Springs v. Timberlake Assocs.*, 824 P.2d 776, 781-82 (Colo. 1992) (declines to take route of courts that have distinguished sovereign immunity and *nullum tempus* in order to retain the latter in the face of abrogation of the former); *Gruzen Partnership*, 125 N.J. at 76, 592 A.2d at 564 (in order to be consistent with legislature's abrogation of sovereign immunity, the court prospectively abrogated *nullum tempus*).

In a final argument against allowing Rowan to maintain its suit beyond the running of applicable statutes of repose, USG argues

that statutes of repose are different from statutes of limitation and that *nullum tempus* applies only to the latter. This Court has recognized that unlike statutes of limitation, statutes of repose are not mere procedural limitations on rights. They also constitute substantive limitations that act as conditions precedent to the accrual of an action. *Bolick v. American Barmag Corp.*, 306 N.C. 364, 366-67, 293 S.E.2d 415, 417 (1982). USG argues that it would be anomalous if the substantive repose rights granted to a class of defendants were made contingent upon the character of a particular plaintiff, which will be the case if Rowan is allowed to circumvent the applicable statutes of repose merely because it is a subdivision of the sovereign. As authority for its argument, USG cites a Virginia case which holds that *nullum tempus* is limited to statutes of limitation and does not apply to statutes of repose. *Commonwealth v. Owens-Corning Fiberglas Corp.*, 238 Va. 595, 600, 385 S.E.2d 865, 868 (1989).

While the Virginia case discusses the differing natures of statutes of repose and statutes of limitation, the case turns at least in part on the existence of a Virginia statute codifying the common law doctrine of *nullum tempus*. That statute refers only to statutes of limitation. We do not have a codified version of *nullum tempus* limiting it to statutes of limitation. Further, we are persuaded by the reasoning of cases which hold that despite the fact that statutes of repose differ in some respects from statutes of limitation, they are still time limitations and therefore still subject to the doctrine that time does not run against the sovereign. *See Bellevue*, 103 Wash. 2d at 118-20, 691 P.2d at 183-84 (recognizes difference between a builder limitation statute with a six-year accrual period and conventional statutes of limitation, but holds that statute exempting State from running of statutes of limitation applies to both kinds of time limitations); *Muir*, 808 P.2d at 804 (court applies *nullum tempus* to exempt local school board from running of a statute, which, although termed a statute of limitation by the Wyoming court, works like a real property improvement statute of repose); *District of Columbia v. Owens-Corning Fiberglas Corp.*, 572 A.2d at 401 ("It is well settled that sovereigns enjoy a common-law immunity from the operation of statutes of limitations and repose."); *Rowan I*, 87 N.C. App. at 113, 359 S.E.2d at 819 ("when the State or its political agencies are pursuing a sovereign . . . purpose . . . statutes of limitation or statutes of repose do *not* apply *unless* the statute expressly includes the State.").

In summary, when the State or one of its political subdivisions is pursuing a governmental purpose, the doctrine of *nullum tempus* protects that political body from the running of statutes of limitation and repose unless the pertinent statute expressly includes the State. Rowan was acting in a governmental capacity when it brought suit to recover lost tax money expended in the construction of public schools—an activity incidental to and part of the State's constitutional duty to provide public education—and to abate a potential health hazard to students, teachers, staff, administrators, parents, and others using school buildings. Therefore, the Court of Appeals correctly affirmed the trial court's denial of USG's motion for summary judgment based on the various statutes of limitation and repose.

[2] USG's second issue, whether the Court of Appeals erred in affirming the trial court's order denying USG's motions for directed verdict and judgment notwithstanding the verdict as to Rowan's fraud and misrepresentation claims, in fact contains three sub-issues. As the first sub-issue, which is before us on discretionary review, USG contends that Rowan failed to prove that it or its agents relied upon any specific representation of USG in ordering Audicote for South Rowan High School.

A motion for judgment notwithstanding the verdict "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985). In considering both types of motions, trial and appellate courts apply the same standard, under which courts

> must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Id. at 369, 329 S.E.2d at 337-38. Further, judgment notwithstanding the verdict is "cautiously and sparingly granted." *Id.* In fraud cases, it is inappropriate to grant motions for directed verdict and judgment notwithstanding the verdict if there is evidence that supports the plaintiff's prima facie case in all its constituent elements. *Smith v. Pass*, 95 N.C. App. 243, 255, 382 S.E.2d 781, 789 (1989); *Shaver v. Monroe Construction Co.*, 63 N.C. App. 605, 611, 306 S.E.2d

519, 523 (1983), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d 294 (1984). Applying these standards, we hold that the trial court did not err in denying USG's motions for directed verdict and judgment notwithstanding the verdict as to Rowan's claims of fraud and misrepresentation as to South Rowan High School.

The essential elements of fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)); *accord Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953). USG focuses on the fourth element of fraud, reliance, and argues that because Rowan failed to identify a specific representation upon which it relied in selecting Audicote to be installed in South Rowan High School, Rowan failed to prove this element.

There is a requirement of specificity as to the element of a representation made by the alleged defrauder. " 'The representation must be definite and specific . . . .' " *Johnson v. Owens*, 263 N.C. 754, 756, 140 S.E.2d 311, 313 (1965) (quoting *Berwer v. Insurance Co.*, 214 N.C. 554, 557, 200 S.E. 1, 3 (1938)); *accord Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 500; *New Bern v. White*, 251 N.C. 65, 68, 110 S.E.2d 446, 448 (1959). Requiring proof of a specific representation facilitates courts in distinguishing mere puffing, guesses, or assertions of opinions from representations of material facts. *See Ragsdale*, 286 N.C. at 139, 209 S.E.2d at 500-01 (discusses specificity requirement in context of evaluating whether defendant's representations that a corporation was a "gold mine" "were intended and received as mere expression of opinion or as statements of a material fact"); *Warfield v. Hicks*, 91 N.C. App. 1, 8, 370 S.E.2d 689, 692, *disc. rev. denied*, 323 N.C. 629, 374 S.E.2d 602 (1988) (defendant's "general unspecific statement of opinion about the potential consequences of using beetle infested beams" did not constitute misrepresentation).

Rowan presented evidence of specific representations made by USG about its product Audicote. In its trade literature, USG heavily promoted Audicote as suitable for use in schools. In its sales brochures of the 1950's, USG touted Audicote as having "exceptional bonding ability," "exceptional adhesive qualities," and as "ideal for ceilings in schools." At the same time USG was promoting

Audicote for its bonding abilities, internal USG memoranda from the 1950's reveal that USG was aware that Audicote had a sifting or dusting problem. A January 1956 memorandum addressed to "all architect representatives" evaluated Audicote as follows: "Structurally this material has the least guts [compared to Sabinite and Hi-lite] and it is possible to have fine sifting from slight surface abrasion or vibration." A 12 April 1957 internal document responding to numerous dusting complaints recommended that Audicote should not be promoted for locations where "freedom from dust is crucially important." That same document recommended that "[c]are should be exercised in the promotion of acoustical plasters where dusting may be detrimental to the use of a building or equipment within the building." An internal document dated 21 April 1958 states that since the introduction (the summer before) of USG's new formula substituting asbestos for paper fiber, USG had received complaints about "fissuring and blistering and white spots and streaks," which caused the author of the document to "wonder whether we have the ultimate in product composition and performance." Despite the existence of such internal documents, USG's sales brochures continued to promote Audicote's bonding abilities and did not mention the dusting problems. Neither did the brochures discuss potential health hazards of asbestos, of which USG was aware.

Rowan thus clearly presented evidence in support of the first element of fraud—the existence of a "false representation or concealment of a material fact." *Ragsdale*, 286 N.C. at 138, 209 S.E.2d at 500.

The question, however, is whether Rowan proved that it or its agents relied on the above representations in selecting Audicote for South Rowan High School. Testimony by deposition of the school's architect, Howard Bangle, constituted the main evidence supporting the reliance element. Bangle testified as follows:

> Q. Mr. Bangle, what I would like for you to do is explain how you as an architect would determine which products to specify.
>
> A. . . . I rely, as most architects do, on Sweet's, and I rely on manufacturers' representatives who call on you and explain their product. . . .

Q. In the course of your practice, would you have received sales information such as product brochures from U.S. Gypsum Company?

A. Oh, yes.

Q. Could you describe for us what the Sweet's catalog is and how it works?

A. Sweet's catalog is an architect's Bible . . . .

. . . .

These [volumes of Sweet's] contain basically all building products that an architect will use, and from this he would—if he's going to use a product, he goes to Sweet's, looks it up, looks at the competitors, their presentations, and he pretty much uses this in the writing of his specifications as guides and outlines.

. . . .

Q. In the course of your architectural practice, did you use the Sweet's catalogs on a routine basis?

A. Of course.

Q. Can you tell me whether or not it was your practice to rely upon the information contained in Sweet's catalog?

A. Yes.

Q. Can you tell me whether or not it was your practice to rely upon product literature and information submitted by manufacturers?

A. Yes, but this is pretty much taken from Sweet's. What's in Sweet's a manufacturer's rep will come around and give you some additional copies, which you usually use because it's not so burdensome and heavy and hard to handle like your Sweet's catalogs are. Your Sweet's catalogs are somewhat like you see behind a lawyer's desk, huge volumes of books that you have to refer to but you avoid as much as possible if you have the literature in a smaller, more compact method.

Q. Okay. Can you tell me whether or not it was standard practice during the time you worked as an architect for ar-

chitects to rely on Sweet's catalogs and manufacturers' product literature for information?

A. I don't know of any architect that didn't.

Q. Did you believe the information contained in Sweet's catalog accurately described the quality of the product?

A. Yes.

Q. Did you believe the information contained in the manufacturers' brochures and literature accurately described the quality of the product?

A. Yes.

Q. Did you rely on the manufacturer to tell you about the qualities and [properties] of its products?

A. Yes.

Bangle further testified that neither USG's trade literature nor its representatives had ever informed him that Audicote had problems of dusting, blistering, shrinking, and sifting or that it contained a potentially hazardous ingredient, all of which would have been material to Bangle. When asked whether he would have included Audicote in his specifications for South Rowan if he had known of the complaints and problem properties of the product, Bangle unequivocally answered "[n]o." USG's attorney attempted to soften the impact of that answer with the following question:

Q. And if you had been told by a Gypsum representative that, yes, we've had some problems with Audicote, but we are implementing formula changes which we believe will correct those problems, you would not have been concerned about using the product then, would you?

Bangle responded:

A. Well, a caution flag would certainly go up. I would be more apt to keep an eye on that product. I would have some hesitancy to use it until I was convinced that whatever the problem was had been taken care of.

When USG's attorney suggested to Bangle that he relied on his own experience with the product rather than on USG's promotional material, Bangle responded that "[i]t's a combination of both," and

that he "put a lot of stock in manufacturers' literature, but . . . also went with [his] experience."

USG contends that because Bangle never identified a specific representation by USG upon which he relied, Rowan failed to prove the reliance element of fraud. While Bangle did not speak of any specific representation, advertisement, or brochure that he had read thirty years before upon which he then relied, we know from USG itself that it specifically targeted architect-clients, directly and through Sweet's, with its promotional literature. USG acknowledged that Sweet's is the source which "an architect would then refer to in specifying products for installation within a building design that he is providing." USG further acknowledged that its brochures were placed in Sweet's during the pertinent years. This Court has recognized that "proof of circumstances from which the jury may reasonably infer the fact is sufficient" in proving the element of reliance. *Grace v. Strickland*, 188 N.C. 369, 374, 124 S.E. 856, 858 (1924).

We hold that because the agent of Rowan responsible for ordering Audicote for installation in South Rowan High School testified that he relied on Sweet's in drawing up the specifications for that school, and USG acknowledged that its promotional literature was placed in Sweet's at that time, a jury reasonably could find that Bangle relied on the literature and the representations in it about Audicote. *See In re Baby Boy Scamp*, 82 N.C. App. 606, 613, 347 S.E.2d 848, 852 (1986), *disc. rev. denied*, 318 N.C. 695, 351 S.E.2d 750 (1987).

[3] The second sub-issue of USG's fraud issue involves Rowan's fraudulent concealment claim for South Rowan. USG claims that Rowan failed to prove that USG had actual knowledge in the 1950's of any alleged danger posed by its acoustical plaster products as installed in buildings. "Petitioners whose cases come before this Court on discretionary review are limited by Rule 16 of the North Carolina Rules of Appellate Procedure to those questions they have presented in their briefs to the Court of Appeals." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 467, 343 S.E.2d 174, 178 (1986). In its brief to the Court of Appeals, USG argued that "Rowan failed to meet its burden of proving (a) the existence of a specific representation; (b) reliance; and (c) any legal duty of U.S. Gypsum to disclose any information." In its petition for discretionary review in this Court, USG presented its fraud issue

as whether "plaintiff demonstrate[d] that he relied upon a definite and specific representation of the defendant in selecting the product at issue." In neither of these documents did USG present the argument it now raises. As a result, this issue is not properly before us, and we do not consider it.

[4] The third sub-issue of USG's fraud issue concerns the punitive damage award of $1,000,000.00. This issue comes to us via Judge Greene's dissent. Judge Greene concurred in the majority's holding that the trial court did not err in denying USG's motions for directed verdict and judgment notwithstanding the verdict with regard to Rowan's fraud claim as to South Rowan. He differed, however, with the majority's holding that the trial court did not err in denying USG's motions regarding Granite Quarry Elementary School and East Rowan High School. Rowan did not offer testimony of any of those school's architects. Because Bangle was not involved in the construction of either school, Judge Greene would not accept, as sufficient evidence of reasonable reliance with regard to Granite Quarry and East Rowan, Bangle's statement that every architect he knew used Sweet's.

Despite the lack of legally sufficient evidence—as viewed by USG and Judge Greene—as to Granite Quarry and East Rowan, the jury found that USG defrauded Rowan with respect to those schools as well as South Rowan. The jury then awarded total punitive damages of $1,000,000.00. Judge Greene reasoned that because there is a substantial likelihood that some portion of that award was granted for the alleged Granite Quarry and East Rowan frauds, which claims he believed should have been dismissed, USG must receive a new trial on the issue of punitive damages related to the South Rowan fraud.

We need not decide whether the evidence regarding fraud as to Granite Quarry and East Rowan was legally sufficient because, under the verdict form agreed to by both parties and submitted to the jury, the jury's finding of fraud with respect to South Rowan was sufficient to support the entire punitive damages award. While drafting the verdict sheet, USG specifically requested that the jury indicate separately whether it found fraud with respect to each of the three schools. After reaching agreement on that detail, the court proposed that the punitive damages issue read as follows: "If the fifth issue [relating to the existence of fraud with respect to each of the three schools] *or any part thereof* is answered 'yes,'

what amount of punitive damages, if any, is plaintiff entitled to recover of the defendant?" (Emphasis added). Counsel for both parties explicitly stated their agreement with the form of the verdict sheet with respect to punitive damages.

The jury returned a verdict in plaintiff's favor with respect to all issues, including specific findings of fraud with respect to each of the three schools. Regardless of whether the evidence was sufficient to support a finding of fraud with respect to Granite Quarry and East Rowan, under the agreed-upon wording of the jury verdict form the South Rowan fraud is sufficient to support the award of punitive damages. Because USG did not object to the verdict form, and indeed consented to it, it will not be heard to complain on appeal. N.C. R. App. P. 10(b); *see King v. Powell*, 220 N.C. 511, 513, 17 S.E.2d 659, 660 (1941) (lack of objection to jury's failure to answer certain issues on verdict form precluded appellate review); *Kim v. Professional Business Brokers*, 74 N.C. App. 48, 52, 328 S.E.2d 296, 299 (1985) (issue of separate damages not before appellate court where defendant's counsel recommended to trial court that only one damage issue be submitted to the jury); *Bennett v. Bennett*, 24 N.C. App. 680, 681, 211 S.E.2d 835, 836 (1975) (without having objected at trial, plaintiff may not appeal trial court's failure to submit tendered issues to the jury).

As its final issue, USG argues that the trial court erred in refusing to give the jury a "state of the art" instruction. In the absence of the instruction, USG argues that the jury was permitted to evaluate USG's conduct by 1990 standards rather than the standards at the time, 1950 to 1961. We conclude that discretionary review of this issue was improvidently allowed.

For the reasons stated, we affirm the Court of Appeals on the first two issues. We hold that review of the third issue was improvidently allowed.

Affirmed in part; discretionary review improvidently allowed in part.

Justice WEBB dissenting.

I dissent from the majority because I believe the plaintiff's claim is barred by the applicable statutes of limitation and repose. N.C.G.S. § 1-30 says:

> The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties.

I do not see how the meaning of this statute could be more clear. It makes the statute of limitation and the statute of repose applicable to this case. Rather than interpret the fine reasoning of some previous cases, I would hold that the statute is clear and all cases inconsistent with this case are overruled.

As to the majority's reliance on inaction by the General Assembly, as evidence that it approves through its inaction the interpretation we have given the statute, I can only quote this Court in *DiDonato v. Wortman*, 320 N.C. 423, 425, 358 S.E.2d 489, 490 (1987), in which we said:

> We must be leery, however, of inferring legislative approval of appellate court decisions from what is really legislative silence. "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." . . . We cannot assume that our legislators spend their time poring over appellate decisions so as not to miss one they might wish to correct.

I vote to reverse the Court of Appeals and remand this case with an order that it be dismissed.

STATE OF NORTH CAROLINA v. JOSEPH EDWIN BROMFIELD

No. 234A91

(Filed 17 July 1992)

1. Evidence and Witnesses § 1220 (NCI4th)— defendant not illegally seized—admissibility of statement to officers

Defendant was not illegally seized or detained in violation of the Fourth Amendment to the U.S. Constitution so as to render inadmissible defendant's first statement to Spring Lake police officers where Raleigh officers advised defendant at a bus station that he was not under arrest and asked defendant if he would accompany them to be questioned about a murder; defendant agreed to do so; defendant was not handcuffed and

his freedom was not restrained; defendant was not intimidated or locked in an office while at the police station; defendant signed a form in which he acknowledged his right to decline to accompany Spring Lake officers and stated that he accompanied the officers to Spring Lake of his own free will; defendant sat unattended and unrestrained in the lobby of the Spring Lake police department; officers explained to defendant that he was there voluntarily, that there were no charges against him, and that he was free to go anywhere he wanted; defendant went unescorted to the snack bar and restrooms; defendant acknowledged that, based upon prior experiences, he could not be coerced into talking with law officers; and a reasonable person would thus have believed that he was free to leave at the time defendant made his first statement to the officers.

Am Jur 2d, Constitutional Law § 586.

Admissibility of pretrial confession in criminal case. 23 L. Ed. 2d 1340.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

2. Evidence and Witnesses § 1220 (NCI4th)— probable cause for arrest—admissibility of second statement to officers

Assuming arguendo that defendant was arrested prior to giving his second statement to the police, the statement was not inadmissible as fruit of the poisonous tree where the evidence reveals that defendant's arrest was based upon probable cause and that defendant waived his rights to remain silent and to have a lawyer present during questioning. Officers had probable cause to arrest defendant as an accessory after the fact to murder based upon his admission in his first statement that he left Spring Lake in an automobile with the perpetrator (1) with knowledge that the perpetrator had murdered two victims, (2) with knowledge that the perpetrator was leaving town because "the heat was coming," and (3) with knowledge of the location of the murder weapons.

Am Jur 2d, Criminal Law § 791.

3. Evidence and Witnesses § 1220 (NCI4th)— defendant not illegally seized—third statement admissible

Where the trial court properly denied defendant's motion to suppress defendant's first two statements to the police because defendant was not illegally seized or detained in violation of the Fourth Amendment, defendant's Fourth Amendment challenge to the admission of his third statement as being the fruit of the poisonous tree is also without merit.

Am Jur 2d, Criminal Law § 791.

4. Evidence and Witnesses § 1255 (NCI4th)— invocation of right to counsel—further questioning—initiation of communications by accused

An accused in custody who requests counsel is not subject to further questioning until counsel has been made available to him unless the accused himself initiates further communications with the police.

Am Jur 2d, Criminal Law § 796.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

5. Evidence and Witnesses § 1255 (NCI4th)— invocation of right to counsel—third statement—conversation initiated by defendant

Defendant's third statement to the police after counsel had been appointed to represent him was the result of a conversation initiated by defendant and was not taken in violation of defendant's Sixth Amendment right to counsel where the police chief did not know that counsel had been appointed for defendant when he went to serve first degree murder warrants on defendant; defendant was shocked when informed about the warrants and voluntarily indicated to the police chief that he wanted to talk with him further about the facts of the case; and defendant made the third statement of his own free will in an effort to exculpate himself.

Am Jur 2d, Criminal Law §§ 796-797.

6. Homicide § 268 (NCI4th)— murders in perpetration of robberies—acting in concert—sufficient evidence of robbery of both victims

The evidence was sufficient for the jury to find that both victims were robbed so as to support defendant's conviction of first degree murder of both victims committed in the perpetration of armed robbery under the theory that he acted in concert with the actual perpetrator where it tended to show that the perpetrator, accompanied by defendant, went to the home shared by the two female victims, brandishing a knife and an axe handle; upon entering the house, the perpetrator struck both victims with the axe handle, and both women fell to the floor; the perpetrator then shot the first victim; when the second victim regained consciousness, she begged the perpetrator not to kill her, saying that she would tell him where drugs were if he would not kill her; the perpetrator then started stabbing the second victim with the knife; after murdering both women, the perpetrator took $400 and ten "rocks" of cocaine from the floor while defendant observed; defendant's own statements showed that the perpetrator was upset with both women about drugs and had told him that he was going to "get those bitches"; and both victims had plastic bags with a white substance in them in their clothing when they were killed.

Am Jur 2d, Homicide §§ 34-40.

7. Criminal Law § 873 (NCI4th)— jury's request for written instructions—denial—oral instructions—exercise of discretion

The trial court did not fail to exercise its discretion when it denied the jury's request for a written copy of instructions on the elements of armed robbery and instead reinstructed the jury orally where the court's response to the request indicates that, because the instructions did not exist in writing at the time the request was made, the court decided that reinstructing the jury orally would serve the same purpose as written instructions and would be more efficient given the time constraints.

Am Jur 2d, Trial § 1149.

8. Criminal Law § 793 (NCI4th)— reinstruction—acting in concert—mere presence

The substance of defendant's request that the trial court reinstruct on "mere presence" if it reinstructed on "acting in concert" was satisfied by the trial court.

Am Jur 2d, Homicide §§ 561, 562.

9. Criminal Law § 750 (NCI4th)— final mandate—omission of instruction on reasonable doubt—error cured by reinstruction

Any error in the trial court's omission of an instruction on reasonable doubt in the final mandate to the jury regarding armed robbery was cured by the trial court's correction of this omission when court resumed the next morning.

Am Jur 2d, Homicide §§ 561, 562.

10. Criminal Law § 754 (NCI4th)— question by jury—consideration of each count separately—sufficiency of instruction

The trial judge did not err in his response to a question by the jury as to whether finding defendant guilty of robbery with a dangerous weapon would mean that defendant was automatically guilty of felony murder where the court first instructed the jury that it should consider each "case" separately and then clarified this instruction by stating that he meant count when he said "case," that each case contains two counts, and that the jury should consider each count in each case separately.

Am Jur 2d, Homicide § 561.

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 sentences of life imprisonment entered by *Herring, J.*, at the 13 August 1990 Criminal Session of Superior Court, CUMBERLAND County, upon verdicts finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 December 1991.

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

James R. Parish for defendant-appellant.

FRYE, Justice.

On 12 February 1990, defendant, Joseph Edwin Bromfield, was indicted for the murders and robberies of Annanitra "Star" Jackson and Arlena Elizabeth Redd. Defendant entered pleas of not guilty to the charges and was tried capitally on the theory of acting in concert with Everett "Witt" Monroe.[1]

The jury returned verdicts finding defendant guilty of the first-degree murders of both victims under the felony murder rule and guilty of two counts of robbery with a dangerous weapon. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended sentences of life imprisonment for each murder conviction. Finding that the robbery conviction as to each victim merged with the murder convictions, the trial judge arrested judgment on both convictions of robbery with a dangerous weapon and, in accordance with the jury's recommendation, imposed a sentence of life imprisonment for each murder conviction. Defendant gave notice of appeal to this Court on 28 August 1990. Defendant brings forward several assignments of error. After thorough review of the record, we conclude that defendant received a fair trial, free of prejudicial error.

I.

The State's evidence tended to show the following sequence of events. In the late evening hours of 15 May 1989, Lorida Miller, Donald "Ducky" Sanderlin, and some of their friends arrived at the residence located at 109 Kaye Street in Spring Lake, North Carolina. Lorida Miller was seeking to get paid by her friend, Star Jackson, for having helped Star move that day. Ms. Miller and Mr. Sanderlin approached the house, noticing that it was dark. They opened the screen door, pushed the front door open, and stopped. In the living room lying near the door was Arlena Redd. She appeared to be dead. Star Jackson was lying in the middle of the living room. She too appeared to be dead. Ms. Redd had been beaten and stabbed several times, and Ms. Jackson had been beaten and shot.

Robert L. Thompson, a forensic pathologist in the office of the Chief Medical Examiner in Chapel Hill, North Carolina, per-

1. The record shows that shortly after his capture, Monroe was charged with two counts of first-degree murder.

formed an autopsy on the body of Arlena Redd. He testified that, in his opinion, the cause of Arlena Redd's death was blunt force injuries of the head and multiple stab wounds to the chest and back. John D. Butts, a pathologist and Chief Medical Examiner for the State of North Carolina, performed an autopsy on the body of Star Jackson. He testified that, in his opinion, the cause of Star Jackson's death was the gunshot wound to the back of the head and blunt force injuries. The autopsies revealed that both victims had plastic bags containing a white substance in their clothing.

After discovering the bodies, Ms. Miller found Ms. Redd's two little girls in a room in the back of the house. They were uninjured. Ms. Miller put them in her car and tried to console them. The children told Ms. Miller that a man named Witt was responsible for the murders. On the night in question, one of the girls had heard Witt's voice as he closed the door to their bedroom. At one time they had lived with Everett "Witt" Monroe and a woman associated with him. Witt now lived at a place called Moore's Motel. After talking to detectives, the girls were placed in Ms. Miller's custody.

Based upon the information provided by the girls, Spring Lake Police Chief Gil Campbell went to Moore's Motel, where Monroe lived with defendant, Joseph Bromfield. There, witnesses informed Chief Campbell that, shortly before he arrived, Monroe, who is black, along with a black female and two children, another black man named Michael Breaux, and a white man named Joseph Bromfield, had left in Mr. Breaux's automobile. They were headed in a northerly direction on Highway 87. Chief Campbell placed an all-points bulletin for Monroe, Breaux, and defendant, specifically in the area of Raleigh, in and around the bus stations and airports.

On 16 May 1989, Raleigh police officers and agents of the State Bureau of Investigation, who were working drug interdiction at the bus station, observed a group of people matching the descriptions of the people being sought by the Spring Lake Police Department. The group had its luggage on a cart outside the bus terminal near a bay where a bus traveling north was expected to arrive. The officers observed name tags on the luggage for a Mr. Rodriguez and a Mr. Bromfield. Recognizing the name "Bromfield," the officers approached the white male, introduced themselves and asked for

identification. Defendant correctly identified himself and produced identification. The group was then transported to the Raleigh Police Department, where they waited one and one-half hours until the Spring Lake officers arrived to transport them to Spring Lake.

While at the Spring Lake Police Department, defendant signed a statement on a form entitled "VOLUNTARY STATEMENT NOT UNDER ARREST." In this first statement,[2] taken after Miranda warnings were given, defendant stated that he was home when Monroe returned, hysterical and sweating. Monroe said that "he done those two dikes [sic] in" because they had "f---- [him] over with some drugs . . . [and] had messed up a package worth two thousand dollars of rock." Monroe said that "he couldn't account for the package with the main man, Jamaican Steve" and that Jamaican Steve no longer trusted him because the women had "f---- over him" and he had been "cut . . . out of the thing." Monroe said that they all needed to leave because "the heat was coming." Defendant said that he was planning to visit his mother in New Hampshire anyway, so he decided to accompany Monroe. Chief Campbell reviewed the statement and told defendant he found it unbelievable. In an apparent effort to boost his credibility, defendant told Campbell that he knew where the murder weapons had been discarded and could be found. Defendant left the police station with Sergeant Thomas to attempt to locate the weapons. The weapons were not found that night.

Several hours later, defendant signed a second statement on a form entitled "VOLUNTARY STATEMENT UNDER ARREST." In this statement defendant admitted that he had accompanied Monroe to the house where the victims lived and had witnessed Monroe kill the two women. Prior to going to the victims' house, Monroe had said that he was angry at the women for refusing to sell him drugs. Vowing to "get those bitches," Monroe grabbed defendant's axe handle and his own ten-inch blade knife. After committing the murders, Monroe took about $400 and "ten rocks" of cocaine from the floor. Upon the conclusion of this statement, defendant was transported to the Law Enforcement Center in

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2. Defendant gave three statements to the police. The first statement is dated 16 May 1989 and was signed by defendant at 7:20 p.m. The second statement is dated 17 May 1989 and was signed by defendant at 12:30 a.m. The third and final statement was via a tape-recorded interview and was given at 4:30 p.m. on 17 May 1989.

Fayetteville and placed in jail under a $200,000 bond on two counts of accessory after the fact to murder.[3]

The next morning, 17 May 1989, defendant made his first appearance before the district court, was advised of his right to counsel, and requested court-appointed counsel. Following the appointment of counsel, defendant was returned to the Law Enforcement Center. That same morning, the Spring Lake police conducted a search in the area where defendant had indicated Monroe had thrown away the weapons. In the daylight hours, police were able to find a wooden axe handle, a .32 calibre pistol, and a knife. Chief Campbell then secured warrants charging defendant with the first-degree murders of Star Jackson and Arlena Redd. Later in the afternoon, Chief Campbell arrived at the Center with the two warrants. He escorted defendant to an interrogation room which he had reserved earlier, admittedly with hopes of getting a third statement from defendant. Chief Campbell then served the warrants upon defendant, who became upset at the new charges and indicated that he would like to make another statement.

In his third statement, given in the form of a tape-recorded interview, defendant stated that, prior to going to the victims' house, Monroe told him that he was going to take the cocaine from the women. Defendant said that the axe handle that Monroe took to the house belonged to defendant. Defendant admitted that he may have kicked one of the women when Monroe was beating them, and that after Monroe had killed the women, defendant picked up a couple of dollars from the floor. Defendant continued denying aiding and abetting the murders, saying he never expected the murders to occur. Defendant was then returned to the jail and held without bond.

Defendant did not testify at trial. He presented evidence solely for the purpose of showing his good character. Several witnesses testified that defendant was a mild-mannered, compassionate, and peaceful person, who was hardworking and trustworthy.

Other evidence will be discussed as it becomes relevant to a fuller understanding of the specific issues raised on appeal.

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3. There is a conflict in the evidence as to exactly when defendant was arrested as an accessory after the fact to murder. This conflict is discussed in more detail under defendant's first assignment of error.

II.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his motion to suppress the statements made by him to law enforcement officers. Defendant contends that the statements were causally connected to his seizure and arrest, which he contends were without probable cause, and therefore violated his rights under the Fourth Amendment to the United States Constitution and Article I, Sections 19, 20 and 23 of the North Carolina Constitution. The State contends that defendant consented to all encounters and interaction which occurred between him and law enforcement officers until the time of his arrest for accessory after the fact to murder. Therefore, defendant was not "seized" within the meaning of the Fourth Amendment's prohibition against unreasonable searches and seizures at the time he made the first two statements. Accordingly, the State argues, the trial court did not err in denying defendant's first motion to suppress.[4]

"Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 20 L. Ed. 2d 889, 905 n.16 (1968). In assessing whether someone has been seized for purposes of the Fourth Amendment, the salient question is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *U.S. v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980); *State v. Johnson*, 317 N.C. 343, 360, 346 S.E.2d 596, 606 (1986). Defendant argues that, under the circumstances of the instant case, a reasonable person would not have believed he was free to leave. What the circumstances are is a question of fact to be decided by the trial court. How these circumstances would be viewed by a reasonable person is a question of law fully reviewable by an appellate court. With reference to the circumstances of the instant case, the trial judge, after considering the evidence presented at the first suppression

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4. Defendant filed two motions to suppress statements. In the first motion, filed on 4 October 1989, defendant sought to suppress his statements, arguing that they were the result of a violation of the Fourth Amendment. In his second motion, filed 27 April 1990, defendant sought to suppress his third statement on the ground that it had been taken in violation of his Sixth Amendment right to counsel. It is the first motion that is at issue here. The second motion is addressed in defendant's second argument.

hearing, made the following relevant findings of fact (rephrased and renumbered for convenience):

(1) At the bus station in Raleigh, Agent Black told defendant and his companions that the Spring Lake Police Department was interested in talking with them about a homicide in Spring Lake, and that they were not under arrest and asked if they would go to the Raleigh Police Department to wait until the Spring Lake officers arrived;

(2) Defendant and the others agreed to voluntarily go to the Raleigh Police Department with the officers;

(3) Agent Black advised the Raleigh police officers who arrived to transport the persons to the Raleigh Police Department that the individuals were not under arrest;

(4) Upon arrival at the Raleigh Police Department, Detective Thomas from Spring Lake spoke with each person separately and each was asked to return to Spring Lake voluntarily; rights were explained to each person and defendant read the rights and indicated that he understood them; defendant was asked by the officers if he would voluntarily return to the Spring Lake Police Department and defendant agreed that he would do so and signed a document[5] which indicates that he volunteered to go back with the officers to Spring Lake, that he realized he was not under arrest, that he did not have to go back with the officers except of his own free will, that he had not been threatened or promised anything, and that he was doing this so the police could question him concerning the crimes of homicide that occurred on 15 May 1989;

(5) Defendant was under no restraints other than the seatbelt upon the return trip to Spring Lake;

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5. The document reads as follows:

> I, Joseph Edwin Bromfield, hereby volunteer to come back with Detective William R. Thomas and Officer Thomas Court to the Spring Lake Police Department. I realize that I am not under arrest and that I do not have to come back with these officers except of my own free will.
>
> I have not been threatened or promised anything. I do this so the police may question me concerning the crime of homicide that occurred the 15th day of May, 1989. No further statement.

The document was signed by defendant at 1:30 p.m. on 16 May 1989.

(6) Defendant's decision to talk with Spring Lake Detective Penny Goodwin and to make a statement and answer questions was made after having been advised of his rights; he indicated that he understood his rights, that he did wish to answer questions, and he did not wish to have a lawyer present during the questioning; the statement made by defendant was voluntary;

(7) Defendant's first statement was made and reduced to writing at 7:20 p.m. on 16 May 1989;

(8) Chief Campbell talked with defendant about the statement and told him he thought the statement was inaccurate; he again advised defendant of his rights; at this point defendant had not been charged and would have been free to leave the police station and Chief Campbell explained this to defendant;

(9) Defendant indicated to Chief Campbell that he would make a truthful statement;

(10) Defendant asked for something to drink and to go to the restroom and was allowed to do so. He went to the snack bar and restroom in another part of the building unescorted;

(11) Defendant then made a second statement, which was reduced to writing;

(12) Defendant was then arrested for accessory after the fact to murder and was transported to the Law Enforcement Center in Fayetteville;

(13) Defendant was familiar with arrest procedures in North Carolina; he had previously been arrested for felonies on three occasions and had been given Miranda warnings on those occasions; he knew he had a right to an attorney and did not have to make any statement;

(14) Defendant's statements were made in order to help himself.

Based on these and other findings, the trial court concluded, *inter alia*, that "none of the constitutional rights either federal or state of the Defendant were violated by his arrest, detention, interrogation, or either of the statements . . . ." The court concluded further that defendant's first and second statements "were made freely, voluntarily and understandingly" and that defendant was

aware of his rights and had "freely, knowingly, intelligently, and voluntarily waived each of those rights" before giving the statements.

We agree with the State that there was ample evidence in the record to support the trial court's findings of fact and that the findings support the conclusions of law. A trial court's findings of fact are binding on appeal when supported by competent evidence. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 166 (1991). Inconsistencies or conflicts in the testimony do not necessarily undermine the trial court's findings, since such contradictions in the evidence are for the finder of fact to resolve. *State v. Jenkins*, 311 N.C. 194, 203, 317 S.E.2d 345, 350 (1984).

In *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986), this Court addressed a similar situation involving the circumstances surrounding an alleged seizure of the defendant and the admissibility of his confession. In *Johnson*, this Court rejected the defendant's argument that his confession was improperly admitted into evidence as having been made pursuant to an illegal seizure by law enforcement officers without probable cause. Acting on information which they had received, officers approached the defendant on a public road and requested that he accompany them to the police station so that they might question him about a homicide about which they thought he might have information. The defendant agreed to accompany them, and upon arrival at the station the officers read the defendant his rights, even though at that time he was considered merely a witness. Defendant signed a written waiver of his rights. He was questioned for more than three hours, was again read his rights, and once again waived them. In the afternoon, an officer introduced the defendant to a detective who said he "just wanted to meet a cold-blooded killer." *Johnson*, 317 N.C. at 350, 346 S.E.2d at 600. The defendant began to cry and then made a full confession, including statements that he had killed the victim.

At the suppression hearing, Johnson testified that he did not think he had any choice about accompanying the officers. He thought that he had been placed under arrest when he was approached by the officers, one of whom had a gun. Johnson testified that he thought that if he refused to accompany the officers he may have risked being shot. Nevertheless, he got into the car of his own free will. Johnson testified that there was no force involved.

In concluding that the defendant had not been seized, the Court in *Johnson* found that the evidence which supported the trial court's findings of fact was that the defendant testified that he was not frisked or searched; that he was provided with cigarettes and coffee; that he was allowed to go unescorted to the bathroom and to make telephone calls; that he was left alone unsupervised in the interview room; that the detectives never raised their voices or talked in a loud, threatening manner and never called him a liar; and that the defendant acknowledged that based upon prior experiences, he understood his rights. *Id.* at 366, 346 S.E.2d at 608-09.

The evidence in the instant case, like that in *Johnson*, supports the trial court's findings of fact and ultimate conclusion that defendant was neither seized nor involuntarily detained at the time of the first statement. In fact, the evidence, including the form signed by defendant on 16 May 1989, demonstrates the consensual nature of defendant's interaction with the police officers. At the suppression hearing, Agent Black testified that he and another officer advised defendant at the bus station that he was not under arrest and asked if he would accompany them to be questioned. Defendant agreed to do so. He was at no time prior to his arrest handcuffed, nor was his freedom restrained. Other evidence showed that while at the police station, defendant was not intimidated or locked in an office. Defendant signed a form in which he acknowledged his right to decline to accompany the Spring Lake officers, but stated that he did so of his own free will. While at the Spring Lake police station, defendant sat in the lobby unattended and unrestrained. It was explained to defendant that he was there voluntarily, that there were no charges against him, and that he was free to go anywhere he wanted. Defendant went unescorted to the snack bar and restrooms, and acknowledged that based upon prior experiences, he could not be coerced into talking with law enforcement officers. Given these circumstances, we cannot say that a reasonable person would have believed he was not free to leave.

[2] There is a conflict in the evidence as to exactly when defendant was arrested. Defendant argues that the timing of his arrest is significant. Defendant argues that he was arrested for accessory after the fact to murder after giving the first "exculpatory" statement and prior to giving the second statement. Defendant contends that, at the time of his arrest, there was no probable cause, and any statement relating to or subsequent to that arrest is therefore

inadmissible as "fruit of the poisonous tree." Defendant argues that the trial court's finding that defendant was arrested after, rather than before, giving the second statement is not supported by the evidence. Chief Campbell testified initially that defendant was arrested after giving the second statement. Campbell later testified that defendant was apparently arrested prior to giving the second statement, pointing to the form upon which the second statement was taken, which was entitled "VOLUNTARY STATEMENT UNDER ARREST."

Assuming, *arguendo*, that defendant was arrested prior to giving his second statement, we hold that the second statement was nevertheless admissible. Contrary to defendant's argument, the evidence reveals that defendant's arrest was based upon probable cause and that defendant waived his rights to remain silent and to have a lawyer present during questioning. In his first statement, defendant stated that after Monroe killed the victims, he returned home hysterical, saying that they needed to leave town because "the heat was coming." Defendant admitted to his decision to accompany Monroe out of town. Also, at the conclusion of his first statement, defendant informed police officers that he knew the location of the murder weapons. Although a brief search failed to locate the weapons that night, defendant was nevertheless arrested as an accessory after the fact to murder. Defendant's admission that he left Spring Lake in the automobile with Monroe (1) with knowledge that Monroe had murdered the two victims, (2) with knowledge that Monroe was leaving town because "the heat was coming," and (3) with apparent knowledge of the location of the murder weapons, amounts to sufficient probable cause for his arrest as an accessory after the fact to murder. *See generally State v. Wrenn*, 316 N.C. 141, 147, 340 S.E.2d 443, 447 (1986) ("Probable cause exists when there is 'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious [person] in believing the accused to be guilty.' ") (Citations omitted.)

Moreover, the trial court found as a fact, and there is substantial, uncontroverted evidence in the record which indicates that defendant was read his *Miranda* rights on several occasions. On each of these occasions, defendant waived his rights. Defendant does not challenge the trial court's conclusion that he fully understood his constitutional rights, including his right to remain silent. Because defendant knowingly, voluntarily, and intelligently waived his rights

prior to giving his second statement, that statement is admissible even if, contrary to the trial court's finding, defendant was under arrest at the time of the statement. *See generally State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986) (confession properly admitted where defendant was fully advised of his *Miranda* rights and his waiver of those rights was knowing, voluntary, and intelligent).

[3] Based upon the foregoing, we hold that, because defendant was not illegally seized or detained in violation of the Fourth Amendment of the United States Constitution, the trial court did not err in denying defendant's motion to suppress the first two statements. Because the first two statements were not taken in violation of defendant's constitutional rights, defendant's Fourth Amendment challenge to the admission of his third statement as being fruit of the poisonous tree is also without merit. For the same reasons, we conclude that defendant's rights under Article I, Sections 19, 20 and 23 of the North Carolina Constitution were not violated.

In his next assignment of error, defendant argues that his third statement should have been suppressed because it was taken in violation of his Sixth Amendment right to counsel. It is uncontested that defendant's Sixth Amendment right to counsel had attached at the time the third statement was given. A person is entitled to counsel once judicial proceedings have been commenced against him, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Brewer v. Williams*, 430 U.S. 387, 398, 51 L. Ed. 2d 424, 436 (1977); *see also State v. Tucker*, 331 N.C. 12, 33, 414 S.E.2d 548, 560 (1992); *State v. Nations*, 319 N.C. 318, 324, 354 S.E.2d 510, 513 (1987). Here, defendant's right to counsel attached at his first appearance, when counsel was appointed. *McNeil v. Wisconsin*, --- U.S. ---, ---, 115 L. Ed. 2d 158, 168 (1991); *Tucker*, 331 N.C. at 33, 414 S.E.2d at 560; *Nations*, 319 N.C. at 324, 354 S.E.2d at 514.

[4] It is well settled that once an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing merely that he responded willingly to further police-initiated custodial interrogation, even if he has been again advised of his rights. *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981). Therefore, an accused in custody who requests counsel is not subject to further questioning until counsel has been made available

to him, unless the accused himself initiates further communications with the police. *Edwards*, 451 U.S. at 485-86, 68 L. Ed. 2d at 386. In *Michigan v. Jackson*, 475 U.S. 625, 89 L. Ed. 2d 631 (1986), the United States Supreme Court held that this rule in *Edwards*, although decided under the Fifth Amendment, applies with at least equal force to situations involving the Sixth Amendment. *Id.* at 632-35, 89 L. Ed. 2d at 639-41. Under *Jackson*, if police initiate an interrogation after a defendant's assertion of his right to counsel at a judicial proceeding, any waiver of the right for that police-initiated interrogation is invalid. 475 U.S. at 636, 89 L. Ed. 2d at 642; *McNeil v. Wisconsin*, --- U.S. at ---, 115 L. Ed. 2d at 166.

[5] At the suppression hearing regarding the third statement, the trial court found the following relevant fact:

> 7. That in this case Chief Gil Campbell was desirous of and was prepared to take the statement of the Defendant, not knowing that he had requested counsel, and that counsel had been appointed to represent him. That Chief Campbell indicated to the Defendant that he was there to arrest him for first degree murder, the Defendant indicated voluntarily to Chief Campbell that he wished to talk with him further about the facts of the matter, and that he thereby initiated further conversation with the officer. That Chief Campbell properly advised him again of his Miranda rights which the Defendant signed and indicated that he understood.

Based upon this and other findings, the trial court concluded that none of defendant's constitutional rights had been violated and that "defendant initiated the statements made to Chief Campbell even though an attorney had been appointed to represent him on that same date." Accordingly, the trial court concluded that the third statement was admissible. Because there is competent evidence in the record to support the trial court's finding that defendant initiated the conversation with Chief Campbell, we reject defendant's assignment of error.

Chief Campbell testified that, upon signing defendant out of jail, he indicated to defendant that he had come to serve first-degree murder warrants on him. When Chief Campbell informed defendant of the warrants, defendant was shocked and indicated to Chief Campbell that he wished to talk with him about the situation. Further testimony disclosed that defendant was calm when he made the statement and that defendant talked to the officers

of his own free will and made the statement in an effort to exculpate himself. This evidence supports the trial court's findings that defendant initiated the discussion with Chief Campbell. We are therefore bound by this finding. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 166. We hold, therefore, that the trial court did not err in denying defendant's motion to suppress the third statement based upon a violation of defendant's Sixth Amendment right to counsel.

[6] In his next assignment of error, defendant contends that the trial court erred in denying his motion to dismiss at the close of all the evidence the charge of robbery with a dangerous weapon of Arlena Redd. Defendant further contends that, because the evidence was insufficient to support a charge of robbery with a dangerous weapon, the trial court erred in failing to dismiss the charge of first-degree murder based upon murder in the perpetration of an armed robbery. As the basis for his argument, defendant contends that there was no evidence that any personal property taken belonged to Ms. Redd. Defendant argues that the evidence showed that Star Jackson, rather than Arlena Redd, was in possession of the cocaine and money. The State responds that the evidence was sufficient to show that each victim was robbed. We agree with the State and find defendant's contentions to be without merit.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). The evidence is to be considered in the light most favorable to the State, and the State is to be given the benefit of every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). The defendant's motion to dismiss must be denied if the State has offered substantial evidence against defendant of each essential element of the crime charged. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981). 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).

Under N.C.G.S. § 14-87, an armed robbery occurs when a person takes or attempts to take personal property from the person of another, or in his presence, or from any place of business or residence where there is a person or persons in attendance, by the use or threatened use of a dangerous weapon, whereby the

life of a person is endangered or threatened. *State v. Porter*, 303 N.C. at 686, 281 S.E.2d at 382. In order to be convicted of robbery with a dangerous weapon the State must show (1) an 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), *overruled on other grounds, State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988).

The evidence in the instant case, taken in the light most favorable to the State, was clearly sufficient to show that Monroe robbed Arlena Redd with the use of a dangerous weapon. It is undisputed that Monroe went to the home shared by Star Jackson and Arlena Redd, brandishing a knife and an axe handle. Upon entering the house, Monroe struck Ms. Jackson with an axe handle. He then struck Ms. Redd with the axe handle, and both women fell to the floor. Monroe then shot Ms. Jackson. When Ms. Redd regained consciousness, she begged Monroe not to kill her, saying she would tell him where the drugs were if he would not kill her. Monroe took his knife and started stabbing Ms. Redd. After murdering both women, Monroe took $400 and "ten rocks" of cocaine from the floor, while defendant observed. Defendant's own statements showed that Monroe was upset with both women, "because Star *and* Arlena wouldn't sell him any dope" and because they "f---- him over with some drugs." (Emphasis added). Also, defendant stated that, prior to going to the victims' house, Monroe told him that he was going to "get *those bitches*." (Emphasis added). The State presented further evidence which showed that both women had plastic bags with a white substance in them in their clothing when they were killed.

The above evidence, taken in the light most favorable to the State, is sufficient to support the jury's finding that defendant, acting in concert with Monroe, was guilty of robbery with a dangerous weapon of Arlena Redd, and of her murder, committed in the perpetration of the robbery. We hold, therefore, that the trial court did not err in denying defendant's motions to dismiss at the conclusion of all the evidence.

[7] In his next assignment of error, defendant contends that the trial court erred in failing to exercise its discretion when it denied the jury's request for a written copy of instructions regarding

robbery with a dangerous weapon. Shortly after the jurors retired to the jury room to deliberate, the jury sent a note through the bailiff to the trial judge, which read: "May we have a copy of Judge's instructions?" The trial judge responded as follows:

> There used to be a law on the books that upon a request of a juror or any counsel or party, the Court had to reduce instructions to writing and sign them and deliver it to the jury. Since that has been repealed, I don't think I'll try to do that.

The judge had the entire jury brought back into the courtroom, whereupon he stated that there was no written instruction, per se, that existed that could be delivered to the jury, so he must deny the request. The jury foreman then asked if there was a list available with the seven criteria for robbery with a dangerous weapon. The trial judge replied that he did not have a paper which would list the criteria but that he could reinstruct the jury as to robbery with a dangerous weapon and list the elements, and in so doing, give the jury the final mandate as to each count. The trial judge asked the foreman if that was desired, and the foreman responded affirmatively. The trial judge then instructed the jury on the elements of robbery with a dangerous weapon, and gave the mandate as to each count.

Defendant argues that the trial judge erred, not in denying the request, but in failing to exercise his discretion at all. As support, defendant relies primarily upon *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), and *State v. Lang*, 301 N.C. 508, 272 S.E.2d 123 (1980). In *Ashe*, this Court held that the trial court committed error by refusing the jury foreman's request to review testimony on the ground that the testimony was not available. 314 N.C. at 34-35, 331 S.E.2d at 656-57. The Court concluded that the trial judge's response indicated that he could not permit review of the transcript and therefore did not exercise his discretion in denying the request. *Id.* at 35, 331 S.E.2d at 657. In *Lang*, the trial court also denied the jury's request for review of the transcript. As in *Ashe*, the trial judge in *Lang* responded to the request by saying that there was no transcript available. This Court concluded that this response was not an act of discretion and that the denial of the request as a matter of law was therefore erroneous. *Lang*, 301 N.C. at 511, 272 S.E.2d at 125.

We believe that the trial judge in the instant case did exercise his discretion. First, the judge realized that he was no longer re-

quired by law to give the instructions in writing. Second, realizing that he had the authority to reinstruct the jury, the judge decided to do so orally, and he did. *See generally State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986) (under N.C.G.S. § 15A-1234, trial judge has discretion in determining whether to provide additional instructions to the jury). Unlike the responses of the judges in *Ashe* and *Lang*, the response of the judge in the instant case does not indicate that he believed that he did not have the authority to grant the request. Instead, the response indicates that because the instructions simply did not exist in writing at the time the request was made, reinstructing the jury orally would serve the same purpose as written instructions and would be more efficient, given time constraints. For these reasons, we hold that the trial judge did exercise his discretion in deciding to deny the request and therefore committed no error.

In his remaining assignments of error, defendant combines three arguments. First, he argues that the trial judge erred in refusing to instruct on "mere presence," while reinstructing the jury on the elements of robbery with a dangerous weapon, thereby placing undue emphasis on "acting in concert." Second, defendant argues that the trial judge erred in omitting an instruction on reasonable doubt in his final mandate to the jury regarding robbery with a dangerous weapon. Finally, defendant contends that the trial judge erred by giving a confusing response to a question by the jury as to whether finding defendant guilty of robbery with a dangerous weapon would mean that defendant was automatically guilty of felony murder. For the reasons which follow, we find defendant's assignments of error to be without merit, and we therefore reject them.

[8] Defendant argues that in the original oral instruction, the term "acting in concert" was defined once and used at least thirty other times throughout the instruction. In the reinstruction, the term was used eight additional times. Defendant points out that his sole defense was that he was "merely present" during the commission of the crimes, while the State's theory was that defendant "acted in concert" with Monroe. Defendant argues that the repetitious reference to acting in concert placed undue emphasis on the State's theory, which the court did not counterbalance with an instruction on mere presence. We disagree.

Review of the record reveals that the substance of defendant's request that the trial court reinstruct on mere presence if it instructed on acting in concert was satisfied. There were two reinstructions on robbery with a dangerous weapon. In the first reinstruction in which the trial judge merely set forth the elements of robbery with a dangerous weapon, the trial judge did not instruct on mere presence or acting in concert. In the second reinstruction, the trial judge instructed on both "mere presence" and "acting in concert." N.C.G.S. § 15A-1234 provides a trial judge with discretion in instructing a jury. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159. A judge is not required to repeat instructions if he chooses not to do so. *State v. Hockett*, 309 N.C. 794, 309 S.E.2d 249 (1983). Here, however, the judge chose to repeat the instructions, and he did so substantially in accordance with defendant's request. We believe that he acted within his discretion, and we reject defendant's assignment of error.

[9] Next, defendant argues that the trial judge erred in omitting the instruction to the jury to acquit if it had a reasonable doubt as to any of the elements of robbery with a dangerous weapon. This omission was brought to the attention of the trial judge by defense counsel, and the trial judge agreed to correct the instruction the next morning when court resumed. The trial judge did exactly that. We hold, therefore, that any error in the final mandate was cured by the trial judge's reinstruction on reasonable doubt.

[10] Finally, defendant argues that the trial court erred in the manner by which it responded to a question by the jury. After being reinstructed on robbery with a dangerous weapon, and after resuming deliberations, the trial judge received a note which said, "If [defendant is] found guilty of robbery with a dangerous weapon, must [the jury] automatically find him guilty of felony murder?" Before responding, the trial judge solicited comment from both counsel. The following occurred:

> MR. PARISH [Defense counsel]: I would request that you ask the Foreperson to see if she can articulate the question. I mean I suspect that your hypothesis is correct, but I would like for you to find out what the question is. If your hypothesis is correct, I would ask you, as you have previously instructed, to consider the charges separately and the counts separately.

The prosecutor had no comment, and the jury was conducted back into the courtroom. The jury foreman repeated the question, which

was, as anticipated by defense counsel and the judge, whether defendant could be found guilty of armed robbery but not first-degree murder. The judge responded:

> All right. Very well. I'll answer the question this way. If you remember the earlier instruction. You were advised, and I advise you again that you're to consider each case separately on its own merits, remembering the elements and the instruction that was given. Do you feel that answers the question?

After a bench conference in which defense counsel asked if the judge had said "each count or each charge," the trial judge clarified the instruction:

> I think I said that you're to consider each case separately on its own merits, Each case, however contains two counts. When I said "case," I meant count. You're to consider each count in each case separately, independently. Is there any other question?

The jury resumed deliberations. Upon inquiry by the trial court as to whether there were any further matters for the State or for the defendant, the prosecutor and defense counsel answered no. Shortly thereafter, the jury returned with the verdicts.

The trial judge's response to the jury's question was carefully designed to prevent confusion by the jury. He first consulted with counsel for defendant and the State. He then had the foreman repeat the question, prior to attempting to respond. The judge instructed the jury to consider each charge separately. He then clarified this by instructing the jury to treat each count separately, in accordance with defense counsel's suggestion. We find no error in the trial judge's response to the jury's question.

In defendant's trial, we find

No error.

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

STATE OF NORTH CAROLINA v. MARK TYRON SOYARS

No. 564A90

(Filed 17 July 1992)

1. **Criminal Law § 78 (NCI4th)— kidnapping, murder, robbery— motion for change of venue—pretrial publicity—denied**

There was no error in the denial of a motion for change of venue for pretrial publicity in a prosecution for kidnapping, murder, and robbery where defendant's jury was composed of eight persons who had prior knowledge of the case and four who did not, and all of the jurors who had prior knowledge stated that they had formed no opinion and could set aside what they had heard or read and base their verdict on the evidence presented in court. The factors cited in *State v. Jerrett*, 309 N.C. 239, are essential but not exhaustive, and *Jerrett* is distinguishable on the facts.

Am Jur 2d, Venue § 60; Criminal Law §§ 372, 378.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

2. **Jury § 6.3 (NCI3d)— jury selection—questioning on accomplice testimony—no prejudicial error**

There was no prejudice in a prosecution for kidnapping, murder, and robbery where the court during voir dire sustained the State's objection to a question concerning whether the jurors could follow the court's instructions on accomplice testimony, but the court sustained the objection only as to defendant's presentation of the instruction and permitted defendant to ask an almost identical question regarding the jurors' ability to apply the court's instruction.

Am Jur 2d, Jury § 202.

3. **Evidence and Witnesses § 754 (NCI4th)— allegedly illegal search—evidence admitted—cumulative—not prejudicial**

There was no prejudicial error in a prosecution for kidnapping, murder and robbery from the admission of evidence seized from defendant's backpack and duffle bag where the evidence

was merely cumulative and corroborative of testimony of other witnesses, including defendant.

Am Jur 2d, Evidence § 256.

4. **Criminal Law § 442 (NCI4th)— prosecutor's argument—role of jury—conscience of community—no error**

There was no error in a prosecution for kidnapping, murder and robbery from the prosecutor's argument to the jury that it was acting as the voice and conscience of the community. The impropriety in *State v. Scott*, 314 N.C. 309, did not lie in the statements that the jury had become the representatives of the community, but in the invocation of public sentiment about drinking and driving and the accidents caused by such behavior.

Am Jur 2d, Trial § 569.

Prejudicial effect of prosecuting attorney's argument to jury that people of city, county, or community want or expect a conviction. 85 ALR2d 1132 supp. sec. 1.

5. **Jury § 6.1 (NCI3d)— individual voir dire and sequestration of prospective jurors—denied—no abuse of discretion**

The trial court did not abuse its discretion in denying a motion for individual voir dire and sequestration of potential jurors due to pretrial publicity. N.C.G.S. § 15A-1214(j).

Am Jur 2d, Trial §§ 1494-1496.

Separation of jury in criminal case before introduction of evidence—modern cases. 72 ALR3d 100.

6. **Criminal Law § 107 (NCI4th)— kidnapping, murder, robbery—in camera examination of law enforcement files**

The trial court did not err in a prosecution for kidnapping, murder and robbery by denying defendant's motion for access to investigative files or for an in camera inspection where defendant was provided with all of an accomplice's statements prior to trial, the court ordered the State to produce all exculpatory evidence, defendant was entitled to and received the statements of the prosecution's material witnesses, and defendant was unable to show the existence of any *Brady* evidence denied him.

Am Jur 2d, Criminal Law § 830.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

7. **Criminal Law § 107 (NCI4th) — kidnapping, murder, robbery — accomplice — disclosure of psychiatric records — denied**

A defendant in a kidnapping, murder, and robbery prosecution was deprived of no information or evidence that would have materially assisted his defense or have led to a different result at trial when the trial court denied his motion for discovery of the psychiatric evaluation of an accomplice.

Am Jur 2d, Criminal Law § 830.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

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 *Albright, J.*, at the 16 April 1990 Criminal Session of Superior Court, ROCKINGHAM County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 9 March 1992.

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

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

WHICHARD, Justice.

Defendant was indicted on counts of first-degree kidnapping, robbery with a dangerous weapon, and first-degree murder. The jury convicted defendant on all counts. In a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended, and the trial court imposed, a sentence of life imprisonment for the murder conviction. Because the jury found defendant guilty of first-degree murder under the felony murder rule, the trial court arrested judgment on the kidnapping and robbery convictions. De-

fendant appealed as of right. We conclude that defendant received a fair trial, free from prejudicial error.

The State presented the following evidence tending to show that on 18 July 1989, after robbing and kidnapping Nan Barnard Doyle, defendant killed her:

Byron Poindexter, defendant's cousin, testified that while giving defendant a ride on 17 July 1989, defendant asked Poindexter to drive by Nan's Hallmark Shop in the Meadow Green Shopping Center, Nan Doyle's place of business. At that time defendant remarked that he might have to rob the business because he needed money and might want to leave town. Defendant also stated that a robbery would be relatively easy because Nan worked alone and that he would consider robbing her near closing time. After Poindexter expressed his disapproval, defendant replied that it was "just a thought."

Donald William (Billy) Campbell, Jr. (Campbell), who was also charged with the murder of Nan Doyle, but was tried separately, testified that he first met defendant on 10 July 1989. Campbell, his wife Lisa Campbell, defendant, and Julie Medley, defendant's girlfriend, met a number of times during the following week. Campbell and defendant discussed the possibility of robbing a poker house, and Campbell observed that defendant owned a .45 caliber gun.

On 18 July 1989, defendant telephoned Campbell and asked that he pick him up at the Mar-Gre Motel where he had been staying. Defendant had no money and wanted to leave the motel. Campbell met defendant around 6:30 a.m. and decided not to go to work. The two men drove around the area and returned to Campbell's apartment in the afternoon. Lisa Campbell and Julie Medley arrived at approximately 4:00 p.m. Following an argument about Campbell's absence from work, Lisa told him to leave and come back later to pick up his clothes. Campbell took his .25 caliber handgun and left. Defendant joined him. Defendant's belongings, which included his .45 caliber handgun, were still in Campbell's car.

Campbell testified that defendant then directed him to the Meadow Green Shopping Center, and they proceeded directly to Nan's Hallmark Shop. They entered the shop, and defendant asked Nan Doyle when it closed. When a police car passed by, defendant became nervous and decided to leave. Campbell and defendant drove away and agreed to rob the store. They returned to the

shop before closing. Defendant asked Campbell to give him the .25 caliber gun because it could be more easily concealed. Defendant and Campbell reentered the shop, whereupon defendant told Nan he was robbing her, shook the gun at her, and told her to put the money in a plain bag. After Nan gave him the money, defendant told her she would have to leave with them. Campbell drove out of town; the victim sat on defendant's lap. They stopped along a gravel road adjacent to some woods. Defendant took the victim into the woods, telling her he was going to tie her up. Campbell waited in the car for about ten minutes. He heard three gunshots, and then defendant came running out of the woods carrying a woman's watch. They drove away, and defendant told Campbell he had had to kill Nan. Defendant looked through Nan's purse and then threw it into the river. Campbell received half of the $1000 stolen from the shop.

While driving from the area later that evening, Campbell and defendant passed Lisa and Julie and pulled over to talk to them. Defendant got out of the car to talk to Julie. Her testimony revealed that defendant gave her a gold bracelet and a jade ring which were later identified as the victim's. Campbell and defendant drove on to Virginia and registered at a motel. While defendant was showering, Campbell left, taking his .25 caliber handgun with him. On 25 July 1989, Campbell informed authorities of the location of the victim's body.

Law enforcement officials discovered the body that day in an abandoned house in a densely wooded area just outside Eden. Evidence collected at the scene included the victim's personal belongings and three empty .25 caliber cartridge cases. A forensic pathologist identified two gunshot wounds to the head and one to the neck as the cause of death. Three small caliber bullets were removed from the body. A State Bureau of Investigation forensic firearms expert concluded that one of the bullets came from Campbell's pistol, but was unable to attribute the other two bullets to a particular weapon.

Defendant testified that he did not murder Nan Doyle. He confirmed that he spent 18 July 1989 with Campbell, but contended that after Campbell and Lisa argued, he accompanied Campbell to Nan's Hallmark Shop, went in briefly with him, and then returned to Campbell's apartment. When they returned they found a note from Lisa telling Campbell to take his things and leave.

Campbell left the apartment, and defendant stayed behind. Campbell returned approximately an hour later with his pistol in hand and a grocery bag. Later, both men left the apartment. In Campbell's car defendant noticed a ring, bracelet, and watch, and he asked Campbell if he could buy them from him. Campbell told defendant he could have the ring and watch. Defendant then gave them to Julie when they met the women along the road. The two men proceeded to Virginia, where Campbell later left defendant at the motel.

[1] In his first assignment of error, defendant contends the trial court erred in denying his pretrial and renewed motions for change of venue or, in the alternative, for a special venire. Defendant argues that he could not obtain a fair and impartial trial in Rockingham County due to pretrial publicity and that the denial of these motions infringed on his federal and state constitutional rights. For the reasons below, we hold that the trial court properly denied the motions.

The relevant statute regarding motions for change of venue states:

> 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.

N.C.G.S. § 15A-957 (1988).

Three basic principles regarding the implementation of this statute are well settled. (1) " 'Due process requires that an accused receive a trial by an impartial jury free from outside influences.' " *State v. Boykin*, 291 N.C. 264, 269, 229 S.E.2d 914, 917 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L. Ed. 2d 600, 620 (1966)); *see also State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983). Thus, where there is a reasonable likelihood that prejudicial pretrial publicity will prevent a fair trial, the trial court must transfer the case to another county. N.C.G.S. § 15A-957. (2) The

burden of showing prejudice that prevents a fair trial is on the defendant. *State v. Dobbins*, 306 N.C. 342, 344, 293 S.E.2d 162, 163 (1982); *State v. Boykin*, 291 N.C. at 269, 229 S.E.2d at 917-18. (3) A motion for change of venue is addressed to the sound discretion of the trial judge whose ruling will not be overturned absent an abuse of discretion. *State v. Dobbins*, 306 N.C. at 344, 293 S.E.2d at 164; *State v. Oliver*, 302 N.C. 28, 37, 274 S.E.2d 183, 189 (1981).

In support of his first motion for change of venue, defendant submitted copies of approximately eighteen newspaper articles covering the victim's disappearance and the ensuing arrests. The publicity included references to two prior kidnappings from area shopping centers, a story on defendant's criminal history, and a story on the victim's grandfather who had been murdered more than fifty years earlier under uncannily similar circumstances. In a hearing on the motion, two Eden police officers testified that the event precipitated a large number of phone calls from concerned citizens and that the content of the calls reflected the spread of rumors "like wildfire." A local attorney opined that, given community sentiment, a fair trial could not be had in Rockingham County. The motion for change of venue and the motion for special venire were denied. Defendant later renewed the motion, supporting it with articles published since the denial of his first motion. The trial court denied defendant's renewed motion, concluding, *inter alia*, that the news articles were not unduly inflammatory and that defendant had failed to demonstrate that the publicity would prevent him from obtaining a fair trial. The trial court denied defendant's subsequent and final renewed motion on similar grounds.

Standing alone, evidence of pretrial publicity does not establish a reasonable likelihood that a fair trial cannot be had. " 'This court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue.' " *State v. Madric*, 328 N.C. 223, 229, 400 S.E.2d 31, 35 (1991) (quoting *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985)). Having reviewed the news articles submitted by defendant, we conclude that they are primarily factual in nature. Most of the articles address the sequential events of the murder, which began with the victim's disappearance, continued through the arrests, and terminated with the trial proceedings. Some of the publicity, however, may be deemed inflammatory. One article

focused on defendant's criminal record, and others emphasized the community's shock at the disappearance of a well-regarded businesswoman. Even so, the burden remains on defendant to show that it was reasonably likely that the jurors would base their decisions on pretrial information rather than on the evidence presented at trial. *State v. Hunt*, 325 N.C. 187, 199, 381 S.E.2d 453, 460 (1989). "Where, as here, a jury has been selected to try the defendant and the defendant has been tried, the defendant must prove the existence of an opinion in the mind of *a juror who heard his case* that will raise a presumption of partiality." *State v. Madric*, 328 N.C. at 228, 400 S.E.2d at 35.

In further support of his argument, defendant observes that the majority (approximately eighty-five percent) of the prospective jurors had been exposed to media coverage of the murder, and that some of these jurors served on his jury. Exposure to pretrial publicity does not necessarily render a juror incapable of impartiality. The United States Supreme Court has noted that

> [i]n these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 366 U.S. 717, 722-23, 6 L. Ed. 2d 751, 756 (1961).

This Court has noted that jurors' responses to questions during voir dire provide "[p]erhaps the most persuasive evidence that the pretrial publicity was not prejudicial or inflammatory." *State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). When each juror states unequivocally that he can set aside what he has heard previously about a defendant's guilt and arrive at a determination based solely on the evidence presented at trial, a defendant fails to establish an abuse of discretion by the trial court in refusing to grant a change of venue. *State v. Corbett*, 309 N.C. 382, 396, 307 S.E.2d 139, 148 (1983); *see also State v. Madric*, 328

N.C. at 230, 400 S.E.2d at 35-36 (no abuse of discretion where each of the five jurors exposed to pretrial publicity gave such unequivocal answers).

The record shows that defendant's jury was composed of eight persons who had prior knowledge of the case and four who did not. When questioned during the selection process, all of the jurors who had prior knowledge stated that they had formed no opinion and could set aside what they had heard or read and base their verdict on the evidence presented in court. Given these statements, the trial court did not abuse its discretion in concluding that the evidence of these jurors' prior knowledge of the case failed to establish a reasonable likelihood that they would base their decisions on pretrial information.

Finally, defendant argues that he has established the need for a change of venue in the same manner as the defendant in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339, a case in which we held the trial court's denial of a motion for change of venue to be improper. Defendant contends that he fulfilled the three conditions requisite for a change of venue enumerated in *Jerrett*, where we stated:

> [D]efendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury.

Id. at 255, 307 S.E.2d at 347-48. Defendant erroneously interprets this quote to mean that a showing of these three factors warrants a change of venue. A reading of *Jerrett* in its entirety and a review of cases prior to *Jerrett* make it clear, however, that although these three factors are essential, they are not exhaustive. In *Jerrett*, the Court went on to say: "In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial." *Id.* In other cases, the Court has referred to the *absence* of these factors to show that a defendant failed to meet his burden of proof. *See State v. Dobbins*, 306 N.C. at 345, 293 S.E.2d at 164; *State v. Harrill*, 289 N.C. 186, 191, 221 S.E.2d 325, 328-29, *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1211 (1976). Defendant's inference that the mere *presence* of all three warrants a change of venue, however, is incorrect.

Further, *Jerrett* is distinguishable on the facts. In *Jerrett*, defendant presented extensive testimony from members of the media, a sheriff, a local magistrate and three attorneys that a fair trial could not be had in Allegheny County. The Court noted that the county, with a population of approximately 9,600, was small, rural, closely-knit, "in effect, a neighborhood." One third of the potential jurors knew or were familiar with the victims or their family; four of the jurors who served were at least familiar with the victims' relatives, and six jurors were at least familiar with the State's witnesses. More importantly, the Court reversed the trial court's ruling in part because the record revealed undue emphasis on the right of county residents to try the case where the crime was committed. *State v. Jerrett*, 309 N.C. at 254, 307 S.E.2d at 347.

Here, although he presented similar evidence from media representatives and a member of the legal community, defendant has not established a reasonable likelihood that pretrial publicity prevented a fair and impartial trial in Rockingham County. Thus, the trial court did not abuse its discretion in denying his motion for change of venue.

[2] In his next assignment of error, defendant contends the trial court erred in sustaining the State's objection to a question defendant posed to prospective jurors regarding their ability to apply instructions on accomplice testimony. Defendant argues that the ruling prevented him from obtaining information necessary to exercise his "for cause" and peremptory challenges intelligently and thereby secure an impartial jury. We conclude that there is no merit in this contention.

Both the State and the defendant have the right to question prospective jurors to determine their fitness and competency to serve. N.C.G.S. §§ 9-15(a) (1986), 15A-1214(c) (1988). This right serves a double purpose—to ascertain whether grounds for challenge for cause exist and to enable counsel to exercise peremptory challenges intelligently. *State v. Allred*, 275 N.C. 554, 169 S.E.2d 833 (1969). However, the extent and manner of counsel's inquiry rest within the trial court's discretion; thus, to establish reversible error, the defendant must show prejudice in addition to a clear abuse of discretion. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989); *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975), *death penalty vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); *State v. Bryant*,

282 N.C. 92, 191 S.E.2d 745 (1972), *cert. denied*, 410 U.S. 958, 35 L. Ed. 2d 691, *and cert. denied*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973).

The question the trial court refused to allow follows:

> [DEFENSE COUNSEL]: This case, as the District Attorney indicated, is a case in which there is to be testimony by the co-defendant, Donald William Campbell, otherwise known as Billy Campbell and he was also charged with these offenses and the Court will give you certain instructions regarding . . . accomplice testimony. Basically those instructions will include instructions that an accomplice is considered by the law to have an interest in the outcome of the case and you should examine the testimony in whole or in part and you should treat what you believe the same as you would treat any other believable evidence in court.
>
> Now I ask you is there anyone on the jury as it is presently constituted that could not follow that instruction? In other words, that you should scrutinize that testimony because he has an interest in the case. Anybody that could not follow that instruction?
>
> [PROSECUTOR]: Objection.
>
> COURT: What is the objection?
>
> [DEFENSE COUNSEL]: Your Honor, I was making an inquiry, if they could follow the Court instructions about accomplice's testimony and I read the accomplice testimony rule.
>
> COURT: Objection is sustained as to reading law to the jury, that is for the Court.
>
> [DEFENSE COUNSEL]: Then could each of you follow the Court's instructions with regard to the accomplice's testimony? If you could raise your hand at this time if you could follow the Court's instructions in that regard.

We conclude that defendant has failed to show prejudice from the court's ruling. It is clear that defendant was interested in determining whether there were any prospective jurors who could not follow the "accomplice testimony" instruction. The trial court sustained the objection only as to defendant's presentation of the instruction, and it permitted defendant to ask an almost identical question regarding the jurors' ability to apply the court's instruc-

tion. There is no indication that any prospective juror was unable to do so. A complete review of the jury selection voir dire reveals that the trial court was cooperative and tolerant of both parties' extensive questioning. This assignment of error is overruled.

[3] Next, defendant contends the trial court committed reversible error in denying his motion to suppress evidence which was recovered by the Rockingham County Sheriff's Department at the time of his arrest. On 24 July 1989, law enforcement officers stopped the truck in which defendant was riding and directed him to exit the vehicle. After handcuffing and shackling defendant and placing him in the police car, the officers seized defendant's duffle bag and backpack from the truck. Defendant argues that evidence from the bags was obtained by an unreasonable search and seizure; therefore, its admission at trial violated his federal and state constitutional rights. Assuming, *arguendo*, that the evidence should have been suppressed, we conclude that given its nature, any error in its admission was harmless beyond a reasonable doubt and does not entitle defendant to a new trial.

"Error committed at trial infringing upon a defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error committed was harmless beyond a reasonable doubt." *State v. Brown*, 306 N.C. 151, 164, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *see also* N.C.G.S. § 15A-1443(b) (1988). The United States Supreme Court, in the case in which it established this standard, explained that in essence, the question is " 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710 (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 11 L. Ed. 2d 171, 173 (1963)), *reh'g denied*, 386 U.S. 987, 18 L. Ed. 2d 241 (1967).

The evidence seized from defendant's duffle bag and backpack consisted of a receipt from the Arborgate Inn in Christianburg, Virginia, a receipt from the Innkeeper in Eden, three Greyhound bus receipts, and defendant's .45 caliber pistol. It is clear from the record that this evidence was merely cumulative. It corroborated the testimony of other witnesses and that of the defendant himself. Defendant testified that prior to the murder he had been living in motels in Eden, that the night of the murder he stayed at a motel in Virginia, and that afterwards he went to Atlanta by

bus to meet his girlfriend. He also stated that he owned a .45 caliber handgun. The State's evidence indicated that the murder weapon was a .25 caliber handgun. Testimony from defendant's girlfriend, motel and bus station employees, and Billy Campbell also included the facts supported by the evidence from the bags. Moreover, the evidence did not in any manner directly link defendant to the crime. Its most important role was to establish defendant's whereabouts after the murder. Given that other competent and admissible evidence tended to prove the same facts as the allegedly improperly obtained evidence, we conclude with confidence that any error resulting from admission of the evidence was harmless beyond a reasonable doubt.

[4] Defendant next argues that the trial court erred in overruling his objection to a portion of the prosecutor's closing argument. He avers that the prosecutor's remarks impermissibly urged the jury to render a verdict based on the outrage of the community rather than the evidence. We find no error in the ruling.

The argument to which defendant objected follows:

> [PROSECUTOR]: You know, everyone of you, not just one or two of you, but everyone of you at some point in your adult life you said why don't they do something about violence. Why don't they do something about victim's rights?
>
> [DEFENSE COUNSEL]: Objection to this argument.
>
> [PROSECUTOR]: Your Honor please, the argument is that at some point in their lives they have said why don't they do something about violent crimes, why don't they do something about it.
>
> COURT: Objection is overruled.
>
> [PROSECUTOR]: Ladies and gentlemen, you have heard it said why don't they do something, you know there is no mystical "they" hiding around in this courtroom. Not hiding any place. Just do something about the violent crimes. Jurys [sic] do something about victim's rights. And jurors follow the law.

As evidence of improper argument, defendant also points to the prosecutor's later statement to the jury: "You come here and represent the conscious [sic] of the community."

Trial counsel are granted wide latitude in the scope of jury argument, and control of closing arguments is in the discretion of the trial court. *State v. Zuniga*, 320 N.C. 233, 253, 357 S.E.2d 898, 911, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986). Further, for an inappropriate prosecutorial comment to justify a new trial, it "must be sufficiently grave that it is prejudicial error." *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977).

Defendant relies on our holding in *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985), that statements about the sentiments of the citizens of the community are improper and are a basis for reversal when the defendant shows them to be prejudicial. *Id.* at 312-13, 333 S.E.2d at 298. In *Scott*, the prosecutor argued:

> [T]here's a lot of public sentiment at this point against drinking and driving, causing accidents on the highway. And, you know, you read these things and you hear these things and you think to yourself, "My God, they ought to do something about that." . . .
>
> . . . .
>
> Well, ladies and gentlemen, the buck stops here. You twelve judges in Cumberland County have become the "they".

Id. at 311, 333 S.E.2d at 297.

We emphasized in *Scott* that the impropriety of the prosecutor's argument did not lie in his statements that "the buck stops here" or that the jurors had "become the they." "These statements correctly informed the jury that for purposes of the defendant's trial, the jury had become the representatives of the community." *Id.* The argument became improper, however, when the prosecutor invoked public sentiment about drinking and driving and the accidents caused by such behavior. *Id.* at 312, 333 S.E.2d at 298. The argument went outside the record and could have led the jury to convict the defendant because of accidents caused by other impaired drivers. *Id.* "Further, such statements could only be construed as telling the jury that the citizens of the community sought and demanded conviction and punishment of the defendant. . . . [B]y such arguments, '[t]he State was asking the jury to lend an ear to the community rather than a voice.'" *Id.* (quoting *Prado v. State*, 626 S.W.2d 775, 776 (Tex. Crim. App. 1982)).

The prosecutor's remarks here reminded the jury that for purposes of defendant's trial, it was acting as the voice and conscience of the community. In recent cases we have repeatedly held such arguments permissible. *State v. Artis*, 325 N.C. 278, 329-30, 384 S.E.2d 470, 499 (1989) ("When you hear of such acts . . . you think, 'Well, somebody ought to do something about that.' . . . You are the somebody. . . . You speak for Robeson County . . . ."), *death sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991); *State v. Huff*, 325 N.C. 1, 71, 381 S.E.2d 635, 676 (1989) ("Today, you speak for the people of North Carolina. You are the moral conscience of our community."), *death sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991); *State v. Brown*, 320 N.C. 179, 203, 358 S.E.2d 1, 18 ("[W]hen you hear of such acts, you say, 'Gee, somebody ought to do something about that.' You know something, Ladies and Gentlemen of the Jury, today you are the somebody that everybody talks about . . . ."), *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987). The trial court did not err in overruling defendant's objection to the prosecutor's summation.

[5] Defendant also argues that the trial court erred in denying his motion for individual voir dire and sequestration of prospective jurors. He contends that in light of pretrial publicity which included information inadmissible at trial, individual voir dire was required. We disagree.

"In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j) (1988). In *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986), we recapitulated the established construction of this statute:

> This provision does not grant either party any absolute right. . . . The decision of whether to grant sequestration and individual *voir dire* of prospective jurors rests in the sound discretion of the trial court, and its ruling will not be disturbed absent a showing of an abuse of discretion. . . . A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

Id. at 678-79, 343 S.E.2d at 837 (citations omitted).

Defendant recognizes that this Court has consistently denied relief on this argument. He nevertheless contends that he might have been able to demonstrate more effectively the impact of pretrial publicity on potential jurors if individual voir dire had been allowed. On that basis, he asks that we reconsider our previous holdings. *See, e.g., State v. Reese*, 319 N.C. 110, 119-20, 353 S.E.2d 352, 357 (1987). We decline to do so and accordingly overrule this assignment of error.

[6] Defendant next assigns error to the trial court's denial of his request for an in camera examination of certain law enforcement files. During a pretrial motions hearing, defendant acknowledged that the State had complied with discovery requests for access to each of Billy Campbell's prior written statements. He then sought access to other witnesses' statements, purportedly within law enforcement files, in order to see if they contained evidence exculpating defendant or if they conflicted with any of Campbell's statements. Essentially, defendant argued that because Campbell made at least four different statements which were at times largely inconsistent, any statement made by another witness would contradict Campbell in part, thereby impeaching Campbell and tending to exculpate defendant.

In response to defendant's argument, the court required the District Attorney to provide defendant with copies of any statements made to the officers once the witness testified at trial. The court also ordered the State to provide any statement made by a witness which tended to exculpate defendant. After this ruling, defendant requested that the court conduct an in camera review of the investigative files to search for exculpatory evidence.

Prior to jury selection, defendant renewed his request that the court conduct an in camera inspection of investigative files for exculpatory evidence. The court noted that defendant was in possession of all of Billy Campbell's statements and then determined, after inquiring of the District Attorney, that defendant had been provided with all evidence of an exculpatory nature. The court found facts that defendant's motion constituted a "fishing expedition" involving a search of the entire investigative file in search of exculpatory evidence. The court found that defendant's request was "so broad as to be general in nature" and that it did not suffice as a specific request for disclosure contemplated by *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977).

We conclude that the court did not err in denying defendant's request for access to investigative files or for an in camera inspection. "[N]o statutory provision or constitutional principle requires the trial court to order the State to make available to a defendant all of its investigative files relating to his case . . . ." *State v. McLaughlin*, 323 N.C. 68, 85, 372 S.E.2d 49, 61, *death sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991). A defendant is legally entitled to access to certain portions of the State's evidence prior to trial. By statute, a defendant is entitled to all statements of a codefendant. N.C.G.S. § 15A-903(b) (1988). However, defendant here has made no showing, and does not contend on appeal, that there was a statement by Campbell of which he was deprived.

Defendant is also statutorily entitled to any statement of a witness other than the defendant, in the possession of the State and relating to the subject matter of the witness' testimony, once the witness has testified. N.C.G.S. § 15A-903(f) (1988). If the State wishes to withhold a statement, the court must conduct an in camera review of the statement to determine whether the statement relates to the subject matter of the testimony. However, as defendant's request came prior to the testimony of any of the witnesses, he was not yet entitled to such statements and an in camera review would have been premature. Thus, defendant's right to access to evidence, prior to trial, was not violated.

At this point in the pretrial hearing, defendant's argument became merely a demand for an in camera inspection of the investigative files in search of exculpatory material. Defendant has a constitutional right to the disclosure of exculpatory or favorable evidence. "Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 490 (1985); *see also Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). "This rule applies regardless of whether there has been a specific request for the evidence." *State v. Wise*, 326 N.C. 421, 429, 390 S.E.2d 142, 147 (citing *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 113 (1990)). In *Hardy*, however, we noted:

> Under *Agurs*, it appears the prosecutor is constitutionally required to disclose only *at trial* evidence that is favorable and material to the defense. Due process is concerned that the

> suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial.

State v. Hardy, 293 N.C. at 127, 235 S.E.2d at 841. In light of the facts that defendant was provided with all of Campbell's statements prior to trial, that the trial court ordered the State to produce all exculpatory evidence, that defendant was entitled to and received the statements of the prosecution's material witnesses, and that defendant is unable to show the existence of any *Brady* evidence denied him, we conclude that there was no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494. Thus, this assignment of error is overruled.

[7] In his last assignment of error, defendant contends the court erred in denying his motion for disclosure of certain psychiatric records and evaluations relating to Billy Campbell. During the pretrial motions hearing, defendant introduced testimony from Dr. Bob Rollins to the effect that Dr. Rollins conducted a pretrial examination of Billy Campbell. Defendant then sought to determine whether evidence tending to exculpate him arose out of Dr. Rollins' testing and evaluation of Campbell. The court conducted an in camera inspection of Dr. Rollins' records and notes and made available to defendant such portions as were favorable to the defense. Certain portions were excised as they did not relate to the subject matter of Dr. Rollins' testimony. The court further ordered the remainder of the file to be sealed and made available for appellate review.

The record on appeal as originally filed with this Court contained no sealed documents. Upon our request, the Clerk of Superior Court of Rockingham County has forwarded to us all sealed documents in her records relating to this case. We have examined these records, and we conclude that the court did not erroneously exclude evidence favorable to defendant. *See State v. Phillips*, 328 N.C. at 18-19, 399 S.E.2d at 301.

Following Billy Campbell's testimony at trial, defendant renewed his motion for discovery of Dr. Rollins' psychiatric evaluation of Campbell. In doing so, defendant contrasted the basis of his earlier motion, his *Brady* right to exculpatory evidence, with the basis for his renewed motion, his statutory right to a testifying

witness' statements relating to the subject matter of his testimony. N.C.G.S. § 15A-903(f). The trial court denied defendant's motion because of Judge Ferrell's earlier in camera inspection of the records, and in light of the provision by Judge Ferrell of certain portions of the psychiatric report and evaluation. Though it appears that the trial court did not distinguish between these bases in making its ruling, we hold that defendant suffered no prejudice. Having reviewed the sealed report and evaluation, we conclude that defendant was deprived of no information or evidence that would have materially assisted his defense or have led to a different result at trial. Thus, we overrule this assignment of error.

No error.

STATE OF NORTH CAROLINA v. BOBBY RAY MOSS

No. 86A90

(Filed 17 July 1992)

1. **Homicide § 253 (NCI4th)— murder—premeditation and deliberation—sufficiency of evidence**

There was sufficient evidence in a first degree murder prosecution that the victim died as a result of a premeditated and deliberate murder by defendant where defendant borrowed three dollars from his sister as she let him off near a house on 7 January 1989; defendant and the victim left the house later that day and were seen walking along the highway near the scene of the killing; the victim was then wearing the same clothes as when her body was found and defendant was then wearing a toboggan that was found at the crime scene; hair from defendant was found at the scene; the cause of death was strangulation, which would have required the perpetrator to continue to apply pressure to the victim's throat for two minutes after she lost consciousness; defendant was seen alone on the highway near the scene of the killing shortly after the victim had last been seen alive walking with defendant; defendant was now carrying a "wad" of cash and appeared to be nervous; and no evidence of provocation was presented.

Am Jur 2d, Homicide § 454.

2. Homicide § 277 (NCI4th)— felony murder—robbery—evidence sufficient

There was sufficient evidence from which the jury could find defendant guilty of felony murder based on common law robbery where defendant had borrowed three dollars earlier in the day of the crime; the victim had $375 in her pocketbook before she went walking with defendant; defendant had a "wad" of money later that same day; and no money was found in the victim's pocketbook or at the scene of the murder.

Am Jur 2d, Homicide § 454.

3. Constitutional Law § 344 (NCI4th)— murder, kidnapping, robbery—voir dire—unrecorded bench conferences with prospective jurors—new trial

A defendant in a prosecution for first degree murder, kidnapping, and robbery received a new trial where the court conducted private, unrecorded bench conferences with prospective jurors during jury selection and nothing in the record establishes the nature and content of the trial court's private discussions with the prospective jurors. Prior holdings compel the conclusion that defendant must receive a new trial on all charges, both capital and noncapital, presented to the jury during defendant's capital trial because the State failed to show that the violation of the right to be present during the capital trial was harmless beyond a reasonable doubt.

Am Jur 2d, Criminal Law §§ 901-905.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 ALR4th 429.

Justice MEYER concurring.

APPEAL by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments sentencing him to death for first-degree murder and to a sentence of imprisonment for common law robbery, entered by *Griffin, J.*, on 31 January 1990 in Superior Court, DUPLIN County. Heard in the Supreme Court on 13 April 1992.

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, for the defendant-appellant.

MITCHELL, Justice.

The State's evidence tended to show the following. On Saturday, 14 January 1989, hunters discovered the body of the victim Pauline Sanderson in a wooded area off Highway 1003 in Duplin County. The hunters immediately called the sheriff.

Sheriff's deputies arrived shortly thereafter and found the victim's body in a clearing. The body was lying against a tree with a navy blue sweater tied around the neck and to the tree. The deputies observed a red jacket, a toboggan hat, an open pocketbook and items apparently from the pocketbook strewn near the body. The victim's body was clothed in a white blouse and red slacks that were unbuttoned at the top. There was an injury to the left side of the victim's head.

Roger Byrd, a resident of the area where the victim's body was found, testified that he gave the victim a ride to the house of Archie Mathis around 9 a.m. on Saturday, 7 January 1989. When they arrived, the victim stated that she had misplaced her purse which had contained about $375. She searched for her purse and found it in Mathis's car. The victim indicated that all the money was accounted for. The purse was big and dark-colored and contained a billfold that was medium-sized and white. Byrd later identified the billfold found at the scene of the killing as the one belonging to the victim. Byrd stayed at the house for twenty to thirty minutes and saw the defendant enter the house as he was leaving.

Archie Mathis testified that Byrd brought the victim to his house on the morning of 7 January 1989. The defendant Bobby Ray Moss arrived shortly afterwards. When the defendant left to go to his brother's residence, the victim said she would walk with him as far as her brother-in-law's trailer. When the victim left with the defendant, she was carrying a pocketbook and was wearing red pants and a light-colored blouse. The defendant was wearing a dark-colored toboggan hat. This was the last time Archie Mathis saw Ms. Sanderson alive.

Kenneth Mathis, a nephew of Archie Mathis, testified that on 7 January 1989, the defendant left Archie Mathis's house with the victim. The defendant was carrying a brown bag that appeared to contain a change of clothes.

Vickie Godwin Baker, an employee at the Rose Hill IGA Store, testified that she saw the victim walking with a younger man along the highway on Saturday, 7 January 1989. Baker recognized the victim as a customer of the store. The man walking with the victim was much younger than the victim and was wearing a toboggan hat.

William R. Woodcock, a high school student, testified that he saw the defendant on Saturday, 7 January 1989, between 3 and 4 p.m. as Woodcock was driving out of his driveway. The defendant was walking with a woman. When Woodcock returned home thirty to thirty-five minutes later, he saw the defendant walking alone. The defendant came into his yard and asked for a ride. Woodcock and his brother took the defendant to Warsaw. The defendant was wearing jeans with white socks pulled up over the outside of the jeans and was not wearing a hat. The defendant was carrying a lot of cash and paid Woodcock five dollars for the ride. The defendant appeared nervous.

The victim's sister, Marleen Pope, testified that the victim received a disability check of $368 on the first of each month. The navy sweater found at the scene of the killing belonged to the victim and had been a gift from the victim's daughter. Pope did not recognize the toboggan hat that was found at the scene.

Detective W.E. Ramsey testified regarding the details of the crime scene. The body of the victim was found clothed in a white blouse and red pants. The body was face up with a navy sweater looped around the neck and tied to a tree. The body was without shoes or socks. A maroon-colored toboggan hat and a maroon purse were found next to the victim's body. The contents of the purse were spilled on the ground. No money was found in the purse or at the scene of the killing. The victim's body bore bruises on the neck and a wound just above the left eye exposing the edge of the skull.

W. Scott Worsham testified for the State as an expert in forensic hair examination and identification. Worsham examined eighty head hairs taken from the toboggan hat found near the

body; these hairs were consistent with hair of the defendant. None were consistent with those of the victim. One head hair from the navy sweater and one on a handkerchief found at the scene originated from the defendant. A pubic hair found on the red jacket was consistent with the defendant's pubic hair. A forensic serologist testified that he found sperm inside the victim's vagina.

The medical examiner noted that there were minor injuries on the victim's abdomen and wrists. Near the victim's left eye was a laceration measuring one-quarter inch in length that exposed the victim's skull. This injury was probably caused by blunt force. The medical examiner determined that the cause of the victim's death was strangulation but could not determine the time of death. The medical examiner stated that the changes in the body's condition were consistent with the death occurring on 7 January 1989.

The defendant did not testify at trial, but did introduce evidence. Robert Wiggins, the defendant's employer, testified that the defendant was not at work on Saturday, 7 January 1989. The defendant was paid $200 per week and had been paid on the 6th or 7th of January 1989.

The defendant's sister, Betty Ann Beddingfield, testified that the defendant was drunk on Saturday, 7 January 1989, when she dropped him off near Archie Mathis's house about 1 p.m. At that time the defendant asked his sister for three dollars to play cards. The defendant came back to Beddingfield's house at 5:30 p.m. by taxi and paid for the taxi with cash. The defendant had a "wad" of money on him and was not wearing the toboggan hat she had seen him wearing earlier. Beddingfield identified the toboggan hat found at the scene as belonging to the defendant. Timothy Beddingfield, Betty Ann Beddingfield's husband, corroborated his wife's testimony.

Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

At the close of the State's evidence, and again at the close of all evidence, the defendant moved to dismiss all of the charges against him for insufficiency of the evidence. The trial court denied the motions.

[1] The defendant assigns as error, *inter alia*, the trial court's denial of his motions to dismiss the first-degree murder charge and the common law robbery charge for insufficiency of the evidence.

The defendant argues that the State presented insufficient evidence to support a reasonable finding that the defendant killed the victim with premeditation and deliberation, killed the victim during a common law robbery, or committed any robbery or killing at all.

In *State v. Small*, 328 N.C. 175, 400 S.E.2d 413 (1991), we described the appropriate standard for appellate review of such questions 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 191 (quoting *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991)).

Under this standard, we conclude that the State presented substantial evidence to support the defendant's conviction of first-degree murder, both on the theory of premeditation and deliberation and the theory of felony-murder. N.C.G.S. 14-17 (Supp. 1991).

The evidence, taken in the light most favorable to the State, tended to show that the defendant went to Archie Mathis's house on 7 January 1989 about 1 p.m. When the defendant's sister let him off near the house, the defendant borrowed three dollars from her. Later that day, the defendant and the victim left Mathis's house and were seen walking together along the highway near the scene of the killing. At that time, the victim was wearing the same clothes as when her body was found. When seen walking with the victim, the defendant was wearing a toboggan hat that was later found at the crime scene. Several of the defendant's head hairs were on the hat. Also, the defendant's head hairs were found on the navy sweater found around the victim's neck and on a handkerchief found near the victim's body. Hair consistent with the defendant's pubic hair was on the victim's red jacket found at the scene. An expert examined all eighty-three individual hairs found at the scene, which included five different types of body and head hair. In the expert's opinion, any possibility that all these hairs came from someone other than the defendant was extremely remote. The medical examiner determined that the cause of the victim's death was strangulation. The defendant was seen alone on the highway near the scene of the killing shortly after the victim had last been seen alive walking with the defendant. Although earlier that day the defendant had needed to borrow three dollars from his sister, he was carrying a "wad" of cash and appeared to be nervous after walking with the victim the last time she was seen alive. There clearly was substantial evidence that the defendant killed the victim.

When determining whether there is sufficient evidence to support a reasonable finding that a killing was done with premeditation and deliberation, the court may consider evidence tending to show, *inter alia,* 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. *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 here that the victim was murdered in a brutal manner. The victim suffered a laceration near her left eye that exposed a portion of her skull. The medical examiner discovered a hairline fracture of the victim's

skull that was probably caused by a blunt force injury. In addition, the medical examiner determined that the victim was strangled to death. The victim's thyroid cartilage or voice box was fractured, which resulted in a large amount of internal bleeding. The medical examiner testified that a person being strangled would become unconscious in fifteen to twenty seconds. The perpetrator would have had to continue to apply pressure on the victim's throat for two minutes after she lost consciousness in order to kill her. 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). Such evidence was substantial evidence that the victim died as a result of a premeditated and deliberate murder.

[2] There was also substantial evidence from which the jury quite reasonably could find that the defendant was guilty of felony-murder, with common law robbery as the underlying felony. Common law robbery is:

> "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). The felonious taking element of common law robbery requires "a taking with the felonious intent on the part of the taker to deprive the owner of his property permanently and to convert it to the use of the taker." *State v. Lawrence*, 262 N.C. 162, 168, 136 S.E.2d 595, 599-600 (1964)

State v. Herring, 322 N.C. 733, 739-40, 370 S.E.2d 363, 368 (1988).

Evidence tended to show that when the defendant's sister dropped him off near Archie Mathis's house, the defendant borrowed three dollars from her. Before the defendant went walking with the victim, the victim had about $375 in her pocketbook. Later that same day, the defendant had a "wad" of money. No money was found in the victim's pocketbook or at the scene of the murder. There was substantial evidence supporting each element of common law robbery and substantial evidence to support a reasonable finding that the defendant murdered the victim in order to rob her of her money. Therefore, the trial court did not err by refusing to dismiss either the first-degree murder charge or the charge of common law robbery.

[3] In another assignment of error, the defendant contends that the trial court committed reversible error under Article I, Section 23 of the Constitution of North Carolina when it conducted unrecorded private bench discussions with prospective jurors during jury selection for the defendant's capital trial. We have often held that similar errors required a new trial. *E.g., State v. Johnston and Johnson*, 331 N.C. 680, 417 S.E.2d 228 (1992); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). With commendable candor, the State concedes that it is unable to distinguish the errors in such cases from the error in the present case in any meaningful way.

When the first group of prospective jurors was brought into the courtroom at the commencement of jury selection for the defendant's trial, the trial court asked whether any prospective juror would have difficulty in serving as a juror. Several prospective jurors approached the bench and conferred privately with the trial court. Neither the court reporter, the defendant, nor defense counsel were privy to these conversations. On the second day of jury selection, the trial court asked a similar question of prospective jurors. Several more prospective jurors approached the bench and conferred privately with the trial court. None of these conferences with prospective jurors was recorded and all of them were conducted out of the hearing of the court reporter, the defendant, and defense counsel. The trial court made no entry in the record tending to establish in any manner what took place during most such private unrecorded bench conferences with prospective jurors.

The issue before us is whether the trial court's action in conducting unrecorded bench conferences with prospective jurors out of the hearing of the defendant and his counsel violated the defendant's right to be present at every stage of the trial. As we have often stated:

> The confrontation clause of the Constitution of North Carolina guarantees the right of this defendant to be present at *every* stage of the trial. *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 651 (1989); N.C. Const. Art. I, § 23 (1984). This state constitutional protection afforded to the defendant imposes on the trial court the affirmative duty to insure the defendant's presence at every stage of a capital trial. The defendant's right to be present at every stage of the trial "ought to be

> kept forever sacred and inviolate." *State v. Blackwelder*, 61 N.C. 38, 40 (1866). In fact, the defendant's right to be present at every stage of his capital trial is not waiveable. *State v. Artis*, 325 N.C. 278, 297, 384 S.E.2d 470, 480 (1989); *State v. Huff*, 325 N.C. at 31, 381 S.E.2d at 652. *But cf. State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978) (private communication between a judge and a seated juror expressly disapproved, however, the defendant's failure to object to the impropriety held to constitute a waiver).

Smith, 326 N.C. at 794, 392 S.E.2d at 363.

Jury selection is a stage of a capital trial at which the defendant must be present. *Id.* The trial court erred by conducting bench conferences with prospective jurors out of the hearing of the defendant and his counsel. *Id.* Therefore, "[u]nless the State proves that the denial of the defendant's right, under article I, section 23 of the Constitution of North Carolina, to be present at this stage of his capital trial was harmless beyond a reasonable doubt, we must order a new trial." *Id.* (citing *State v. Huff*, 325 N.C. 1, 33, 381 S.E.2d 635, 653 (1989), *death sentence vacated on other grounds*, --- U.S. ---, 111 L. Ed. 2d 777 (1990)).

We cannot determine from the record of this capital trial whether the error in question was harmless beyond a reasonable doubt. Nothing in the record before us establishes the nature and content of the trial court's private discussions with the prospective jurors. Therefore, we are required to conclude that the State has failed to carry its burden of proving that the trial court's errors were harmless beyond a reasonable doubt. *Smith*, 326 N.C. at 794, 392 S.E.2d at 364. As a result, the defendant must receive a new trial.

The State argues, however, that even if the defendant must receive a new trial for murder, a new trial is not required for the noncapital charge of common law robbery. The State points out that in noncapital trials, the defendant's right of presence is personal and the defendant may waive his right. *State v. Richardson*, 330 N.C. 174, 410 S.E.2d 61 (1991); *State v. Tate*, 294 N.C. 189, 239 S.E.2d 821 (1978). The State correctly summarizes this legal principle in cases where the defendant is tried only for noncapital offenses. However, we have held when a defendant was tried in a *capital trial* at which both capital and noncapital offenses were joined for trial, that the defendant may not waive the constitutional requirement of his presence. In such cases, absent a showing of

harmlessness beyond a reasonable doubt, the defendant is entitled to a new trial for all offenses charged, both capital and noncapital. *E.g., State v. Cole,* 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. McCarver,* 329 N.C. 259, 404 S.E.2d 821 (1991); *State v. Smith,* 326 N.C. 792, 392 S.E.2d 362 (1990).

In *Smith,* the defendant was charged with and convicted of first-degree murder, felonious breaking and entering, and being a habitual felon. 326 N.C. at 793, 392 S.E.2d at 363. We held there that the defendant was entitled to a new trial because the State could not show that the trial court's unrecorded private conversations with the prospective jurors were harmless beyond a reasonable doubt. *Id.* at 794, 392 S.E.2d at 364. As a result, we concluded that "we must vacate the *verdicts* and *judgments* entered against the defendant after the capital *trial* in which these errors were committed." *Id.* at 795, 392 S.E.2d at 364 (emphasis added).

In *State v. McCarver,* 329 N.C. 259, 404 S.E.2d 821 (1991), the defendant was *tried* capitally and convicted of first-degree murder and robbery with a dangerous weapon. *Id.* at 260, 404 S.E.2d at 821. We granted the defendant a new trial because the State could not show that the private unrecorded conversations between the trial court and the prospective jurors which violated the defendant's right of presence were harmless beyond a reasonable doubt. *Id.* at 261, 404 S.E.2d at 822. We ordered a new trial on all charges which had been before the jury during the defendant's *capital trial*—first-degree murder and armed robbery. *Id.*

In the recent case of *State v. Cole,* 331 N.C. 272, 415 S.E.2d 716 (1992), the State raised the same argument it asserts in the present case. In *Cole,* the defendant was charged with the murder of his girlfriend and his girlfriend's mother. *Id.* at 274, 415 S.E.2d at 716. The charges were joined and presented to the jury in a capital trial at which the defendant was tried for his life for the first-degree murder of his girlfriend and also tried for the noncapital offense of the second-degree murder of his girlfriend's mother. *Id.* We held that the trial court erred when it excused prospective jurors after holding unrecorded bench conferences with them and concluded that the State had not shown that the error was harmless beyond a reasonable doubt. *Id.* at 275, 415 S.E.2d at 718. The State argued that the defendant was not tried capitally for the murder of his girlfriend's mother and, therefore, the defendant could waive his right of presence with regard to the noncapital

offense of second-degree murder. *Id.* at 276-77, 415 S.E.2d at 718. The State argued that the defendant, by not objecting at trial, waived his right of presence with regard to the charge of second-degree murder and, as a result, the conviction for that charge was without error. *Id.* at 277, 415 S.E.2d at 718. Relying on *Smith* and *McCarver*, we rejected the State's argument and held that the defendant must receive a new trial on all charges which had been presented during his capital trial. *Id.*

In *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988), we granted a new trial on all charges—both capital and noncapital—because of prejudicial error committed by the trial court. *Id.* at 651, 365 S.E.2d at 555. In that case, the defendant was charged with first-degree murder, armed robbery, aiding and abetting in armed robbery, and felonious conspiracy. *Id.* at 651, 365 S.E.2d at 554. The charges were joined and brought on for trial in a capital trial at which the defendant was placed in jeopardy of receiving the death penalty for first-degree murder. We held that the trial court's denial of the defendant's statutory right to have all of his counsel address the jury at the conclusion of each stage *of a capital trial* required a new trial. *Id.* at 659, 365 S.E.2d at 559. Although the error related only to rights attaching to a criminal defendant during a capital trial, we held that the same

> principles of law require us to hold in cases where a capital felony has been joined for trial with noncapital charges "that the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the noncapital as well as the capital charges." *State v. Eury*, 317 N.C. at 518, 346 S.E.2d at 451. Therefore, the defendant is also entitled to a new trial as to the noncapital charges in the present case.

Id.

A proper regard for the doctrine of *stare decisis* and the adherence to case precedents required by that doctrine compels us to follow the rules established in our prior cases and, therefore, to grant the defendant in the present case a new trial for both the capital offense of first-degree murder and the noncapital offense of common law robbery.

The State has presented no reason sufficient to convince us that our reasoning in our prior cases was wrong. Our prior holdings

compel us to conclude that this defendant must receive a new trial on all charges—both capital and noncapital—presented to the jury during the defendant's capital trial because the State has failed to show that the violation of the defendant's right of presence during his capital trial was harmless beyond a reasonable doubt.

We are confident that the actions of the trial court were in good faith and resulted from its concern for the efficient selection of the jury. Nevertheless, the defendant must receive a new trial on these charges.

New trial.

Justice MEYER concurring.

I agree in all respects with the opinion of the majority. I write separately only to point out a matter not addressed by the majority.

With regard to defendant's contention that the trial court erred in conducting private, unrecorded bench conferences with prospective jurors, the majority relies in part on our recent opinion in *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992). As in this case, the trial court in *Cole* conducted unrecorded bench conferences with prospective jurors on two days. In *Cole*, the first instance of unrecorded bench conferences with prospective jurors occurred immediately following the court's announcement that its first order of business would be to select a grand jury and grand jury foreman. *Id.* at 274, 415 S.E.2d at 717. Because "defendant's trial had not commenced at that time," we concluded that "defendant did not have the right to be present at the conferences." *Id.* at 275, 415 S.E.2d at 717. However, we further concluded that the defendant was entitled to a new trial because the trial court had excused other prospective jurors questioned during private, unrecorded bench conferences that were held after the defendant's case had been called for trial and jury selection had commenced. *Id.* Thus, in *Cole*, we made it clear that a defendant has no right to be present during private, unrecorded bench conferences with prospective jurors prior to the commencement of the defendant's trial.

My review of the record on appeal in this case reveals that defendant's case was never formally called for trial by the prosecutor; thus, it is unclear whether the trial court's conferences with prospective jurors on the first day were conducted before or after

defendant's trial had commenced. However, here, as in *Cole*, a second venire was summoned to appear at trial after jury selection had commenced in defendant's case. As with the first venire, the trial court asked of these prospective jurors whether any of them would have difficulty serving as a juror. Several of these prospective jurors approached the bench and conferred privately with the trial court, out of the hearing of the court reporter, defendant, and defense counsel. At least one prospective juror was then excused by the trial court without explanation. While it is unclear from the record on appeal whether some of the trial court's earlier, private, unrecorded conferences with prospective jurors occurred before defendant's case was called for trial or had otherwise commenced, it is quite clear that the trial court deprived defendant of his state constitutional right to presence by engaging in private, unrecorded communications with prospective jurors on the second day of jury selection, well after defendant's trial had commenced. Because the State has failed to show that the trial court's error with regard to these latter ex parte communications was harmless beyond a reasonable doubt, defendant is entitled to a new trial.

ANNER F. EVANS, EMPLOYEE, PLAINTIFF v. AT&T TECHNOLOGIES, INC., SELF-INSURED, EMPLOYER, DEFENDANT

No. 294PA91

(Filed 17 July 1992)

1. **Master and Servant § 69 (NCI3d)— workers' compensation— voluntary disability payments—dollar-for-dollar deduction**

The deduction allowed by N.C.G.S. § 97-42 from amounts paid as workers' compensation entitles defendant employer, subject to Commission approval, to full dollar-for-dollar rather than week-to-week credit for disability benefits voluntarily paid to plaintiff employee under the employer's sickness and accident disability plan.

Am Jur 2d, Workmen's Compensation § 365.

2. **Master and Servant § 69 (NCI3d)— workers' compensation— disability payments—deduction of before-tax amount**

The amount of the deduction under N.C.G.S. § 97-42 for disability payments is the gross before-tax amount paid by

the employer's disability plan rather than the net after-tax amount received by the employee.

Am Jur 2d, Workmen's Compensation § 365.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 103 N.C. App. 45, 404 S.E.2d 183 (1991), reversing in part an order filed on 14 March 1989 by the North Carolina Industrial Commission (as modified by an order of the Commission entered on 30 March 1989). Heard in the Supreme Court on 9 March 1992.

Walden & Walden, by Margaret D. Walden and Daniel S. Walden, for the plaintiff-appellee.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for the defendant-appellant.

MITCHELL, Justice.

The defendant AT&T Technologies, Inc. ("AT&T") has brought forward only two issues for review by this Court. The first is whether the deduction allowed by N.C.G.S. § 97-42 from amounts to be paid as workers' compensation entitles the defendant-employer AT&T to full credit for all disability benefits paid to the plaintiff-employee under AT&T's Sickness and Accident Disability Plan. A second issue—properly raised in, but not addressed by, the Court of Appeals—is whether the amount of any deduction under N.C.G.S. § 97-42 is to be based on the gross before-tax amount paid by the defendant's disability plan or the net after-tax amount received by the employee. We conclude that AT&T must receive full credit under N.C.G.S. § 97-42 for the disability benefits paid by its disability plan and that the amount of such credit must be based on the gross before-tax amount of disability benefits paid under its disability plan for the benefit of the plaintiff-employee.

Certain relevant facts are not disputed before this Court. On 20 February 1986 the plaintiff Anner F. Evans was injured while she was working for AT&T at its plant in Winston-Salem. The defendant AT&T provides a Sickness and Accident Disability Plan ("Plan") which compensates its employees when they are absent from work due to injury or disability, regardless of the cause.

Under that Plan, the plaintiff was paid $474.25 per week during her first two-week period of temporary total disability in 1986 and $495.88 per week during a second period of temporary total disability from 8 February 1987 to 2 August 1987. The plaintiff received no benefits under the defendant's Plan after 2 August 1987. The plaintiff received a total of $13,290.50 in benefits under the Plan. All payments to the plaintiff under the Plan were made during a time when the defendant-employer had not accepted the plaintiff's injuries as compensable by workers' compensation benefits and when no determination of compensability had been made by the Industrial Commission.

On 3 April 1986 the plaintiff filed a claim with the North Carolina Industrial Commission seeking workers' compensation benefits. A deputy commissioner entered an Opinion and Award on 23 June 1988 finding and concluding that the plaintiff had been temporarily totally disabled during two different periods. First, the plaintiff was disabled from 21 February 1986 to 3 March 1986. Later, she was disabled from 6 February 1987 through 23 November 1987 (approximately forty weeks) at which time she returned to work part-time. The deputy commissioner held that the plaintiff was entitled to workers' compensation benefits of $294 per week for both of her periods of temporary total disability, less a deduction under N.C.G.S. § 97-42 for some, but not all, of the payments she had received under the defendant's Plan.

The deputy commissioner also ordered that the defendant pay the plaintiff weekly benefits for permanent partial disability at a weekly rate of $294 for seventy weeks commencing 24 November 1987. Neither party before this Court disputes the award to the plaintiff on account of her permanent partial disability, and the defendant seeks no deduction from the payment of those benefits.

In an Order and Award filed 14 March 1989, the Industrial Commission, relying on *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), amended the deputy commissioner's award and granted the defendant AT&T full credit for *all* payments made to the plaintiff under AT&T's Plan. The Commission otherwise adopted as its own the Opinion and Award of the deputy commissioner. Upon a motion to clarify filed by the defendant, the Commission entered an Order on 30 March 1989 amending its Opinion and Award of 14 March 1989 by inserting therein a

directive that the credit the defendant was to receive "shall be based on net after-tax wages paid plaintiff."

The plaintiff-employee Evans appealed to the Court of Appeals and assigned as error the Commission's holding that AT&T was entitled to full credit for all payments made to her under its Plan. The defendant AT&T cross-assigned as error, *inter alia*, (1) the conclusion by the Industrial Commission that the plaintiff's injury was a compensable injury under Article I of Chapter 97 of the General Statutes of North Carolina, our Workers' Compensation Act, and (2) the Commission's conclusion that the credit the defendant received for payments under its Plan should be based on net after-tax wages paid to the plaintiff.

Although the Court of Appeals did not expressly affirm or reverse that part of the Commission's Award holding that the plaintiff was entitled to workers' compensation benefits for her injury, it seems to have agreed with the Commission's ruling in that regard. The defendant has not brought the issue forward on appeal to this Court, and that part of the Commission's Award must be and is left in full effect. The Court of Appeals concluded that the defendant AT&T was only entitled to partial credit under N.C.G.S. § 97-42 for the payments made under its Plan to the plaintiff, not full credit as ordered by the Commission. For that reason, the Court of Appeals reversed that part of the Opinion and Award of the Commission.

The defendant AT&T petitioned this Court seeking our discretionary review of the Court of Appeals' conclusion that for purposes of the deduction authorized by N.C.G.S. § 97-42, AT&T could only receive credit for part of the payments made under its Plan. AT&T contended that the Court of Appeals had erred in its resulting holding reversing in part the Commission's Award. AT&T also requested that this Court resolve one of the issues properly presented to, but not resolved by, the Court of Appeals—whether the amount AT&T is entitled to deduct from the plaintiff's workers' compensation benefits is the gross before-tax payment made under AT&T's Plan or the net after-tax payment received by the plaintiff. The defendant AT&T did not seek our review of any other issues. We allowed AT&T's petition, thereby granting review limited to the two issues it sought to raise.

In the present appeal, the plaintiff-employee argues that the defendant AT&T should only receive what the parties and the

Court of Appeals have denominated as a "week-for-week credit" for payments made on her behalf under AT&T's Plan. She specifically argues that under such a "week-for-week credit" AT&T may only receive credit for—and, thus, deduct from the plaintiff's workers' compensation benefits for temporary total disability—an amount calculated by subtracting "from the total number of *weeks* during which [workers'] compensation was found otherwise due, the total number of *weeks* during which the Defendant [AT&T] had made wage continuation payments of at least the compensation rate." Specifically, to apply the "week-for-week credit" advocated by the plaintiff-employee, one would first calculate the total number of weeks in which an employer had paid its employee *as much or more than* the weekly rate the employee was awarded as workers' compensation benefits. The employer would then be entitled to deduct only an amount *equal to* the weekly workers' compensation benefits the employee was awarded for *each* such *week*. An employer would receive no credit whatsoever for *any amounts* it paid during weeks in which it paid the employee less than the weekly workers' compensation rate. Nor would an employer receive credit for any amounts it paid during any week *in excess of* the weekly rate of workers' compensation benefits awarded to the employee.

Applying a "week-for-week credit," according to the plaintiff, the defendant AT&T should receive a credit in the present case only for an amount *equal to* the weekly benefits the Commission awarded her for the weeks between 21 February 1986 and 3 March 1986 and for the weeks between 6 February 1987 and 2 August 1987. The plaintiff says AT&T is entitled to such credit because the plaintiff received benefits under AT&T's Plan for each of those weeks in excess of the $294 weekly amount later awarded by the Industrial Commission for the plaintiff's temporary total disability. The AT&T Plan did not pay the plaintiff any benefits after 2 August 1987; therefore, the plaintiff argues AT&T should receive no deduction from the workers' compensation benefits awarded the plaintiff for the weeks after 2 August 1987. The plaintiff argues the defendant AT&T must pay her full workers' compensation benefits of $294 per week for the weeks beginning 2 August 1987 through 23 November 1987 when, under the Award of the Industrial Commission, the plaintiff was still entitled to temporary total disability benefits but received no payments under AT&T's Plan.

[1] The defendant AT&T on the other hand argues, relying on N.C.G.S. § 97-42 and *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), that it should receive what the parties and the Court of Appeals denominated as a "full dollar-for-dollar" credit for all payments made under its Plan to the plaintiff, including all payments made in any weeks in excess of the weekly workers' compensation award. In other words, the defendant AT&T argues that it is entitled to deduct from the amounts to be paid the plaintiff as workers' compensation all dollars paid to the plaintiff under the AT&T Plan which were not "due and payable" within the meaning of N.C.G.S. § 97-42 when payment was made. Like the Industrial Commission, we conclude that the defendant's argument in this regard is correct. Therefore, we reverse the decision of the Court of Appeals, which concluded that the defendant AT&T was only entitled to a week-for-week credit under N.C.G.S. § 97-42 and reversed the modified Award of the Commission.

The parties do not dispute whether the defendant is entitled to a "credit" or deduction; they simply dispute the type and amount of deduction. The controlling statute provides that:

> Any payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by terms of this Article were not due and payable when made, may, subject to the approval of the Industrial Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment.

N.C.G.S. § 97-42 (1991).

The statute states that, subject to approval by the Industrial Commission, *any* payments made by the employer to the injured employee that were not due and payable when made may be deducted from the employee's workers' compensation award. The term "any" as used in the statute carries a broad meaning and clearly was intended to include *all* payments made by an employer on account of its employee's disability which the Commission had not determined was owed under Article I of Chapter 97 of the General Statutes of North Carolina. Furthermore, the proviso at the end

of the statute states that "such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment." The defendant, through its Plan, followed the proviso. The Plan paid the plaintiff her full wages for approximately six months after her injury. The Plan discontinued these full wage benefits on 2 August 1987. At that time the plaintiff had received payments from the Plan that exceeded the total amount of the workers' compensation benefits to which she was later determined to be entitled for her temporary total disability. The Plan, in effect, paid the plaintiff a higher weekly benefit than she was entitled to under our Workers' Compensation Act, but shortened the payout period. The defendant AT&T was entitled to deduct the full amount of all payments its Plan made to the plaintiff for her temporary total disability which were not "due and payable when made" to her.

Our interpretation of N.C.G.S. § 97-42 in *Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987), supports our conclusion and holding in the case at bar. *Foster* involved the very same Sickness and Accident Disability Plan before us in the present case; Western-Electric Company, the defendant in *Foster*, was the predecessor corporation to the present defendant AT&T. In *Foster*, the plaintiff-employee was injured when an automobile exiting the defendant's parking lot struck the plaintiff as the plaintiff crossed the road in front of the defendant's plant. *Id.* at 114, 357 S.E.2d at 671. The plaintiff in *Foster* received weekly benefits totaling $7,598.16 under the Plan, which included "full pay" of $342.26 per week for approximately twelve weeks and "half pay" of $171.13 per week for approximately fourteen weeks. *Id.* As in the present case, the plaintiff-employee in *Foster* was paid those benefits under the Plan at a time when the employer had not accepted the employee's injuries as compensable under our Workers' Compensation Act and when the Industrial Commission had not determined compensability. The Industrial Commission subsequently ruled that the plaintiff was entitled to temporary total disability benefits of $6,741.96. This Court held under N.C.G.S. § 97-42 that, on the facts presented by *Foster*, the defendant-employer was entitled to a full credit for all of the benefits paid to its employee under the Plan and that the defendant-employer could deduct all such payments from the workers' compensation benefits awarded to the plaintiff after such payments had been made. *Id.* at 117, 357 S.E.2d at 673.

In *Foster* we relied upon the public policy set out in our Workers' Compensation Act in reaching our conclusion. Specifically, we said that the Act is "designed to relieve against hardship," and "to provide payments based upon the actual loss of wages," and "disfavors duplicative payments." *Id.* at 116-17, 357 S.E.2d at 673. We also stated,

> These policy considerations dictate that an employer such as defendant in this case, who has paid an employee wage-replacement benefits at the time of that employee's greatest need, should not be penalized by being denied *full credit for the amount paid* as against the amount which was subsequently determined to be due the employee under workers' compensation. To do so would inevitably cause employers to be less generous and the result would be that the employee would lose his full salary at the very moment he needs it most.

Id. at 117, 357 S.E.2d at 673 (emphasis added). In order to meet the policy goals clearly outlined in the statute and explained in *Foster*, we must conclude that, subject to the Commission's approval, employers receive a full dollar-for-dollar credit under N.C.G.S. § 97-42 for all payments made under a voluntary sickness and accident disability plan such as AT&T's Plan in the present case, so long as such payments were not "due and payable when made" within the meaning of the statute.

N.C.G.S. § 97-42 encourages an employer to voluntarily compensate an employee with amounts equal to full pay early during his time of disability. By giving the disabled employee full pay, an employer's disability plan operates as a wage replacement program. In the case at bar, the Commission awarded the plaintiff-employee $294 per week of workers' compensation benefits for approximately forty-seven weeks of temporary total disability; effectively, this was an award of $12,639.48 in total. The plaintiff had already been paid a total of $13,290.50 over approximately twenty-seven weeks under the defendant's Plan. The Plan, therefore, had already paid the plaintiff total benefits greater than the total benefits she was ultimately determined to be entitled to receive under our Workers' Compensation Act. The legislature clearly anticipated and provided for such a result when it adopted N.C.G.S. § 97-42.

Giving the defendant AT&T full dollar-for-dollar credit avoids duplicative payment of benefits. The plaintiff argues that its pro-

posed week-for-week credit does not allow for duplication. We disagree. The defendant's Plan paid the plaintiff more than the total amount she was eventually determined to be entitled to as workers' compensation for her temporary total disability. The payment of an additional $4,578 under our Workers' Compensation Act for that same disability would reach the same practical result as a duplication of benefits. Applying the "week-for-week" credit argued for by the plaintiff, rather than a full dollar-for-dollar credit, would allow the plaintiff, in effect, to recover twice for the same temporary total disability.

The plaintiff argues that a full dollar-for-dollar credit is inconsistent with the intent and objectives of the entire Workers' Compensation Act. Citing several provisions of the Act, the plaintiff contends that a primary policy of the Act is to provide for compensation "on a constant, periodic, weekly basis" to workers injured on the job. According to the plaintiff, allowing a full dollar-for-dollar deduction of payments which were not due and payable when made violates this statutory intent. We do not agree.

In resolving the issue presented, we apply the traditional rules of statutory construction.

> Legislative intent controls the meaning of a statute; and in ascertaining this intent, a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish. The statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently.

Shelton v. Morehead Memorial Hospital, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986) (citations omitted); *see Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656-57, 403 S.E.2d 291, 294-95 (1991). N.C.G.S. § 97-42 is part of the same Workers' Compensation Act as the more general provisions cited by the plaintiff. N.C.G.S. § 97-42 specifically addresses deductions from workers' compensation benefits and expressly allows an employer to deduct "any payments made by the employer to the injured employee . . . not due and payable when made," subject to the approval of the Commission. We conclude that the ordinary meaning of the language of N.C.G.S. § 97-42 allows an employer, subject to Commission approval, to receive a full dollar-for-dollar credit for all such payments; this interpretation is not inconsistent with the overall intent of the statute to provide compensation to employees for work-related

injuries. Even though a full dollar-for-dollar deduction may decrease the *number* of weekly payments an employee receives, it will never decrease the total *amount* the employee actually receives to an amount less than that employee would have received under the Act alone.

Both parties rely on cases from other jurisdictions in support of their respective arguments. Because each of those cases was decided on the basis of the language of the particular plan or statute involved, we do not find any one case particularly persuasive. Speaking generally, however, the cases allowing a dollar-for-dollar credit are more persuasive because they tend to rely on and support the public policy of encouraging employers to compensate employees voluntarily early during any period of disability. *See, e.g., Triangle Insulation & Sheet Metal Co. v. Stratemeyer*, 782 S.W.2d 628, 630 (Ky. 1990); *Western Casualty and Surety Co. v. Adkins*, 619 S.W.2d 502, 504 (Ky Ct. App. 1981); *Western Electric, Inc. v. Ferguson*, 371 So.2d 864, 868 (Miss. 1979); *Cowan v. Southwestern Bell Telephone Co.*, 529 S.W.2d 485, 488 (Mo. Ct. App. 1975). Also, they tend to avoid payments amounting to duplicative recovery for the same injury. *See, e.g., Inland Steel Co. v. Brown*, 496 N.E.2d 1332, 1336 (Ind. Ct. App. 1986). It is clear that our legislature also intended to promote such public policies when it adopted N.C.G.S. § 97-42.

If employers cannot receive credit for benefits voluntarily paid to their employees, then they will be less likely to pay such benefits. Not allowing a full dollar-for-dollar credit would discourage employers from voluntarily paying benefits to employees as soon as possible. Encouraging early voluntary payment of benefits by employers to employees serves the public interest as clearly established by N.C.G.S. § 97-42. The Commission's Order allowing the defendant AT&T a full dollar-for-dollar deduction from the total amount its Plan paid to the plaintiff was correct under N.C.G.S. § 97-42. Therefore, the holding of the Court of Appeals to the contrary was error and must be reversed.

[2] The Court of Appeals failed in its opinion to address an additional issue, properly preserved and presented by the defendant, regarding the amount of the payments for which the defendant should receive credit under N.C.G.S. § 97-42. In its 30 March 1989 Order amending its prior Opinion and Award in this case, the Industrial Commission ordered that the credit the defendant was

to receive for payments made from its Plan to the plaintiff "shall be based on the net after-tax" amounts paid the plaintiff. The defendant-employer AT&T argued in the Court of Appeals that the amount of the deduction it should be allowed must be based on the gross before-tax amount of payments made under the Plan. The plaintiff on the other hand argued in the Court of Appeals that the amount of the deduction for which the defendant should receive credit must only be based on the net after-tax amount of the payments she actually received and that the Commission's Award was correct on that point. The Court of Appeals simply left this issue unaddressed and unresolved. We allowed discretionary review and now address this issue.

In resolving this issue, we again turn to the plain language of N.C.G.S. § 97-42 and our past interpretation of that statute in *Foster*. The statute provides that *any* voluntary payments by the employer may be deducted from the amount of a subsequent workers' compensation award. In *Foster*, we interpreted the statute to allow a "full credit" for *all* payments not due and payable when made. 320 N.C. at 117, 357 S.E.2d at 673. We now conclude that, in order for an employer to receive full credit for voluntary payments made to an injured employee, the statute must be interpreted to mean that the amount of the deduction to which an employer, subject to the approval of the Commission, is entitled under N.C.G.S. § 97-42 is the amount of the gross before-tax payments.

Our interpretation of N.C.G.S. § 97-42 with regard to this issue prevents the possibility of an essentially duplicative recovery by an injured employee. Payments made to employees under a voluntary employer-financed wage continuation plan are generally included in the gross income of the employee for purposes of taxation. 26 U.S.C. § 105 (1988). As a result, the employer is required to withhold federal and state income taxes and other taxes from these payments. 26 U.S.C. §§ 3102, 3402 (1988); N.C.G.S. § 105-163.2 (1989). Payments received under workers' compensation acts for personal injuries or sickness are generally excluded from the gross income of the employee. 26 U.S.C. § 104(a)(1) (1988). When an employee, as in the present case, successfully disputes an employers' denial of compensability of the employee's injury through workers' compensation benefits, that employee is entitled to a refund of taxes withheld from payments the employee has received under a wage continuation plan. 26 U.S.C. § 31 (1988); N.C.G.S. § 105-163.2 (1989). An employee may seek a refund of taxes withheld from

payments made under a disability plan to the extent that such payments are not in excess of the amount provided in the applicable workers' compensation act or acts. *See* Treas. Reg. § 1.104-1(b) (1991); Rev. Rul. 72-45, 1972-1 C.B. 34. If an employer were only entitled to a credit equal to the net after-tax amount it paid to the employee, then the employee could obtain what would amount to a double recovery for his injuries by obtaining a refund of taxes previously withheld. The employee in effect would receive the tax refund in addition to any award made under a workers' compensation act or the wage continuation plan.

Another appellate court reached a similar conclusion in *Graham v. Lipe Rollway Corporation*, 114 A.D.2d 570, 494 N.Y.S.2d 431 (1985). In that case, the issue was "whether the employer was entitled [as a credit] to the full amount of the disability award paid by the employer, $95 per week, or the amount of the award actually received by the claimant, $95 per week less FICA (Social Security) taxes withheld by the employer and paid to the Federal government as required by Federal statute." *Id.* at 570, 494 N.Y.S.2d at 431. The workers' compensation board ruled in that case that an employer was entitled to a credit for the full amount it had paid the employee. *Id.* The court noted that the FICA withholdings were overpayment of taxes and, therefore, the plaintiff was entitled to a refund. *Id.* at 571, 494 N.Y.S.2d at 432. The plaintiff argued that the refund procedure is complicated and expensive and, therefore, its expense should be borne by the employer. *Id.* The court disagreed and pointed out that "[t]he refund procedure is no more complicated and expensive for claimant than it is for any other person seeking a refund." *Id.* We find the New York court's reasoning persuasive.

In addition, if employers were allowed a deduction equal to the net after-tax amount ultimately received by the employee, administration of this part of our Workers' Compensation Act would be almost impossible for the Industrial Commission. The withholding of taxes by the employer is based on an estimate of the employee's ultimate tax liability; an employee's tax liability is not established until the employee files a tax return for the particular tax year. The actual tax liability may vary depending on numerous factors, such as, the amount of any itemized deductions, the number of the taxpayer's dependents, and the amount of any other income. If the credit given employers should be held to be equal to the net after-tax amount ultimately retained by the employee, the In-

dustrial Commission would be required to calculate the tax liability of each recipient in order to credit the employer with the proper after-tax amount. Allowing a credit equal to the amount of gross before-tax payments made to the employee avoids these complexities and facilitates the efficient administration of the Act.

As to this issue which the Court of Appeals failed to resolve, we conclude that the Commission erred. The defendant was entitled to deduct the gross before-tax payments made under its Plan to the plaintiff employee. Upon the remand of this case to the Commission, it will be required to enter an order to such effect.

For the reasons stated herein, we reverse the partial opinion of the Court of Appeals which reversed the Commission's Opinion and Award of 14 March 1989 (as modified by the Commission's Order of 30 March 1989) holding that the defendant employer must be given full dollar-for-dollar credit. We remand this case to the Court of Appeals for its further remand to the Industrial Commission for entry of additional orders consistent with this opinion.

Reversed and remanded.

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

JANE DOE AND SALLY DOE, BY AND THROUGH THEIR GUARDIAN *AD LITEM*, ANNE CONNOLLY v. FRANK HOLT

No. 379PA91

(Filed 17 July 1992)

1. Parent and Child § 2.1 (NCI3d) — parent-child immunity — doctrine still applicable

The parent-child immunity doctrine as first enunciated in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12, continues to apply in North Carolina, except to the extent it has been specifically abolished or amended by the legislature.

Am Jur 2d, Parent and Child §§ 138-139.

2. Parent and Child § 2.1 (NCI3d)— parent-child immunity doctrine—inapplicability to willful and malicious act

The parent-child immunity doctrine does not apply to a claim by an unemancipated minor against a parent for a willful and malicious act resulting in injury to the child.

Am Jur 2d, Parent and Child § 148.

Liability of parent for injury to unemancipated child caused by parent's negligence—modern cases. 6 ALR4th 1066.

3. Parent and Child § 2.1 (NCI3d)— parent-child immunity—inapplicable to repeated rapes and sexual molestations

A suit by two minor plaintiffs against their father for damages allegedly resulting from his having repeatedly raped and sexually molested them is not barred by the parent-child immunity doctrine because plaintiffs' complaint alleged conduct by their father which was both "willful" and "malicious."

Am Jur 2d, Parent and Child § 148.

Liability of parent for injury to unemancipated child caused by parent's negligence—modern cases. 6 ALR4th 1066.

Justice MEYER concurring in result.

ON discretionary review of the decision of the Court of Appeals, 103 N.C. App. 516, 405 S.E.2d 807 (1991), reversing an order entered 27 August 1990, *nunc pro tunc* 9 August 1990, by *Walker, J.*, in the Superior Court, FORSYTH County. Heard in the Supreme Court on 9 March 1992.

David F. Tamer for the defendant appellant.

Theodore M. Molitoris and Robert S. Blair, Jr., for the plaintiffs-appellees.

Law Office of Elizabeth Kuniholm, by Elizabeth J. Armstrong, for the North Carolina Association of Women Attorneys, and Marjorie Putnam for the North Carolina Academy of Trial Lawyers, amici curiae.

MITCHELL, Justice.

The issue before this Court is whether this suit by two minor plaintiffs against their father for damages allegedly resulting from

his having repeatedly raped and sexually molested them is barred by the parent-child immunity doctrine. We conclude that the complaint states a claim upon which relief can be granted and that the parent-child immunity doctrine does not bar this suit.

In their complaint, the plaintiffs allege that they are both unemancipated minors. They resided with the defendant, their natural father, from 5 August 1978 until June 1989. Beginning in 1980, when the plaintiffs were five and six years old respectively, the defendant raped and sexually molested both plaintiffs repeatedly; these acts continued until 1989. The defendant pled guilty, in a separate criminal action, to charges of second-degree rape and second-degree sexual offense; those charges and convictions involved some of the same acts against the plaintiffs forming the basis of the tort claims presented in this case. At the time the complaint was filed, the defendant was serving an active prison sentence for those acts.

The plaintiffs brought this tort action by and through their guardian *ad litem* to recover damages for permanent physical, mental and emotional injuries they suffered as a result of being raped and sexually molested by the defendant, their father. The defendant moved to dismiss the plaintiffs' complaint for failure to state a claim upon which relief could be granted, contending that the parent-child immunity doctrine barred the action. The trial court granted the defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. N.C.G.S. § 1A-1, Rule 12(b)(6) (1990). The plaintiffs appealed to the Court of Appeals.

The Court of Appeals concluded that the plaintiffs' action was not barred by the parent-child immunity doctrine and reversed the order of the trial court. *Doe v. Holt*, 103 N.C. App. 516, 405 S.E.2d 807 (1991). For the reasons which follow, we affirm the holding of the Court of Appeals.

The doctrine of parent-child immunity was first recognized in the case of *Hewllette v. George*, 68 Miss. 703, 9 So. 885 (1891). In North Carolina, the doctrine was first applied in *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923). In denying a minor child's action to recover damages against her father for his negligence resulting in an automobile collision, this Court stated:

> [T]he government of a well ordered home is one of the surest bulwarks against the forces that make for social disorder and

> civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration. Under these conditions, the State will not and should not permit the management of the home to be destroyed by the individual members thereof, unless and until the interests of society are threatened.

Id. at 584, 118 S.E. at 15.

We are well aware of the fact that some appellate courts and legislatures have abolished or significantly eroded the parent-child immunity doctrine in other jurisdictions. *See generally* Dean, *It's Time to Abolish North Carolina's Parent-Child Immunity, But Who's Going to Do It?* 68 N.C.L. Rev. 1317, 1328 n. 123 (1990) (listing states where the doctrine has been abolished or modified); 59 Am. Jur. 2d *Parent and Child* § 139 (1987) (same). But since our decision in *Small*, this Court has consistently applied the rule enunciated in that case; "an unemancipated minor child may not maintain an action based on ordinary negligence against his parents." *Lee v. Mowett Sales Co.*, 316 N.C. 489, 491, 342 S.E.2d 882, 884 (1986). *See Redding v. Redding*, 235 N.C. 638, 70 S.E.2d 676 (1952). The parent-child immunity doctrine was abrogated in part, however, when the General Assembly enacted a statute making it inapplicable to actions "arising out of the operation of a motor vehicle owned or operated by the parent or child." N.C.G.S. § 1-539.21 (1991 Cum. Supp.). After the enactment of this statute, we were asked to judicially abolish what remained of the parent-child immunity doctrine. We declined to do so because "[t]o judicially abolish the parent-child immunity after the legislature has considered and retained the doctrine would be to engage in impermissible judicial legislation." *Lee*, 316 N.C. at 494, 342 S.E.2d at 885. We stated that "[t]he doctrine will continue to be applied as it now exists in North Carolina until it is abolished or amended by the legislature." *Id.* at 495, 342 S.E.2d at 886. We adhere to that statement in this case.

[1] We do not deviate from the position we took in *Lee*, to the effect that the parent-child immunity doctrine as first enunciated in *Small* continues to apply in North Carolina, except to the extent it has been specifically abolished or amended by the legislature. *Id.* However, the case before us is not one in which we are asked to modify or abolish the parent-child immunity doctrine. The question before us here is whether the parent-child immunity doctrine, as it has existed in North Carolina since *Small*, bars tort claims

for injuries unemancipated minors have suffered as a result of a parent's willful and malicious conduct. We conclude that the doctrine does not bar such claims.

A number of jurisdictions have had an opportunity to address the question presented by this case. *See* 59 Am. Jur. 2d *Parent and Child* § 148 (1987). The modern trend is to allow an unemancipated minor to recover damages against his or her parent for injuries resulting from the parent's willful misconduct. *Id.; see, e.g., Hurst v. Capitell*, 539 So. 2d 264 (Ala. 1989); *Nudd v. Matsoukas*, 7 Ill. 2d 608, 131 N.E.2d 525 (1956); *Elkington v. Foust*, 618 P.2d 37 (Utah 1980). A review of two such cases is beneficial when considering whether the parent-child immunity doctrine applies to bar claims for injuries resulting from willful and malicious acts of parents against their unemancipated children in North Carolina.

In *Attwood v. Estate of Attwood*, 276 Ark. 230, 633 S.W.2d 366 (1982), Janice Attwood brought a complaint on behalf of her injured minor son against his father for causing the son injuries. The complaint alleged that the father willfully and intentionally became intoxicated, entered an automobile with his child as a passenger, and drove at a speed greatly in excess of the posted speed limit. As a result, the father's vehicle left the roadway and overturned, killing him and injuring the minor son. *Id.* at 232, 633 S.W.2d at 367. The Supreme Court of Arkansas reversed the trial court's order of summary judgment for the defendant father stating that the complaint alleged conduct which was tantamount to willful and wanton misconduct which was not protected by the parent-child immunity doctrine. *Id.* at 238, 633 S.W.2d at 370. The Court said that "[t]he fact that willfulness has to be proven should preclude fraud or collusion from being a problem. We think it is clear that a willful tort is beyond the scope of the parental immunity doctrine in Arkansas." *Id.*

In *Foldi v. Jeffries*, 93 N.J. 533, 461 A.2d 1145 (1983), an unemancipated minor wandered onto a neighbor's driveway where she was bitten on the face by the neighbor's dog. The minor brought suit against the owners of the dog, who in turn sought indemnification from the minor plaintiff's parents for failure to supervise their child. The parents pled the parent-child immunity doctrine contending that it barred the action against them, and the trial court agreed. *Id.* at 536, 461 A.2d at 1147. The Supreme Court of New Jersey affirmed the trial court, concluding—just as this Court con-

cluded in *Lee*—that the parent-child immunity doctrine was still viable in New Jersey to the extent that it barred actions against a parent for simple negligence in supervision of his or her child. *Id.* at 545, 461 A.2d at 1152. The Supreme Court of New Jersey reasoned that: "There are certain areas of activities within the family sphere involving parental discipline, care, and control that should and must remain free from judicial intrusion. Parents should be free to determine how the physical, moral, emotional, and intellectual growth of their children can best be promoted." *Id.* However, the Court further explained that such policy considerations would not justify extending immunity under the doctrine to include a parent's willful misconduct. *Id.* at 547, 461 A.2d at 1152.

The defendant argues in the present case that the parent-child immunity doctrine, as it has been recognized and applied in North Carolina since our decision in *Small*, operates as a complete bar to all tort suits by unemancipated children against their parents unless specifically authorized by statute. We disagree.

The history of the parent-child immunity doctrine in North Carolina reveals that maintenance of family harmony was foremost among the public policies the doctrine was intended to serve. *Lee*, 316 N.C. at 492, 342 S.E.2d at 884; *Skinner v. Whitley*, 281 N.C. 476, 480, 189 S.E.2d 230, 232 (1972). It was feared that suits by children against their parents for negligent injury would "tend to destroy parental authority and to undermine the security of the home." *Small*, 185 N.C. at 584, 118 S.E. at 15. For such reasons, the doctrine has been applied in North Carolina to bar actions between unemancipated children and their parents based on *ordinary* negligence. *Lee*, 316 N.C. at 491, 342 S.E.2d at 884; *Skinner*, 281 N.C. at 484, 189 S.E.2d at 235.

[2] The issue directly presented by this case is whether the parent-child immunity doctrine applies to a claim by an unemancipated minor against a parent for a willful and malicious act resulting in injury to the child. In *Skinner*, we rejected the plaintiff's request to abolish the parent-child immunity in "ordinary negligence cases" but stated: "Of course, the question raised by an intentional, willful or malicious tort inflicted on a child by a parent or person *in loco parentis* is not presented on this appeal. We will pass on that question when it arises in a case properly before us." *Id.* The present case is just such a case requiring that we address and resolve with finality the issue of whether the parent-child

immunity doctrine extends to cases arising from willful and malicious acts against an unemancipated minor by his or her parent.

In *Lee v. Mowett Sales Co.*, 316 N.C. 489, 342 S.E.2d 882 (1986), we held that the parent-child immunity doctrine barred a third-party plaintiff's suit against the father of the injured minor seeking contribution for the father's negligence in causing his minor child's injuries. In so doing, we stated in *obiter dictum*: "However, the parent-child immunity doctrine does not apply to . . . actions by an unemancipated minor involving willful and malicious acts. . . ." *Id.* at 492, 342 S.E.2d at 884. Faced as we are here with a case requiring us to decide the issue with finality, we adhere to the view we expressed in *Lee*; we conclude that the parent-child immunity doctrine in North Carolina has never applied to, and may not be applied to, actions by unemancipated minors to recover for injuries resulting from their parent's willful and malicious acts.

[3] In reviewing the propriety of the trial court's dismissal of the plaintiff's complaint for failure to state a claim upon which relief can be granted, we must next resolve the issue of whether the plaintiffs' complaint alleged "willful and malicious acts" sufficient to withstand the defendant's motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. An act is "willful" "when it is done purposely and deliberately in violation of law . . . or when it is done knowingly and of set purpose. . . ." *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929) (citations omitted); *see generally Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971); *Ballew v. R.R.*, 186 N.C. 704, 120 S.E. 334 (1923); *Bailey v. R.R.*, 149 N.C. 169, 62 S.E. 912 (1908). "Malice in law" is "presumed from tortious acts, deliberately done without just cause, excuse or justification, which are reasonably calculated to injure another or others." *Betts v. Jones*, 208 N.C. 410, 411, 181 S.E. 334, 335 (1935), *quoted in McKeel v. Armstrong*, 96 N.C. App. 401, 406, 386 S.E.2d 60, 63 (1989). It is clear in light of such definitions that the plaintiffs' complaint in the present case alleged conduct against the plaintiffs by their father which was both "willful" and "malicious."

It would be unconscionable if children who were injured by heinous acts of their parents such as alleged here should have no avenue by which to recover damages in redress of those wrongs. Where a parent has injured his or her child through a willful and malicious act, any concept of family harmony has been destroyed.

Thus, the foremost public purpose supporting the parent-child immunity doctrine is absent, and there is no reason to extend the doctrine's protection to such acts.

We wish to make it clear that no issue involving reasonable chastisement of children by their parents is before us in the present case, and we expressly do not intend to be understood as commenting on situations involving such issues. *See generally* 3 Lee, *North Carolina Family Law* § 249 (4th ed. 1981). Furthermore, our opinion in the present case is not intended to permit interference in the proper scope of discretion parents must utilize in rearing their children. As the Supreme Court of New Jersey recognized in *Foldi*, there is no universally correct philosophy on how to raise one's child. *Foldi*, 93 N.J. at 546, 461 A.2d at 1152. In no way do we intend to indicate that reasonable parental decisions concerning children should be reviewed in the courts of this state. Such decisions make up the essence of parental discretion, discretion which allows parents to shape the views, beliefs and values their children carry with them into adulthood. These decisions are for the parents to make, and will be protected as such. *See generally Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923).

Here, we have addressed a different concern; when a parent steps beyond the bounds of reasonable parental discretion and commits a willful and malicious act which injures his or her child, the parent negates the public policies which led to recognition of the parent-child immunity doctrine in North Carolina, and the doctrine does not shield the parent. In the present case, the defendant's rapes and sexual abuses of his two minor daughters certainly constituted "willful and malicious acts" against them. Therefore, the plaintiffs' complaint alleged a proper claim for relief and should not have been dismissed under Rule 12(b)(6).

The decision of the Court of Appeals, reversing the trial court's order dismissing the plaintiffs' complaint, is affirmed for the reasons previously set forth in this opinion.

Affirmed.

Justice MEYER concurring in result.

While I concur in the result reached by the majority, I fear that this is one of those cases where bad facts make bad law. The defendant-father repeatedly raped and sexually molested his

daughters for almost ten years, beginning when they were five and six years old, respectively. The defendant pled guilty to the charges and received an active prison sentence. The daughters, at the time they filed their verified complaint, were ages fifteen and sixteen. This appears to be an open and shut case, as the facts alleged in the verified complaint are not contested and indeed the defendant-father pled guilty to the very acts alleged in the daughters' complaint.

As the majority has noted, the facts of this case are so egregious that to deny recovery would border the unconscionable. I believe, however, that this Court should keep faith with its earlier commitment to continue to apply the parent-child immunity doctrine until it is abolished or amended by the legislature. That position evidenced, and would continue to evidence, this Court's recognition that the legislature is in a far better position than this Court to gauge the wisdom of changing the public policy of the state. The legislature did so when it recently adopted N.C.G.S. § 1-539.21, making the doctrine inapplicable to actions arising out of the operation of a vehicle owned by the parent or child. We should leave it to that body to recognize an exception for willful and malicious acts of the parent against a child.

Since the doctrine's inception, the bench and bar of the state have understood the doctrine of parent-child immunity to apply to all actions for personal injuries, however they were caused. I believe that the majority errs in concluding that it is not recognizing an exception but simply discovering that the doctrine never applied at all except in cases involving "ordinary negligence." This is made clear to me by the fact that the majority limits its holding to "willful and malicious" acts of parents. Rather than flatly holding that the doctrine is inapplicable to all acts of negligence beyond "ordinary negligence," it specifically hedges by limiting its holding to "willful and malicious" acts.

In *Small v. Morrison*, 185 N.C. 577, 118 S.E. 12 (1923), this Court held that the minor plaintiff could not recover against her father for injuries she had sustained in an automobile accident. *Id.* at 579, 118 S.E. at 13. Though the facts in *Small* involved negligently inflicted injuries, the Court's reasoning and holding show that the doctrine, as adopted in North Carolina, is not nearly so narrow as the majority has concluded. In its opinion, the *Small* Court cited with approval four cases to justify its adoption of the

doctrine of parent-child immunity, three of which involved intentional torts: *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891); *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). A careful examination of the circumstances underlying these cases establishes that in these cases, each state supreme court denied recovery because of parent-child immunity, despite the intentional acts of the parent. In *Hewlett*, the plaintiff-child sued her mother for wrongfully committing her to an insane asylum. *McKelvey* involved a daughter who sued her father and stepmother for "cruel and inhuman treatment" by the stepmother at the father's instance. In *Roller*, the father had been convicted of raping his daughter.

I concede that there is dicta in cases since *Small* which purport to limit the doctrine to negligently inflicted injuries. *See Lee v. Mowett Sales Co.*, 316 N.C. 489, 342 S.E.2d 882 (1986); *Coffey v. Coffey*, 94 N.C. App. 717, 381 S.E.2d 467 (1989), *disc. rev. improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990) (per curiam). However, in none of those cases was that issue presented. Furthermore, none of them distinguished or overruled *Small*, and therefore, none is controlling in this case.

Research reveals no North Carolina case in which an appellate court has allowed a minor child to bring a claim against a parent for an intentional tort. This result is consistent with *Skinner v. Whitley*, 281 N.C. 476, 189 S.E.2d 230 (1972), wherein the Court stated that such immunity was *reciprocal*: So long as the parent could not sue the child, the child could not sue the parent. *Id.* at 479, 189 S.E.2d at 231; *see generally Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984). Speaking for the Court in *Skinner*, Justice Huskins stated:

> In North Carolina and the great majority of other states, the rule is that "an unemancipated minor child cannot maintain a tort action against his parent for personal injuries, even though the parent's liability is covered by liability insurance. This rule implements a public policy protecting family unity, domestic serenity, and parental discipline. . . . Upon the same theory, an overwhelming majority of jurisdictions likewise hold that neither a parent nor his personal representative can sue an unemancipated minor child for a personal tort. . . . 'The child's immunity is said to be reciprocal of

the parent's immunity.' " *Gillikin v. Burbage*, 263 N.C. 317, 139 S.E.2d 753 (1965).

281 N.C. at 478, 189 S.E.2d at 231.

Though the majority says otherwise, it is clearly recognizing an exception to the immunity rule, and an exception to the rule by any other name is still an exception. Because of the peculiar nature of these cases, the recognition of an exception would be a far better solution. Some states that have made an exception have limited the exception to cases of sexual abuse, which I believe is all that is called for here.

While I agree with the majority that the plaintiff should recover on the facts alleged here, the same result could be reached with far less damage to existing law. My reticence to join the majority opinion arises not from its result, but from my fear of how the law it announces will be applied in future cases in this particular area, and surely many will be spawned by this case.

In addition to limiting our holding in this case to cases of sexual abuse, I would prefer that this Court erect some hurdles that would weed out the truly marginal cases. One method would be to raise the standard of proof required for recovery from a preponderance of the evidence to clear, cogent, and convincing evidence. Such a course of action by this Court would not be without precedent. Only recently in recognizing a cause of action for unintentional infliction of emotional distress, and because of similar concerns, we took the extraordinary step of imposing a high standard of proof of the injury claimed. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (plaintiff may not recover damages where mere fright or temporary anxiety does not amount to severe emotional distress; "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 that may be generally recognized and diagnosed by professionals trained to do so; factors to be considered on the question of foreseeability include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act), *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990).

For the foregoing reasons, I concur only in the result reached by the majority.

STATE OF NORTH CAROLINA v. KENNETH LEE BOYD

No. 547A88

(Filed 17 July 1992)

1. Constitutional Law § 344 (NCI4th)— first degree murder—voir dire—private, unrecorded bench conference—new trial

A defendant in a first degree murder prosecution was entitled to a new trial where the trial court deferred a juror's service after a private, unrecorded conference with the juror at the bench during jury selection. Whether the potential juror was deferred or excused altogether, the juror was rendered unavailable for defendant's trial. Moreover, the State's motion to allow amendment of the record on appeal four days before oral argument to show that the deferred juror was a substitute teacher and that the judge concluded that service at that time would create a hardship for the school was denied under *State v. McCarver*, 329 N.C. 259.

Am Jur 2d, Jury §§ 177, 202.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific cases. 33 ALR4th 429.

2. Indigent Persons § 19 (NCI4th)— murder—private counsel—motion for State funding of mental health expert

A defendant in a murder prosecution, reversed on other grounds, should not have been denied State funding of a mental health expert on the ground that defendant was not represented by court-appointed counsel. Defendants are required to contribute whatever they can to the cost of their representation, but they are eligible for state funding of the remaining necessary expenses of representation whenever their personal resources are depleted and they can demonstrate indigency.

Am Jur 2d, Criminal Law § 1006.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19.

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 death entered by *Currin, J.*, at the 17 October 1988 Criminal Session of Superior Court, ROCKINGHAM County, upon defendant's conviction by a jury of murder in the first degree. Heard in the Supreme Court 6 May 1991.

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

Sam J. Ervin, IV, for defendant-appellant.

EXUM, Chief Justice.

Defendant was indicted in separate bills dated 16 May 1988 for the murders of his estranged wife and her father on 4 March 1988. In a capital trial the jury returned verdicts of guilty as charged. After a sentencing proceeding, the jury recommended, and the trial court accordingly entered, a sentence of death for each murder.

There are two assignments of error which merit discussion. The first relates to the trial court's excusing a juror from service at defendant's trial during the jury selection process and deferring her for service at a later session after a private, unrecorded bench conference with the juror. For this error, defendant is entitled to a new trial. The second assignment brings forward the trial court's denial of defendant's pretrial motion for a state-paid mental health expert to assist defendant in the preparation of his defense. Since the denial of this motion on the grounds given by the trial court was error, we discuss this assignment for the guidance of the trial court on retrial.

The evidence offered at trial may be briefly summarized inasmuch as it has little bearing on the assignments of error which we address. Essentially, the State's evidence tended to show: On 4 March 1988 defendant entered the home of his estranged wife's father, where his wife and their children were then living, and shot and killed both his wife, Julie Boyd, and her father, Dillard Curry, with a .357 Magnum pistol. The shooting was committed in the presence of the children—Chris, aged thirteen; Jamie, aged twelve; and Daniel, aged thirteen—and other witnesses, all of whom testified for the State. Law enforcement officers were called to the scene. As they approached, defendant came out of the woods with his hands up and surrendered to the officers. Defendant showed

the officers where he had thrown the murder weapon into some adjacent woods. Later, after being advised of his rights, defendant made a lengthy inculpatory statement in which he described the fatal shootings, saying, "It was just like I was in Vietnam."

Defendant's evidence at trial tended to show: Defendant voluntarily served in the United States Army and volunteered for duty in Vietnam, where he was assigned to a combat engineering unit. He habitually drank alcoholic beverages to excess while in the military and since his discharge. His first marriage ended in divorce. His second marriage in 1973 to Julie Boyd was marked by frequent arguments, some violence, several separations and reconciliations. Defendant suffered intestinal illnesses which resulted in the removal of much of his stomach on one occasion and his gallbladder on another. He had sought mental health counseling. He continued to drink alcoholic beverages to excess and had drunk a number of beers on the day of the fatal shooting. His recollection of the time before and during the shootings was incomplete, but he remembered being at the Curry home, his gun going off, and seeing blood. He denied going there with the intent to kill either Julie Boyd or Dillard Curry.

Dr. Patrico Lara, a psychiatrist employed at Dorothea Dix Hospital, examined defendant periodically over a two-week period beginning 11 March 1988. Dr. Lara, testifying for defendant, thought defendant did not suffer from brain damage nor was his understanding of his situation "confused or incoherent." Dr. Lara diagnosed defendant as suffering from an "adjustment" and "personality" disorder with various features which he described for the jury.

Following jury verdicts of guilty of two counts of first-degree murder, a capital sentencing proceeding was convened. The State offered no additional evidence but relied on evidence offered during the guilt proceeding. Defendant offered several family members and others as witnesses who gave favorable accounts of his early childhood, his military career, his relationship with his children, and his employment as a truck driver.

The trial court submitted and the jury found one aggravating circumstance in each murder case: The murder was part of a course of conduct that included the commission by defendant of other crimes of violence against other persons. *See* N.C.G.S. § 15A-2000(e)(11) (1988). The jury unanimously found four of ten mitigating circumstances submitted but failed to find unanimously

six mitigating circumstances, including the mitigating circumstances that (1) defendant was under the influence of a mental or emotional disturbance and (2) his capacity to conform his conduct to the requirements of law was impaired when he committed the murders. *See* N.C.G.S. § 15A-2000(f)(2), (6) (1988).

The State concedes that the testimony of Dr. Lara was sufficient to support both the mental or emotional disturbance and the impaired capacity mitigating circumstances. The State further concedes that the jury instructions on mitigating circumstances violated the Federal Constitution as interpreted in *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *see also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990). The State agrees that because of this error defendant is entitled to a new sentencing hearing.

[1] We conclude that defendant is entitled to a new trial because the trial court excused a juror during the jury selection process in defendant's trial after a private, unrecorded conference with the juror at the bench. The transcript of the trial reveals that during the second day of jury selection additional jurors were called by the clerk to come forward for questioning. The transcript reveals only the following regarding the incident in question:

> CLERK: William Harris, Charlotte Jackson. (Ms. Jackson brought a letter up and handed it to the Bailiff, who then handed it to the judge. The judge then talked to the lady at the Bench.)
>
> COURT: Ma'am Clerk, at this time I am going to defer that particular juror's service until one of the terms during the summer months. And if you will call another juror.

There is nothing in the trial transcript nor in the record on appeal which reveals the substance of the conversation between the trial court and prospective juror Jackson.

Our cases have long made it clear that it is error for trial judges to conduct private conversations with jurors. We said in *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978):

> [T]he trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions

and the court's response should be made in the presence of counsel.

Tate being a noncapital prosecution,[1] we concluded that defendant, by not objecting to the judge's action, waived his right to complain of it on appeal. In capital prosecutions, however, we have long recognized that a defendant may not waive his right to be present at every stage of his trial. *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969); *State v. Jenkins*, 84 N.C. 813 (1881). Thus we have held that private conversations between the presiding judge and jurors during a capital trial, even in the absence of objection by defendant, violated defendant's right of confrontation guaranteed under Article I, Section 23, of the North Carolina Constitution and constituted reversible error unless the State could demonstrate its harmlessness beyond a reasonable doubt. *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987). Since there was no record of what transpired during the conversations in *Payne*, we concluded the State could not demonstrate the harmlessness of the error.

In *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990), a capital prosecution, the trial court spoke privately with prospective jurors during the jury selection process, after which the jurors were excused from having to serve. Neither the record on appeal nor the trial transcript reflected the substance of the bench conferences, except to note the trial court's conclusion that it was within its discretion to excuse each juror. This Court, cognizant of the principles announced in *Tate* and *Payne*, concluded that the process of selecting and impaneling a jury is a stage of the trial to which the defendant's right of confrontation applies and the trial court's excusal of jurors after the private conversations violated that right. We also concluded the private conversations violated the trial court's statutory duty in a capital case to make an accurate record of the jury selection process. N.C.G.S. § 15A-1241(a) (1988). Recognizing the error was subject to harmless error analysis with the burden being on the State to demonstrate its harmlessness beyond a reasonable doubt, we concluded the State could not meet that burden because "[n]o record of the trial court's private discussions with the prospective jurors exists to reveal the substance of those discussions." *Smith*, 326 N.C. at 794, 392 S.E.2d at 363-64.

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1. The crime was committed on 25 December 1976, before the enactment of our present death penalty statute in 1977 and after the immediately preceding death penalty statute had been declared unconstitutional in *Woodson v. North Carolina*, 428 U.S. 280, 49 L. Ed. 2d 944 (1976).

Smith's rationale and holding have been followed in *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228, 1992 WL 145045 (1992); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); and *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991). Where, however, the transcript reveals the substance of the conversations, *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991), or the substance is adequately reconstructed by the trial judge at trial, *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992); *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991), we have been able to conclude that the error was harmless beyond a reasonable doubt.

Here, the substance of the conversation between the trial judge and the excused juror is not revealed by the transcript nor did the trial judge reconstruct it at trial. The State, therefore, cannot demonstrate the harmlessness of the error beyond a reasonable doubt; and defendant must be given a new trial.

That the juror was deferred for service at a future date rather than excused altogether does not call for a different result. *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992). Whether deferred or excused altogether, the juror was rendered unavailable for defendant's trial.

The State on 2 May 1991, four days before oral argument, moved the Court to allow an amendment to the record on appeal. The desired amendment consisted of affidavits of the deputy clerk of court in Rockingham County and the presiding trial judge, signed, respectively, in April and May 1991, and certain jury records maintained by the clerk. These materials would tend to show that prospective juror Jackson was a substitute teacher then teaching at a public school. The trial judge excused her from jury duty for defendant's trial and deferred her until a later time because the trial judge concluded her service at that time would create a hardship on the school. This conclusion was based on a letter from Ms. Jackson's principal.

Defendant responded to this motion on 14 May 1991 and contends the motion should be denied inasmuch as it "seeks to reconstruct a record of events leading to Ms. Jackson's deferral long after the occurrence of the underlying event."

The State's motion to amend the record is denied. In *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991), we allowed a new trial for defendant because the trial judge excused jurors

following unrecorded bench conferences. In that case the State moved to amend the record to add an affidavit of the trial judge, accompanied by his handwritten trial notes, which explained his reasons for excusing the jurors. We denied the motion, saying, "The court reporter did not record the bench conferences, as required by N.C.G.S. § 15A-1241. We will not substitute for this statutory requirement an affidavit made approximately three years after the event. The affidavit was not a part of the record made at trial." *Id.* at 261, 404 S.E.2d at 822. *McCarver* controls and requires that the State's motion to amend the record here be likewise denied.

[2] This brings us to the second assignment of error which we discuss only for the guidance of the trial court on retrial. Defendant before trial moved pursuant to N.C.G.S. § 7A-450(a) for state funding for a mental health expert. Judge Beaty, who heard the motion before trial, acknowledged defendant's affidavit indicating that he had no funds. He nonetheless noted that defendant had released court-appointed counsel and had retained different, privately employed counsel. When he questioned defendant about this, defendant stated that someone else was paying for his counsel and that he had no assets except a 1987 tax refund. Judge Beaty offered defendant the option of accepting different, court-appointed counsel as a condition of receiving funds for an expert witness. When defendant rejected this option, Judge Beaty denied his motion, concluding "the defendant, though indigent, has retained private counsel and is therefore not entitled to State funds for the presentation of his case or his defense."

At trial defendant renewed his motion for a state-paid mental health expert and tendered to the trial judge various mental health records of defendant. The trial judge reaffirmed Judge Beaty's earlier conclusion that because defendant was not represented by court-appointed counsel he was not indigent and not entitled to state assistance pursuant to N.C.G.S. § 7A-450(a). The trial judge denied the motion on this ground.

We address here only the question whether defendant's motion for a state-paid mental health expert should have been denied, as it was, because defendant, although financially unable to employ the expert, was not represented by court-appointed counsel. We conclude, for reasons given below, that the motion should not have been denied on this ground. We express no opinion on whether

defendant's motion should have been denied on the ground that he made an insufficient evidentiary showing.[2] Neither do we express an opinion on whether Dr. Lara's availability and participation in the trial on defendant's behalf justified denying defendant's motion or rendered the denial harmless. The evidentiary showing at defendant's new trial and in support of this motion will ultimately govern these questions.

Under some circumstances an indigent defendant in a criminal case has a right to be furnished the assistance of a mental health expert. This right is guaranteed by the Fourteenth Amendment to the United States Constitution, *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985); *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986), and by statute, *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). An indigent person is defined as one "who is financially unable to secure legal representation and to provide all other necessary expenses of representation." N.C.G.S. § 7A-450(a) (1989). "Whenever a person . . . is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation." N.C.G.S. § 7A-450(b) (1989). "The question of indigency may be determined or redetermined by the court at any stage of the action or proceeding at which an indigent is entitled to representation." N.C.G.S. § 7A-450(c) (1989). *See also* N.C.G.S. § 7A-450(d) (1989). A defendant determined to be partially indigent must pay as he can the expenses of his defense, and the state is required to pay only the remaining balance. N.C.G.S. § 7A-455(a) (1989).

In *State v. Hoffman*, 281 N.C. 727, 738, 190 S.E.2d 842, 850 (1972), this Court read these statutes as manifesting a legislative intent "that every defendant in a criminal case, to the extent of his ability to do so, shall pay the cost of his defense." In *Hoffman*, the defendant was determined not to have been indigent at the time of his arrest and thus not entitled to court-appointed counsel *at that time*. The Court said, however, that the defendant's "ability to pay the costs of subsequent proceedings . . . was a matter

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2. For cases discussing the sufficiency of the factual showing which a defendant must make, *see, e.g., Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985); *State v. Parks*, 331 N.C. 649, 417 S.E.2d 467 (1992); *State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988); *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986). *See also State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992), on the issue of defendant's entitlement to an *ex parte* hearing.

to be determined when that question arose." *Id.* at 738, 190 S.E.2d at 850.

We stress, as we did in *Hoffman*, that the purpose of these statutes is to require defendants to contribute whatever they can to the cost of their representation. But whenever a defendant's personal resources are depleted and he can demonstrate indigency, he is eligible for state funding of the remaining necessary expenses of representation.

That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation—including expert witnesses—if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises.

We vacate the verdicts and judgments entered against defendant and remand this case to the Superior Court, Rockingham County, for a

New trial.

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

CLINTON DEVANE BASS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 12PA91

(Filed 17 July 1992)

Insurance § 528 (NCI4th)— injury in vehicle without UIM coverage —UIM coverage under policy on other vehicles

Underinsured motorist (UIM) coverage is available under an automobile/truck policy issued to a named insured when a motorcycle owned by the named insured and involved in his injuries is insured under a separate policy not containing UIM coverage, since plaintiff is a "person insured" of the first class set forth in N.C.G.S. § 20-279.21(b)(3) under the UIM provisions of the automobile/truck policy.

Am Jur 2d, Automobile Insurance § 322.

Justice MEYER dissenting.

ON discretionary review of a decision of the Court of Appeals, 103 N.C. App. 272, 405 S.E.2d 370 (1991), reversing the entry of summary judgment for the defendant by *Butterfield, J.*, at the 15 December 1989 Session of Superior Court, WILSON County. Heard in the Supreme Court 9 March 1992.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson; and Thomas & Farris, P.A., by Allen G. Thomas and Julie Turner, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellant.

FRYE, Justice.

The sole issue presented on appeal is whether the Court of Appeals erred in holding that underinsured motorist (UIM) coverage is available under a policy issued to a named insured, when the vehicle owned by the named insured and involved in his injuries is insured under a separate policy not containing UIM coverage. We hold that the Court of Appeals did not err.

Plaintiff was permanently injured when his 1986 Honda motorcycle was struck by an automobile driven by Manuel Tyson. Plaintiff insured the Honda motorcycle with State Farm Mutual Automobile Insurance Company. No UIM coverage was provided in this policy. Plaintiff also owned a 1979 Dodge truck and a 1981 Ford automobile, both of which were insured under a policy issued by defendant with $100,000/$300,000 UIM coverage.

In a tort action against Tyson, plaintiff obtained a jury verdict of $900,000, and Tyson's insurance carrier paid the plaintiff $25,000, exhausting its liability limits. Plaintiff then turned to defendant, requesting payment under the UIM provisions of his automobile/truck policy. Following defendant's failure to honor his request, plaintiff commenced this action against defendant.

The trial court granted defendant's motion for summary judgment, and the Court of Appeals affirmed. *Bass v. North Carolina*

Farm Bureau Mut. Ins. Co., 100 N.C. App. 728, 398 S.E.2d 47 (1990). This Court granted plaintiff's petition for discretionary review for the limited purpose of remanding the case for reconsideration in light of our decision in *Smith v. Nationwide Mut. Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 328 N.C. 328, 402 S.E.2d 829 (1991). On remand, the Court of Appeals reversed the trial court's grant of summary judgment. *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 272, 405 S.E.2d 370 (1991). We allowed defendant's petition for discretionary review. *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 330 N.C. 193, 412 S.E.2d 52 (1991).

Defendant contends that the Court of Appeals erred by reversing the trial court's grant of its motion for summary judgment. In support of this contention, defendant argues that *Smith* is distinguishable from the instant case in that "*Smith* is limited to its facts so that an insured injured while riding in an owned vehicle not included in a policy insuring other vehicles, can recover UIM benefits from that policy *only if* the owned vehicle is covered by a policy which also contains UIM coverage." Defendant reads *Smith* too narrowly.

In *Smith*, the plaintiff's intestate was fatally injured while riding in an automobile which she owned with her father and which was insured with UIM coverage in the amount of $100,000 per person. *Smith*, 328 N.C. at 141, 100 S.E.2d at 46. The plaintiff's intestate lived in the same household with her father who owned and insured two automobiles on a separate policy with UIM coverage also in the amount of $100,000 per person for each vehicle. *Id.* The father's policy covered both of his automobiles, neither of which was owned by the plaintiff's intestate. *Id.* The question before the Court was whether the plaintiff's intestate was covered for UIM benefits under her own UIM coverage and under the UIM coverage in her father's policy. We held in *Smith* that the plaintiff was entitled to recover under the UIM provisions of both policies, notwithstanding the fact that his daughter's *vehicle* was not insured under his policy. *Id.* at 150-51, 400 S.E.2d at 51-52.

While both insurance policies in *Smith* contained UIM coverage, this Court's decision did not rest on that fact. Instead, the critical factor in *Smith* was that the plaintiff's intestate was a "person insured" of the first class under the provisions of N.C.G.S.

§ 20-279.21(b)(3).[1] Persons insured of the first class include "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . ." *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129 (quoting N.C.G.S. § 20-279.21(b)(3)), *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). As a "person insured" of the first class under her father's policy, the decedent in *Smith* was covered for UIM benefits regardless of whether the vehicle she was riding in was insured under her father's policy or a separate policy. *See Crowder*, 79 N.C. App. at 554, 340 S.E.2d at 129 (persons insured of the first class entitled to recover "even where the insured vehicle is not involved in the insured's injuries"). As we made clear in *Smith*, "liability insurance is essentially vehicle oriented, while UM/UIM insurance is essentially person oriented." *Smith*, 328 N.C. at 148, 400 S.E.2d at 50.

Turning to the present case, the question becomes whether plaintiff is a "person insured" of the first class under the UIM provisions of his automobile/truck policy with defendant. It is undisputed that plaintiff is the named insured under the policy with defendant. Therefore, plaintiff is a "person insured" of the first class under the UIM provisions of the automobile/truck policy issued to plaintiff by defendant. *Smith*, 328 N.C. at 143, 400 S.E.2d at 47. The fact that plaintiff's motorcycle policy did not provide UIM coverage is of no significance to this decision, because plaintiff is not seeking any recovery under his motorcycle policy. As a person insured of the first class, plaintiff is entitled to UIM benefits under his automobile/truck policy regardless of whether he is riding in the insured vehicles or on his motorcycle, or just walking down the street. *Id.* We therefore hold that plaintiff may recover under the UIM provision of the automobile/truck policy issued by defendant.

While we agree with the decision of the Court of Appeals, we find it necessary to correct some misleading statements in its opinion. For example, at the beginning of the opinion, the court stated, "Following *Smith*, we find the underinsured motorist coverages provided in plaintiff's automobile insurance *policies* are

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1. N.C.G.S. § 20-279.21 was amended by the General Assembly in 1991. 1991 N.C. Sess. Laws ch. 646, §§ 1-4. However, the amendments do not affect claims arising or litigation pending prior to the amendments. *Id.* at § 4. Unless otherwise noted, any citation to or discussion of N.C.G.S. § 20-279.21 will be with respect to that version of the statute in effect at the time of the accident.

stackable." *Bass v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 272, 273, 405 S.E.2d 370, 371 (emphasis added). Again at the end of the opinion, the court stated, "Thus under the language of the policy, the UIM provision of the policy issued by defendant may be *stacked with the UIM coverage in policy 2.*" *Id.* at 275, 405 S.E.2d at 372 (emphasis added). Only one policy issued by defendant is involved in this case, the policy issued to plaintiff insuring the Dodge truck and Ford automobile. The motorcycle policy issued by another carrier, designated as "policy 2" by the Court of Appeals, did not provide UIM coverage. It is impossible to stack the UIM coverage under the automobile/truck policy with coverage under the motorcycle policy, since the policy on the motorcycle contains no UIM coverage. Thus, the stacking involved in the instant case is intrapolicy rather than interpolicy.[2] We thus disapprove any statements in the Court of Appeals opinion suggesting that this case involves interpolicy stacking.

For the reasons stated herein, the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

I agree with the majority that plaintiff is clearly a class one "person insured" with respect to the UIM coverage provided by the policy issued by defendant ("Farm Bureau policy"). However, I do not agree with the majority that a person's status as a class one "person insured" under a policy providing UIM coverage automatically entitles that person to UIM benefits under that policy. In order to be entitled to such benefits, a person must show not only that he is a "person insured," but also that he has been injured by an "underinsured" vehicle, that the liability policy on the underinsured vehicle has been exhausted, and that his insurance policy provides UIM coverage for the accident. I do not believe that plaintiff has met his burden of showing an entitlement to UIM benefits under the Farm Bureau policy. I also have other concerns that I wish to point out.

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2. The 1991 amendment to N.C.G.S. § 20-279.21(b)(4) appears to prohibit intrapolicy stacking. 1991 N.C. Sess. Laws ch. 646, § 2. However, because this action accrued prior to the effective date of the amendment, it is not affected by the amendment. *Id.* at § 4.

Defendant argues that the Farm Bureau policy does not provide UIM coverage to plaintiff for the accident at issue here because plaintiff was driving a vehicle that he owned but did not insure under the Farm Bureau policy. I agree. Part D of the Farm Bureau policy, entitled "Uninsured/Underinsured Motorists Coverage," provides:

> This coverage is subject to all of the provisions of the policy *with respect to the vehicles for which the Declarations [Page] indicates that Uninsured/Underinsured Motorists Coverage applies* . . . .

(Emphasis added.) Listed on the declarations page of the Farm Bureau policy are only two vehicles owned by plaintiff, a 1979 Dodge truck and a 1981 Ford automobile. The declarations page of the Farm Bureau policy further specifies that uninsured and underinsured motorists' coverage is provided in specified amounts for each of these vehicles. Nowhere does the declarations page in any way "indicate" that uninsured or underinsured motorists' coverage applies to the motorcycle owned by plaintiff and involved in the accident. As I expressed in my dissent to *Smith v. Nationwide*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991), it is my opinion that the language of the Farm Bureau policy clearly limits the UIM coverage provided thereunder to the vehicles insured by the policy. This language "is tantamount to an exclusion for other vehicles in the household or owned by members of the household." *Smith*, 328 N.C. at 157, 403 S.E.2d at 55 (Meyer, J., dissenting).

To fail to give effect to such exclusions ignores the General Assembly's intent of offering the added protection of UIM coverage only to insureds who have provided protection greater than that required by law to third persons who might be injured as a result of the insureds' negligent acts. As I expressed in my dissent in *Smith*, the majority's rationale permits individuals or families who own two, three, four, or more vehicles and who have acquired UIM coverage on only one vehicle at the most favorable premium rate to take advantage of this UIM coverage when injured in another vehicle for which they have acquired only minimum coverage and for which UIM coverage is not available.

Smith, upon which the majority relies, has little bearing on the issue presented in the case at bar. In *Smith*, the deceased daughter's vehicle had greater than minimum coverage. UIM

coverage had not been rejected and was included in the daughter's policy. Here, plaintiff's motorcycle had only minimum liability coverage, and thus UIM coverage was not even available on the motorcycle. As the majority points out, when we remanded the case to the Court of Appeals for reconsideration in light of *Smith*, the panel below apparently felt compelled to apply *Smith* to the facts of this case and thus misconstrued this case to be a UIM interpolicy stacking case, which it is not.

As noted by defendant, the holding in *Smith* turned on the policy language of the "Other Insurance" clause contained in the deceased's father's policy. This Court held that the "Other Insurance" provision specifically provided for recovery of UIM benefits under two policies applicable to the same accident and issued to the same named insured. The policy language that was present in the UM/UIM endorsement of the policy before us in *Smith* was as follows:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a family member's injuries shall be the sum of the limits of liability for this coverage under all such policies.

Smith, 328 N.C. at 152, 400 S.E.2d at 52. While this policy language is present in the Farm Bureau policy at issue here, plaintiff here has only one policy that contains UIM coverage, unlike in *Smith* where both of the policies at issue contained UIM coverage. While *Smith* did extend UIM coverage to insureds riding in owned vehicles that are covered by separate liability policies containing UIM coverage, it did not answer the question of whether an insured may recover UIM benefits when injured while operating an owned vehicle that has minimum coverage and no UIM coverage.

One need look no further than the provisions of our Motor Vehicle Safety and Financial Responsibility Act to find that the General Assembly did not intend for UIM coverage to be extended to vehicles insured with minimum liability limits. Pursuant to N.C.G.S. § 20-279.21(b)(4), it is incumbent upon the insurer, when issuing a motor vehicle liability insurance policy, to include UIM coverage only when the liability insurance purchased exceeds that statutorily required to operate a motor vehicle. According to this section, the motor vehicle liability policy "[s]hall . . . provide underinsured motorist coverage, *to be used only with* policies that are written at limits that exceed" the liability insurance limits required by law. N.C.G.S. § 20-279.21(b)(4) (1989) (emphasis added). Under

the express language of this statute, UIM coverage may be *used* only with policies that provide liability insurance in excess of the statutory minimum limits of liability. When read in conjunction with N.C.G.S. § 20-279.21(b)(1)'s requirement that motor vehicle liability insurance policies "designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted," it can only be concluded that the General Assembly did not intend for UIM coverage to be extended to vehicles not specifically listed on a policy providing UIM coverage.

It is contrary to public interest, the intent of the parties to an insurance contract, and the Motor Vehicle Financial Responsibility Act to allow a person to pay a premium for one car and receive coverage on any number of other cars without paying the insurer any additional premium. When the Farm Bureau policy was issued, defendant did not accept the risk attendant with plaintiff's motorcycle having minimum liability coverage and no UIM coverage, but limited UIM coverage to the vehicles listed in its policy. Plaintiff paid no premium to defendant or any other insurer for UIM coverage on the motorcycle. It is inherently unfair to now tax defendant with a risk it did not assume. I conclude that the Farm Bureau policy excludes coverage for plaintiff's injuries, sustained while plaintiff was operating his motorcycle that was not insured under the Farm Bureau policy and that had minimum liability coverage and no UIM coverage. I therefore dissent from the majority opinion and vote to reverse the Court of Appeals.

STATE OF NORTH CAROLINA v. JAMES BRYAN CAMPBELL

No. 268A90

(Filed 17 July 1992)

1. Criminal Law § 414 (NCI4th)— murder—closing arguments—only one defense counsel allowed to argue—error

A murder prosecution was remanded for a new trial where defendant requested that both of his attorneys be allowed to address the jury during the final closing argument in the guilt-innocence phase of the trial and the trial judge, while recognizing that the rule enunciated in *State v. Mitchell*,

321 N.C. 650, applied to the sentencing phase, was under the misconception that the rule did not apply to the guilt-innocence phase. N.C.G.S. § 84-14.

Am Jur 2d, Homicide § 555.

2. Arson and Other Burnings § 6 (NCI4th)— murder and arson—victim dead before arson—continuous transaction

The trial court did not err by submitting to the jury the charge of first degree arson where the undisputed medical evidence was that the victim was already dead from multiple blows to the head when defendant set the house on fire. A dwelling is "occupied" if the interval between the mortal blow and the arson is short and the murder and arson constitute parts of a continuous transaction. N.C.G.S. § 14-58.

Am Jur 2d, Arson § 5.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Ferrell, J.*, at the 14 May 1990 Criminal Session of Superior Court, GRAHAM County. Defendant's motion to bypass the Court of Appeals as to additional judgment was allowed by the Supreme Court on 30 December 1991. Heard in the Supreme Court 11 May 1992.

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

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

FRYE, Justice.

The State concedes that defendant James Bryan Campbell must receive a new trial on all charges because the trial court refused to allow both of his defense attorneys to argue during the final closing argument. N.C.G.S. § 84-14 (1985); *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988). This opinion will therefore be limited to that issue and one other: whether to apply the continuous transaction doctrine to murder-arson cases.

I.

Defendant was indicted by a Graham County grand jury on 12 June 1989 for first-degree murder and assorted other crimes

stemming from a one-day crime spree which left one man dead and another seriously injured. According to testimony at defendant's trial, defendant, his girlfriend Alice Crisp, his girlfriend's son Lamar Ledford, and Ledford's girlfriend Wendy Keller, came to North Carolina from Georgia in January or February 1989. In need of money, defendant asked Crisp for the name of someone to rob. Crisp supplied defendant with the name of fifty-nine-year-old Donald Allen, who lived near Robbinsville, North Carolina. On the evening of 18 March 1989, the two couples went to Allen's home, where they found Allen with his friend Tony Phillips. Shortly thereafter, defendant, Ledford, Crisp and Keller went to Phillips' home, also located on the outskirts of Robbinsville. After a period of drinking, dancing and socializing, defendant attacked Phillips with a hammer. Defendant then beat Phillips repeatedly with a baseball bat until the bat broke. Defendant took $13 from Phillips' pockets and searched the house in vain for valuables. Finally, defendant set the house on fire. Phillips managed to escape his burning home and testified at trial against defendant.

Defendant and his three companions then went back to Allen's house. Defendant ordered Ledford, then sixteen years old, to hit Allen in the head. Ledford hit Allen once in the back of the head with a crowbar. Defendant then struck Allen seven or eight times with the crowbar. Defendant and Ledford looked around the house for valuables and took a shotgun, jewelry and a pill bottle. Defendant then went into the kitchen, turned on the gas stove, poured gasoline around Allen's body, left a gasoline trail from the living room to the outside of the house and lit the trail. According to Ledford's testimony, "flames just blew out the door."

Dr. J.D. Butts, who performed the autopsy on Allen, testified that Allen died of blunt force trauma to the head. Butts testified that, in his opinion, Allen was dead when the fire was set.

Defendant did not testify. Defendant's two trial attorneys requested that they both be permitted to address the jury during the final closing argument. The trial judge denied defendant's request and allowed only one of defendant's attorneys to address the jury during the final closing argument in the guilt-innocence phase. The trial judge did allow both defense attorneys to address the jury during the final closing argument in the sentencing phase.

Defendant was convicted by a Graham County jury on 18 May 1990 of first-degree murder on the theory of premeditation and

deliberation, assault with a deadly weapon with intent to kill inflicting serious bodily injury, two counts of first-degree arson, and two counts of robbery with a dangerous weapon. After a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial judge imposed the sentence of death for the first-degree murder conviction. Judge Ferrell then imposed two consecutive life sentences for the two first-degree arson convictions, two consecutive fourteen-year sentences for the two armed robbery convictions, and a consecutive nine-year sentence for the assault with a deadly weapon with intent to kill inflicting serious bodily injury conviction.

II.

[1] Section 84-14 of the North Carolina General Statutes provides, in pertinent part:

> [I]n capital felonies, the time of argument of counsel may not be limited otherwise than by consent, except that the court may limit the number of those who may address the jury to three counsel on each side.

N.C.G.S. § 84-14 (1985). In *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554, the defendant was charged with first-degree murder and related noncapital offenses. The defendant requested that both his trial attorneys be allowed to address the jury during the final closing arguments in both the guilt-innocence and sentencing phases of his trial. The trial judge in *Mitchell* denied the request, allowing only one defense attorney to address the jury during each of the final closing arguments. After reviewing applicable case law, we said:

> Therefore, we hold that the trial court's refusal to permit both counsel to address the jury during defendant's final arguments constituted *prejudicial error per se* in both the guilt-innocence and sentencing phases. Such error in the guilt-innocence phase entitles the defendant to a new trial as to the capital felony. Further, the foregoing principles of law require us to hold in cases where a capital felony has been joined for trial with noncapital charges 'that the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error *in the noncapital as well as the capital charges.*' *State v. Eury*, 317 N.C. [511,] 518, 346 S.E.2d [447,] 451 [(1986)]. Therefore, the defendant

> is also entitled to a new trial as to the noncapital charges in the present case.

Id. at 659, 365 S.E.2d at 559 (emphasis added); *see generally id.* at 656-60, 365 S.E.2d at 558-59.

As the State forthrightly concedes, *Mitchell* is indistinguishable from this case. Defendant requested that both his attorneys be allowed to address the jury during the final closing argument in the guilt-innocence phase of his trial. Although the trial judge recognized that the rule enunciated in *Mitchell* applied to the sentencing phase, he was under the misconception that the rule did not apply to the guilt-innocence phase. Therefore, as in *Mitchell*, this case must be remanded for a new trial on all charges.

III.

[2] Because defendant must receive a new trial, it is not necessary to address each of his assignments of error; however, both sides urge this Court to decide whether the continuous transaction doctrine applies to murder-arson cases. We hold it does.

Section 14-58 of the North Carolina General Statutes provides:

> 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). A Class C felony carries a maximum prison sentence of fifty years or life imprisonment and a presumptive sentence of fifteen years; a Class D felony carries a maximum prison sentence of forty years and a presumptive sentence of twelve years. N.C.G.S. § 14-1.1(3), (4) (1986); N.C.G.S. § 15A-1340.4(f)(1), (2) (Supp. 1991). The difference in punishment based on occupancy of the dwelling stems from the legislative recognition that " '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. Pigott*, 331 N.C. 199, 207, 415 S.E.2d 555, 560 (1992) (quoting *State v. Jones*, 296 N.C. 75, 77, 248 S.E.2d 858, 860 (1978)). Thus, argues defendant, the trial judge erred by submitting to the jury the charge of first-degree arson as it related to Allen's house, because the undisputed medical evidence at trial

was that Allen was already dead from multiple blows to the head when defendant set the house on fire. The State urges this Court to apply the continuous transaction doctrine to cases such as this and find that "a dwelling is 'occupied' for purposes of the arson statute when the interval between the mortal blow and the burning is short, and the murder and the arson constitute parts of a continuous transaction." We adopt the State's position.

Although this is the first time we have applied the continuous transaction doctrine to a murder-arson situation, we have applied the doctrine to murders involving armed robberies and sex offenses. *State v. Olson*, 330 N.C. 557, 411 S.E.2d 592 (1992) (armed robbery); *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987) (armed robbery); *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985) (armed robbery); *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991) (sex offense); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (sex offense), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). In *Olson*, we held that where the armed robbery and murder are part of a continuous transaction, "the temporal order of the threat or use of a dangerous weapon and the taking is immaterial." *Id.* at 566, 411 S.E.2d at 597. "To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, *or be so joined by time and circumstances with the taking as to be part of one continuous transaction.*" *Id.* (emphasis added); *see also Pakulski*, 319 N.C. at 572, 356 S.E.2d at 325 ("A homicide victim is still a 'person,' within the meaning of a robbery statute, when the interval between the fatal blow and the taking of property is short."); *Fields*, 315 N.C. at 202, 337 S.E.2d at 525 ("When . . . 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.' "); *Williams*, 308 N.C. at 67, 301 S.E.2d at 348 ("It is immaterial," when deciding whether a defendant is guilty of first-degree murder in the perpetration of a sex offense, "whether the felony occurred prior to or immediately after the killing so long as it is part of a series of incidents which form one continuous transaction.").

To accept defendant's argument would be to say that he is less morally culpable—and hence deserves less punishment—because of his success in killing the victim prior to setting the house on fire. We do not believe this to be the intent of the legislature in enacting the arson statute, nor do we believe it to be sound

public policy. As we said in rejecting a similar argument in the murder-armed robbery context: "To accept defendant's argument would be to say that the use of force that leaves its victim alive to be dispossessed falls under N.C.G.S. 14-87 [armed robbery], whereas the use of force that leaves him dead puts the robber beyond the statute's reach." *Fields*, 315 N.C. at 201, 337 S.E.2d at 524. We rejected this argument in *Fields*; we reject it again today.

We hold that if the murder and arson are so joined by time and circumstances as to be part of one continuous transaction, the temporal order of the murder and arson is immaterial. Stated differently, for purposes of the arson statute, a dwelling is "occupied" if the interval between the mortal blow and the arson is short, and the murder and arson constitute parts of a continuous transaction. In this case, the undisputed evidence is that defendant beat Allen to death with a crowbar, searched the house for valuables and then set the house on fire. The murder and arson were clearly part of one continuous transaction. The trial court did not err, therefore, in submitting to the jury the charge of first-degree arson for the burning of Allen's house.

Defendant suggests that a decision by this Court contrary to his position would be inconsistent with the decision of the Court of Appeals in *State v. Ward*, 93 N.C. App. 682, 379 S.E.2d 251, *disc. rev. denied*, 325 N.C. 276, 384 S.E.2d 251 (1989). We disagree. In *Ward*, the defendant was convicted of second-degree murder and second-degree arson. *Id.* at 683, 379 S.E.2d at 252. The evidence at trial showed that Lori Mayse hired defendant to kill her husband. *Id.* After completing the job, defendant disposed of the victim's body in a trash dumpster and left the state for several days. *Id.* Mayse vacated the trailer where she had lived with her husband and disconnected the power. *Id.* at 686, 379 S.E.2d at 253. When defendant returned to North Carolina, Mayse paid him an additional $50 to burn the trailer. *Id.* at 683, 379 S.E.2d at 252.

The Court of Appeals agreed with defendant that his second-degree arson conviction must be reversed because the trailer was not "inhabited" at the time of the fire, as required by our common-law definition of arson.[1] *Id.* at 685-87, 379 S.E.2d at 253-54.

1. Section 14-58 divides arson into two degrees for purposes of punishment, but maintains the common-law definition of arson. N.C.G.S. § 14-58 (1986); *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982).

Although a temporary absence from a dwelling does not affect its status as inhabited, *see State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982), the Court of Appeals held that the trailer was not inhabited at the time of the arson because the victim was dead and his wife had permanently vacated the premises. *Ward*, 93 N.C. App. at 686, 379 S.E.2d at 254.

This holding is not inconsistent with our decision in this case; in fact, it is consistent. In *Ward*, the victim had been dead for several days—and his body deposited in a trash dumpster—when the fire was set; Mayse, after disconnecting the power, had permanently vacated the premises. Only after the defendant returned from out of state and was paid an additional sum of money did he burn the trailer. On these facts, it cannot seriously be argued that the murder and arson were "so joined by time and circumstances as to be part of one continuous transaction." There is no reason why *Ward* and our decision today cannot peacefully coexist.

For the reasons stated in this opinion, this case is remanded to Superior Court, Graham County, for a new trial.

New trial.

STATE OF NORTH CAROLINA v. NORMA PRICE ALLEN

No. 249A91

(Filed 17 July 1992)

Evidence and Witnesses § 1220 (NCI4th)— confession—illegal arrest—not admissible

The trial court erred in a prosecution in which defendant was convicted of maintaining a building for keeping marijuana by admitting an inculpatory statement made by defendant after her illegal arrest. The arrest was illegal because the officers did not have the right to enter the home to arrest defendant without an arrest warrant even though they had probable cause to believe the occupants of the home were growing marijuana, and the search warrant which the officers had was invalid for the search of the house. Although the state contended that the intervening circumstances so attenuated the de-

fendant's statement from the arrest that it was admissible, none of those factors singly or in combination were sufficient to break the chain of causation between the arrest of the defendant and her statements to officers according to Fourth Amendment principles.

Am Jur 2d, Evidence § 613.

Suppression before indictment or trial of confession unlawfully obtained. 1 ALR2d 1012.

APPEAL as of right by defendant 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. 598, 403 S.E.2d 907 (1991), affirming the judgment of *Watts, J.*, entered in Superior Court, WASHINGTON County, on 17 August 1989. Heard in the Supreme Court 11 May 1992.

The defendant was tried for manufacturing marijuana in violation of N.C.G.S. § 90-95(a)(1) and keeping and maintaining a building used for the keeping of marijuana in violation of N.C.G.S. § 90-108(a)(7). Prior to the trial of this case, the defendant moved to suppress all evidence seized in her home because the home was searched pursuant to an invalid search warrant. The search warrant authorized the officers to search the defendant's house and a barn on the premises. The superior court held that the search warrant was invalid for a search of the house but was valid for a search of the barn. It ordered all evidence seized in the search of the house to be suppressed. The State did not appeal this order.

The defendant then moved to suppress a statement she made to the officers after she was arrested. A hearing on this motion was held before the trial commenced. The evidence at the hearing showed that K. L. Bazemore, an agent with the State Bureau of Investigation, participated in a raid in Macon County on a barn used for growing marijuana. The operator of the barn agreed to cooperate with the officers. He told Mr. Bazemore that the Macon County barn was owned by Harold Lewis Davis of Plymouth, North Carolina, and that William Felton Allen, the defendant's husband, was growing marijuana for Mr. Davis in a similar type barn in Washington County. The operator of the Macon County barn also told Mr. Bazemore that William Felton Allen had been to Macon County to observe the operation of the barn. Mr. Bazemore had been to the home of the defendant and William Felton Allen in

Washington County and observed a barn on the premises of similar construction to the Macon County barn.

A search warrant was procured for the house and barn on the premises on which the defendant and her husband lived and the officers went to the home at approximately 10:50 a.m. on 28 October 1988. The defendant came to the door "dressed in a nightgown and robe." After identifying themselves, the officers told the defendant they had a warrant to search the house and barn, provided defendant with a copy of the search warrant, and told her that other officers were bringing her husband home from work.

The officers searched the house to determine whether other persons were present. They then searched the barn, located approximately sixty to seventy-five feet from the residence, and discovered approximately ninety marijuana plants growing in the barn.

After the barn was searched, the defendant asked and received permission to shower and dress. She was escorted to her bedroom to get clothes, and to the bathroom, which was searched again. She was instructed to knock on the bathroom door when she was finished. Fifteen or twenty minutes later, the defendant was taken back to the den.

The defendant's husband was brought home from work at approximately 11:40 a.m. He was advised of his *Miranda* rights and refused to talk until he had an attorney. At 12:25 p.m., the defendant was advised of her *Miranda* rights. She consented to talk to the officers and made incriminating statements. Mr. Bazemore testified that at no time was the defendant free to leave the custody of the officers.

In its order on this suppression hearing, the court found as a fact that although the defendant was "not 'formally' arrested until some time considerably later in the day Mrs. Allen was deprived of her liberty shortly after the arrival of the officers and the discovery of the ongoing growing operation, and was thereafter in custody at all times." The court found that the defendant was fully advised of her rights to remain silent and to have an attorney which she knowingly, voluntarily, and understandingly waived.

The court found further that the incriminating statement by the defendant was not a "fruit of a poisonous tree." The court found that "the effect of any unlawful conduct by the officers was

sufficiently attenuated by intervening events, including the passage of time, the arrival of female officers, the arrival of the defendant's husband and permitting the defendant to bathe and dress."

The court denied the motion to suppress. The defendant was found not guilty of manufacturing marijuana and guilty of maintaining a building used for the keeping of marijuana. The defendant was sentenced to two years in prison. This sentence was suspended on condition that the defendant serve ninety days in prison, pay a fine of $4,500 and be placed on probation for five years. The defendant's husband pled guilty to manufacturing marijuana and maintaining a building used for keeping marijuana. He received a suspended sentence.

The defendant appealed and the Court of Appeals found no error with Judge Wells dissenting. The defendant has now appealed to this Court.

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

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant appellant.

WEBB, Justice.

The defendant in this appeal contends that her inculpatory statement should have been suppressed because it was procured in violation of her rights under the Fourth Amendment to the Constitution of the United States. She does not contend that the statement was taken in violation of her right not to give testimony against herself pursuant to the Fifth Amendment to the Constitution of the United States.

We hold, applying the law in regard to the Fourth Amendment as enunciated by the Supreme Court of the United States, that this assignment of error must be sustained. The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

The United States Supreme Court in interpreting the Fourth Amendment has held that a confession obtained as the result of an illegal arrest of the defendant must be excluded from the evidence against him. The Court said the question as to whether the confession should be excluded depends on whether it was obtained by the exploitation of the illegal arrest or by means sufficiently distinguishable to be purged of the primary taint. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).

The United States Supreme Court in *Payton v. New York*, 445 U.S. 573, 63 L. Ed. 2d 639 (1980), held that, absent exigent circumstances, an officer, although he may have probable cause to believe someone guilty of a felony occupies a dwelling and is in it at that time, may not enter the dwelling to arrest the suspected felon without an arrest warrant. If an officer does so, any evidence gained from the entry should be suppressed. In this case, although there was evidence that at the time the officers approached the defendant's home they had probable cause to believe the occupants of the home were growing marijuana, this would not, under *Payton*, give them the right to enter the home to arrest the defendant without an arrest warrant. The officers had a search warrant but this warrant was held by the superior court to be invalid for a search of the house and the State does not contend on this appeal that this was error. The arrest of the defendant in this case was illegal under *Payton*.

The question on this appeal is whether the statement of the defendant was obtained by reason of the illegal arrest or by means sufficiently distinguishable to be purged of taint. In determining this question, we are guided by cases decided by the United States Supreme Court and not by what we might consider to be the causes for the giving of the statement.

In *Brown v. Illinois*, 422 U.S. 590, 45 L. Ed. 2d 416 (1975), the Court held that the giving of a *Miranda* warning was not sufficient to remove the taint of a confession following an illegal arrest. The Court held that although advising a defendant of his right to remain silent could satisfy the requirement of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), as to a defendant's Fifth Amendment rights, it does not satisfy the requirements of the Fourth Amendment as to the strictures on searches and seizures. If a defendant confesses as the result of an illegal arrest, the taint of this confession is not removed by the voluntariness of

the confession under *Miranda* principles. We believe the rule, as promulgated by the United States Supreme Court, is that if a person is illegally arrested, any inculpatory statement he makes while under arrest must be suppressed unless the State can show the causal chain was broken by some independent circumstance which will show the statement was not caused by the arrest.

The State contends and the superior court and the Court of Appeals held that intervening circumstances so attenuated the defendant's statement that it was admissible in evidence. The superior court found as attenuating events "the passage of time, the arrival of female officers, the arrival of the defendant's husband and permitting the defendant to bathe and dress." The Court of Appeals relied on these factors and the additional facts that the defendant was 35 years of age and a registered nurse to hold that the statement was so attenuated from the arrest as to be admissible.

In determining this case, we take note of *New York v. Harris*, 495 U.S. 14, 109 L. Ed. 2d 13 (1990). In that case, the United States Supreme Court held that a confession made in a station house after the defendant was illegally arrested in his home was admissible. The Court said, however, "a warrantless entry will lead to the suppression of any . . . statements taken inside the home." *Id.* at 20, 109 L. Ed. 2d at 22.

We cannot hold that the statement of the defendant to the officers was so attenuated from the illegal arrest that the statement can be said to be independent of the arrest. The statement was made approximately two hours from the time the officers entered the home. In *Brown* and in *Taylor v. Alabama*, 457 U.S. 687, 73 L. Ed. 2d 314 (1982), the defendants were held approximately two hours and in neither case did the Court hold this caused the confession to be from an independent source. We also cannot say that the arrival of female officers broke the causal connection with the arrest. The arrival of the defendant's husband would likewise not affect the defendant's motive to make a statement. Her husband was under arrest and although she could see him, she was not allowed to talk to him. Allowing the defendant to take a bath was not a break in the chain. She remained under restraint by the officers and could only act as they directed. We also do not believe the fact that the defendant was thirty-five years old and a registered nurse is an attenuating circumstance. This was not something that occurred after the arrest. We hold that none of

these factors relied on by the superior court and the Court of Appeals singly or in combination were sufficient to break the chain of causation between the arrest of the defendant and her statement to the officers according to Fourth Amendment principles as enunciated by the United States Supreme Court. The defendant's inculpatory statement should have been suppressed.

We reverse the Court of Appeals and remand for a remand to the Superior Court, Washington County, for a new trial.

Reversed and remanded.

GLORIA HARRIS DUNN, EXECUTRIX OF THE ESTATE OF JERRY LEWIS DUNN, DECEASED v. PACIFIC EMPLOYERS INSURANCE COMPANY; LOSS CONTROL SERVICES, INC.; DAVID A. FRASER, SC.D.; ENNIS, LUMSDEN, BOYLSTON & ASSOCIATES, INC.; MACDERMID, INC.; CIRCUIT SERVICES CORP.; MALLINCKRODT, INC.; ENTHONE, INC.; ASHLAND INTERNATIONAL CORP.; PHOTO CHEMICAL SYSTEMS; AND CHEMTECH INDUSTRIES, INC.

No. 139PA91

(Filed 17 July 1992)

Death § 4 (NCI3d) — wrongful death — occupational disease — statute of limitations

A wrongful death action filed more than three years after diagnosis of a fatal occupational disease but within two years of decedent's death is not barred by the statute of limitations of N.C.G.S. § 1-53(4) where a bodily injury claim by the decedent would not have been time-barred under N.C.G.S. § 1-52(16) at the time of his death, since the proviso of § 1-53(4) merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life.

Am Jur 2d, Death §§ 56-88, 423, 446.

Time from which statute of limitations begins to run against cause of action for wrongful death. 97 ALR2d 1151.

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

ON discretionary review of the decision of the Court of Appeals, 101 N.C. App. 508, 400 S.E.2d 63 (1991), affirming orders entered by *Hight, J.*, in the Superior Court, WAKE County, on 14 October 1989 and 6 December 1989. Heard in the Supreme Court 13 November 1991.

David H. Rogers for plaintiff-appellant.

Merriman, Nicholls & Crampton, P.A., by W. Sidney Aldridge, for defendant-appellee, Ennis, Lumsden, Boylston & Associates, Inc.

LeBoeuf, Lamb, Leiby & MacRae, by George R. Ragsdale, for defendant-appellee, OMI International Corp.

Teague, Campbell, Dennis & Gorham, by Thomas M. Clare, for defendant-appellees, Pacific Employers Insurance Company, Loss Control Services, Inc., and Chemtech Industries, Inc.

Bailey & Dixon, by Carson Carmichael, III, for defendant-appellee, MacDermid, Inc.

Poyner & Spruill, by Beth R. Fleishman, for defendant-appellee, Photo Chemical Systems, Inc.

Moore & Van Allen, by Elizabeth M. Powell, for defendant-appellee, Ashland Oil, Inc.

Haworth, Riggs, Kuhn & Haworth, by John Haworth, for defendant-appellee, Dynachem Corp.

Brooks, Stevens & Pope, by David Victor Brooks, for defendant-appellee, David A. Fraser, Sc.D.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for defendant-appellee, Circuit Services Corp.

Manning, Fulton & Skinner, by Michael T. Medford, for defendant-appellee, Mallinckrodt, Inc.

Janet Ward Black and J. Wilson Parker for North Carolina Academy of Trial Lawyers; Thomas W. H. Alexander for North Carolina Association of Defense Attorneys, amici curiae.

EXUM, Chief Justice.

This is a civil action grounded in negligence in which plaintiff seeks to recover damages for the wrongful death of her husband, Jerry Lewis Dunn. Plaintiff's husband was diagnosed as having

liver cancer in August of 1985 and died from that disease on 24 June 1987. Plaintiff filed this wrongful death action on 23 June 1989. The issue is whether a wrongful death action filed more than three years after diagnosis of the fatal disease but within two years of decedent's death is barred by the statute of limitations.

Plaintiff's husband worked for the ITT Telecom Products Corporation ("ITT"), a subsidiary of International Telephone & Telegraph Corporation, at its manufacturing facility in Raleigh. While employed by ITT, plaintiff's husband was allegedly exposed to numerous hazardous and toxic chemicals. He was hospitalized on 20 August 1985 and was seen by a doctor at Wake Medical Center who established a tentative diagnosis of hepatoma (liver cancer). Following an exploratory laparotomy on 29 August 1985, doctors informed plaintiff and her husband that a biopsy had confirmed the initial diagnosis. Despite undergoing various treatments over the next two years, decedent died of liver cancer on 24 June 1987.

On 23 June 1989, plaintiff filed this wrongful death action, alleging that defendants negligently supplied and installed various harmful substances at decedent's workplace. Defendants moved to dismiss the action on the ground it was filed more than three years after decedent's fatal illness was diagnosed and therefore time-barred by N.C.G.S. § 1-53(4). The trial court granted these motions. Plaintiff appealed.

A unanimous panel of the Court of Appeals agreed that plaintiff's claim was time-barred as to all defendants and affirmed the trial court's orders. We allowed plaintiff's petition for discretionary review, and we now reverse.

The applicable time periods for bringing an action for wrongful death are set out in N.C.G.S. § 1-53, which provides:

> Within two years—
>
> (4) Actions for damages on account of the death of a person caused by the wrongful act, neglect or fault of another under G.S. 28A-18-2; the cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16), no action for his death may be brought.

N.C.G.S. § 1-53(4) (1983).

We focus on the statute's proviso added in 1979. 1979 Sess. Laws ch. 654, § 3. Under it, a wrongful death claim is time-barred if "the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) or 1-52(16)."[1] Section 1-52(16) of the North Carolina General Statutes requires that a personal injury action be brought within three years from the date "bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant, whichever event occurs first." In occupational disease cases, such as the instant case, a cause of action grounded in negligence accrues when the disease is diagnosed. *Wilder v. Amatex Corp.*, 314 N.C. 550, 560-61, 336 S.E.2d 66, 72 (1985). In dispute is on what date the decedent must have had a viable claim for personal injury, i.e., a claim not time-barred by N.C.G.S. § 1-52(16)—the date of his death or the date upon which his personal representative files the wrongful death action—in order for the wrongful death action itself to be timely filed.

Defendants contend the date when the wrongful death action is instituted is the critical date. They construe the statute to provide two conditions to the timely filing of a wrongful death action: (1) that it be filed within two years of decedent's death and (2) that on the filing date, decedent, had he lived, would not have been time-barred from bringing a personal injury claim based upon the same alleged wrong.

Defendants also contend that any other interpretation of N.C.G.S. § 1-53(4) would render the statute's proviso surplusage and would hence violate the presumption that the legislature intended each statutory provision to be given full effect. *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). Defendants argue that the proviso imposes an additional time restriction that can serve to cut short the ordinary two-year limitation for wrongful death actions if the decedent's disease or injury was diagnosed more than a year before his death.

Plaintiff, however, contends the proviso in N.C.G.S. § 1-53(4) was intended to bar wrongful death actions when the decedent's claim for bodily injury caused by the same alleged wrongful conduct had become time-barred during decedent's life. Under this inter-

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1. N.C.G.S. § 1-15(c) deals with professional malpractice claims and has no application to this case.

pretation, a wrongful death action may be maintained if: (1) it is instituted within two years of decedent's death and (2) on the date of his death the decedent's claim for bodily injury would not have been time-barred.

Although the Court of Appeals agreed with defendants' interpretation of the statute, Judge Wells, in a concurring opinion, noted that it was "anomalous . . . that this plaintiff's right to sue for the wrongful death of her husband—a right which did not accrue until his death—must be cut off by a limitations clock which started running well before his death . . . ." *Dunn v. Pacific Employers Ins. Co.*, 101 N.C. App. 508, 513, 400 S.E.2d 63, 66 (1991).

We agree with plaintiff's interpretation of the statute. Under it, the proviso is not surplusage as defendants contend. It has the effect claimed by plaintiff.

We are persuaded by a recent federal decision, *Thacker v. A.C. & S., Inc.*, No. 89-74 Civ. 7-F (E.D.N.C. 2 Nov. 1990), which addressed the issue now before us. In *Thacker*, a wrongful death claim was filed by the estate of a carpenter whose death was allegedly caused by exposure to asbestos-containing products. Decedent's illness became apparent in April 1986 and he died on 13 August 1987. The wrongful death action was filed on 10 August 1989. The court held that because decedent had a bodily injury claim which was not time-barred on the day he died, the wrongful death action, filed within two years of death but more than three years from discovery of the illness, was not time-barred. The court reasoned that the General Assembly did not intend the critical date to be that of the filing of the wrongful death action "because it would create a situation in which a personal representative could have little or no time within which to institute a wrongful death action." *Thacker*, slip op. at 5. In the case of an injured person who died two days before the expiration of the three-year statute of limitations, the court noted, "the personal representative would have only *two days* within which to institute an action for wrongful death. Most personal representatives have not even been appointed within two days of death." *Thacker*, slip op. at 5-6 (emphasis in original).

We agree with the decision and reasoning of the federal district court in *Thacker*. The claim for wrongful death is distinct and separate from the claim for bodily injury. The only relation between the two is that both the personal injury and resulting death were

allegedly caused by the same wrongful conduct. The three-year statute of limitations period for the bodily injury claim does not, however, trigger the running of, or cut short, the period for filing the wrongful death action when the underlying bodily injury claim of the decedent was not time-barred at his death. The proviso merely provides a limitations defense to a wrongful death action when the claim for injuries caused by the underlying wrong had become time-barred during the decedent's life.

Our interpretation of N.C.G.S. § 1-53(4) is further supported by the grammatical structure of the proviso. Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language. *Falk v. Frandsen*, 137 N.W.2d 228 (N.D. 1965); *State ex rel. Daly v. Montana Kennel Club*, 144 Mont. 377, 396 P.2d 605 (1964); *Doull v. Wohlschlager*, 141 Mont. 354, 377 P.2d 758 (1963); 82 C.J.S. *Statutes* § 340, at 682 (1953). The best indicia of legislative intent are the language of the act, the spirit of the act, and what the act seeks to accomplish. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379 (1980), *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The legislature's intent may be inferred from the language used.

The proviso states: "[W]henever the decedent would have been barred, had he lived, from bringing an action for bodily harm . . ., no action for his death may be brought." The verb, "would have been barred," is in the past subjunctive tense; it must, therefore, refer to a past event—an event, in other words, that occurred before decedent's death. Defendants' argument would be more persuasive if this verb were "would be barred," in which case it would more readily refer to some future event, i.e., an event to occur after decedent's death. *See generally* H.W. Fowler, *Modern English Usage* 595-98 (Sir Ernest Gowers ed., 2d ed. 1965).

In the instant case, decedent's liver cancer was diagnosed on 29 August 1985 following a laparotomy and biopsy at Duke Medical Center. Decedent's bodily injury claim, had he lived, would have accrued on 29 August 1985 and would have been time-barred three years later under N.C.G.S. § 1-52(16). Decedent died on 24 June 1987. On that date, his bodily injury claim would not have been time-barred. Thus, this wrongful death claim, having been filed within two years of decedent's death, is not time-barred by any of the provisions of N.C.G.S. § 1-53(4).

For the foregoing reasons, the Court of Appeals' decision affirming the orders of the trial court dismissing plaintiff's wrongful death claim as being time-barred is reversed and the matter is remanded to the Superior Court, Wake County, for further proceedings.

Reversed and remanded.

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v. KENNETH W. BLACKWELDER, EXECUTOR OF THE ESTATE OF CLYDE WILLARD BLACKWELDER

No. 404PA91

(Filed 17 July 1992)

1. Insurance § 464 (NCI4th)— underinsured motorist payment—subrogation right—injured party's dismissal of claim against tortfeasor's estate

An injured party's dismissal with prejudice of her claim against the tortfeasor's estate for injuries received in an automobile accident did not extinguish plaintiff automobile insurer's subrogation right against the tortfeasor's estate for the underinsured motorist payment it made to the injured party, its insured, where the tortfeasor's liability insurer stated that it would tender its $50,000 liability limit to plaintiff's insured at the appropriate time; plaintiff advanced $50,000 to its insured to protect its subrogation interest; plaintiff then paid its $50,000 underinsured motorist limit to its insured and indicated to the tortfeasor's estate and liability insurer that it would not release its subrogation right against the estate; plaintiff's insured released plaintiff from all claims arising from the accident in consideration for the $100,000 it had paid to her, and the release acknowledged plaintiff's subrogation right; the tortfeasor's liability insurer paid its $50,000 liability limit to plaintiff's insured, who released all claims against the tortfeasor's liability insurer and dismissed with prejudice her action against the tortfeasor's estate; this $50,000 was deposited

into plaintiff's account; and plaintiff filed this action to recover its underinsured motorist payment from the tortfeasor's estate. Plaintiff preserved its subrogation right against the tortfeasor's estate in the manner set forth in N.C.G.S. § 20-279.21(b)(4), and this subrogation right had already passed to plaintiff by operation of law at the time the injured party dismissed her claim and could be pursued by plaintiff in its own name at its election.

Am Jur 2d, Automobile Insurance §§ 439, 441.

Rights and remedies of insurer paying loss as against insured who has released or settled with third person responsible for loss. 51 ALR2d 697.

2. Executors and Administrators § 103 (NCI4th)— subrogation claim against estate—statute of limitations

Plaintiff underinsured motorist insurer's subrogation claim against the tortfeasor's estate was not barred by N.C.G.S. § 28A-19-3(b) since the tortfeasor lived for twenty-four hours after the accident from which the claim arose, and the claim thus arose before rather than at or after the tortfeasor's death.

Am Jur 2d, Executors and Administrators § 584.

ON petition for discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 103 N.C. App. 656, 406 S.E.2d 301 (1991), reversing the trial court's grant of defendant's motion for summary judgment entered by *Davis, J.*, in the Superior Court, CABARRUS County, on 21 August 1990 and remanding for trial. Heard in the Supreme Court 10 March 1992.

On 21 March 1988 Maureen Sargeant was seriously injured when her car, in which she was a passenger, was struck head-on by a vehicle driven by Clyde Willard Blackwelder. Mr. Blackwelder died the next day as a result of the accident. The plaintiff, State Farm Mutual Insurance Company (hereinafter "State Farm"), insured the Sargeant automobile and provided underinsured motorist coverage in the amount of $100,000. Nationwide Mutual Insurance Company (hereinafter "Nationwide") provided liability coverage of $50,000 on Blackwelder's automobile.

In 1988, Maureen Sargeant filed suit against the Blackwelder estate seeking damages for her personal injuries arising from this accident. On 28 March 1989, Nationwide sent a letter to Mrs.

Sargeant's attorney stating that it would tender its $50,000 liability limits to Mrs. Sargeant at an appropriate time and asked that he forward the letter to State Farm so it could decide whether to advance Nationwide's $50,000 to Mrs. Sargeant and preserve its subrogation rights.

On 24 April 1989, State Farm advanced $50,000 to Mrs. Sargeant to protect its subrogation interest. On 6 November 1989, State Farm paid its $50,000 underinsured motorist limits to Mrs. Sargeant and indicated to Nationwide and Blackwelder's estate that it would not release its subrogation right against the estate. Mrs. Sargeant executed a release discharging State Farm from all claims arising from the 21 March 1988 accident for the stated consideration of $100,000. She agreed to hold in trust for the benefit of State Farm "any and all rights of recovery which (she) now (has) . . . against any person . . . who may be legally liable . . . for any and all damages . . . which (she) sustained" in the accident. She further agreed to hold in trust for or assign to State Farm "the proceeds of any settlement with or the amount of any judgment which she may obtain against any person or entity who may be legally liable to (her) for any and all damages . . . (she) may have sustained" in the accident of 21 March 1988. The release further acknowledged the subrogation rights of State Farm.

On 26 January 1990, Nationwide paid its $50,000 liability limits to Mrs. Sargeant, who released all claims that she had against it and also dismissed her action against the Blackwelder estate with prejudice. Nationwide's draft was to Mrs. Sargeant, her attorney and State Farm. It was endorsed by Mrs. Sargeant and her attorney and deposited into State Farm's account. On 19 March 1990, State Farm filed this action to recover payment from Blackwelder's estate. The trial court granted defendant's motion for summary judgment and dismissed this action with prejudice. The Court of Appeals reversed, holding that State Farm preserved its subrogation rights against the defendant by following the statutory procedure in N.C.G.S. § 20-279.21(b)(4).

The defendant's petition for discretionary review was allowed by this Court.

Hartsell, Hartsell & Mills, P.A., by W. Erwin Spainhour, for defendant appellant.

Hutchins, Tyndall, Doughton & Moore, by Kent L. Hamrick, for plaintiff appellee.

WEBB, Justice.

[1] The defendant contends that the dismissal with prejudice of Mrs. Sargeant's Watauga County case against the defendant extinguished as a matter of law all claims against the defendant arising from the 21 March 1988 accident, whether such claims were asserted on behalf of Mrs. Sargeant or her subrogee, State Farm. The defendant argues that Mrs. Sargeant and State Farm were entitled to bring only one civil action against the defendant for Sargeant's injuries. By participating in the dismissal with prejudice of Sargeant's claim, State Farm had its subrogation rights extinguished. The defendant contends that State Farm has no right and no claim beyond that possessed by Mrs. Sargeant. We disagree.

N.C.G.S. § 20-279.21(b)(4) provides in pertinent part:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of such payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, ... No insurer shall exercise any right of subrogation . . . where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of such notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election.

Here, State Farm preserved its subrogation rights against the defendant by pursuing this claim in the manner as set forth in N.C.G.S. § 20-279.21(b)(4). On 24 April 1989, State Farm advanced $50,000, the amount of Nationwide's liability limits, to Mrs. Sargeant to protect its subrogation interests. On 6 November 1989, it advanced an additional $50,000 to settle the underinsured motorist

claim. As of that time, Nationwide had paid nothing whatsoever under its primary liability policy issued to Mr. Blackwelder.

By complying with the express terms of the statute, State Farm had the absolute right to pursue "any claim" against the defendant that Mrs. Sargeant "has or had." It was not necessary for State Farm to prosecute the Watauga County action in Mrs. Sargeant's name, nor was it necessary that that action remain pending for State Farm to pursue a recovery. It is clear under N.C.G.S. § 20-279.21(b)(4) that once the advancement is made and the underinsured claim is settled prior to exhaustion of the primary policy limits, the underinsured motorist carrier is pursuing "its claim" and not that of the insured. The underinsured motorist carrier is not required to be designated as a party plaintiff "except upon its own election." State Farm has elected to pursue its claim in its own name as provided by the statute.

In conjunction with the settlement of the underinsured motorist claim, State Farm obtained a release from Mrs. Sargeant discharging State Farm from any claims Mrs. Sargeant had against State Farm. This release discharged State Farm only, not Nationwide. The release also acknowledged State Farm's subrogation rights and assigned to it (to the extent of its payment) all of Sargeant's claims against Blackwelder's estate. Sargeant further agreed that any claims of State Farm pertaining to the accident could be presented in her name or in State Farm's name. Thus, State Farm had the absolute statutory right to pursue a claim against the defendant in the amount of $50,000, the amount of its underinsured payment. As both defendant and Nationwide had knowledge of State Farm's subrogation rights, they could not defeat State Farm's rights by any subsequent release from Mrs. Sargeant.

Mrs. Sargeant's dismissal did not terminate State Farm's subrogated claim because the claim against the defendant had already passed to State Farm by operation of law. The right to recover from the defendant was and is still vested in State Farm and by statute, State Farm may pursue "its claim" in its own name "at its election." Mrs. Sargeant could not dismiss, release, or waive State Farm's right to recover as she does not possess such right.

The defendant relies on several cases which it says establish the proposition that subrogation is based on equitable principles and a subrogee stands in the shoes of the subrogor. *See Insurance Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Montsinger*

v. White, 240 N.C. 441, 82 S.E.2d 362 (1954); *Mace v. Construction Corp.*, 48 N.C. App. 297, 269 S.E.2d 191 (1980). When Mrs. Sargeant released the defendant, he says this extinguished the claim of the plaintiff. The defendant also relies on *N.C. Baptist Hospitals, Inc. v. Mitchell*, 323 N.C. 528, 374 S.E.2d 844 (1988) and *Harris-Teeter Super Markets v. Watts*, 97 N.C. App. 101, 387 S.E.2d 203 (1990), for the proposition that a claim for negligence may not be assigned. These cases dealing with subrogation and the assignment of claims do not deal with N.C.G.S. § 20-279.21(b)(4) and have no application to this case.

[2] The defendant also contends that the claim against him is barred under N.C.G.S. § 28A-19-3(b) which provides in part:

> All claims against a decedent's estate which arise at or after the death of the decedent, . . . are forever barred against the estate, . . . unless presented to the personal representative . . . as follows:
>
> . . . .
>
> (2) With respect to any claim other than a claim based on a contract with the personal representative or collector, within six months after the date on which the claim arises.

In this case the testate lived for twenty-four hours after the accident from which the claim arose. The claim arose before the death of Mr. Blackwelder and the claim is not barred by this section.

Having followed the statutory procedures in N.C.G.S. § 20-279.21(b)(4), State Farm is entitled to pursue its claim against the defendant.

Affirmed.

RUSSELL S. CORRELL AND KELLY L. CORRELL, PETITIONERS-APPELLEES v. DIVISION OF SOCIAL SERVICES AND DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENTS-APPELLANTS

No. 406PA91

(Filed 17 July 1992)

Social Security and Public Welfare § 1 (NCI3d)— Medicaid— contiguous property exclusion—ownership of primary residence not required

Applicants for Medicaid benefits for medically needy persons are not required to own their primary place of residence in order for property contiguous to their residence to be excluded from their assets under N.C.G.S. § 108A-55 for purposes of determining their eligibility for Medicaid benefits. Therefore, Medicaid benefits were improperly denied on the ground that the applicants owned a small tract of land contiguous to their rented primary residence.

Am Jur 2d, Welfare Laws §§ 38-41.

Eligibility for welfare benefits, under maximum-assets limitations, as affected by expenditures or disposal of assets. 19 ALR4th 146.

ON discretionary review of the decision of the Court of Appeals, 103 N.C. App. 562, 406 S.E.2d 633 (1991), reversing the judgment entered by *Gray, J.*, on 15 December 1989, in the Superior Court, GASTON County. Heard in the Supreme Court on 13 May 1992.

Turner, Enochs, and Lloyd, P.A., by Wendell H. Ott, Thomas E. Cone, and Laurie S. Truesdell, for the petitioner-appellants.

Lacy H. Thornburg, Attorney General, by Robert J. Blum, Special Deputy Attorney General, and Jane T. Friedensen, Assistant Attorney General, for the respondent-appellees.

MITCHELL, Justice.

This is an action involving interpretation of the North Carolina statutory scheme governing eligibility for benefits from the Medicaid program. The primary issue before this Court is whether N.C.G.S.

§ 108A-55 requires that Medicaid applicants own their primary place of residence in order to exclude property they own contiguous to their residence from their assets for purposes of determining their eligibility for Medicaid benefits. We conclude that no such ownership requirement exists. Accordingly, we reverse the decision of the Court of Appeals.

The facts of this case are not in dispute. The petitioners Russell and Kelly Correll rent the home in which they live. They have lived in this home for fourteen years, and it is their primary place of residence. The petitioners purchased a small tract of land directly across a street from their residence in 1988. All parties to this action agree that the petitioners' land is "contiguous" to their residence and has a tax value of $3,640.00.

The petitioners applied for Medicaid benefits on 28 November 1988. Their Medicaid application was denied by the Gaston County Department of Social Services on 6 January 1989 on the ground that the petitioners owned the small tract of land contiguous to their residence. Its value of $3,640.00 caused the value of the petitioners' assets to exceed the $2,350.00 maximum reserve limit, beyond which the members of a three-person household are not medically needy under 10 North Carolina Administrative Code 50B.0311(2)(b) and, thus, not entitled to Medicaid benefits. The North Carolina Department of Human Resources, Division of Social Services, ultimately issued a final agency decision on 21 June 1989 upholding denial of Medicaid benefits for the petitioners. On 19 July 1989 the Corrells petitioned the Superior Court, Gaston County, for judicial review of the final agency decision. On 15 December 1989 the Superior Court entered its judgment. The Superior Court concluded that, pursuant to N.C.G.S. § 108A-55, the petitioners' property contiguous to their principal residence must be excluded from their resources for purposes of determining their eligibility for Medicaid benefits—without regard to whether they owned their principal residence—and that the final agency decision to the contrary amounted to an error of law. For this reason, the Superior Court reversed the final agency decision and ordered that the petitioners' Medicaid application be remanded to the Gaston County Department of Social Services for a proper determination of Medicaid eligibility. The respondents appealed to the Court of Appeals.

The Court of Appeals construed N.C.G.S. § 108A-55 as requiring that applicants for Medicaid benefits own their principal place

of residence in order to take advantage of the exclusion of the value of their contiguous property for purposes of determining their entitlement to Medicaid benefits. *Correll v. Division of Social Services*, 103 N.C. App. 562, 406 S.E.2d 633 (1991). As a result, the Court of Appeals reversed the judgment of the Superior Court. We now conclude that the judgment of the Superior Court was correct. Accordingly, we must reverse the decision of the Court of Appeals and remand this case for reinstatement of the judgment of the Superior Court.

The Medicaid program was established by Congress in 1965 to provide federal assistance to states which chose to pay for some of the medical costs for the needy. *Schweiker v. Gray Panthers*, 453 U.S. 34, 69 L.Ed.2d 460 (1980); *Morris v. Morrow*, 783 F.2d 454, 456 (4th Cir. 1986). Whether a state participates in the program is entirely optional. "However, once an election is made to participate, the state must comply with the requirements of federal law." *Lackey v. N.C. Dept. of Human Resources*, 306 N.C. 231, 235, 293 S.E.2d 171, 175 (1982). To qualify for federal Medicaid grant funds, the state must develop a coherent plan for medical assistance as prescribed by federal guidelines. *Id.*; 42 U.S.C. § 1396a (1984). North Carolina has elected to participate in the Medicaid program and outlined its plan for medical assistance by the enactment of Chapter 108 of the General Statutes of North Carolina, now recodified as Chapter 108A.

Upon a state's election to participate in the Medicaid program, the state must provide medical assistance to a group termed the "categorically needy." *Morrow*, 783 F.2d at 456. This group includes people who are entitled to general welfare assistance under four programs: Old Age Assistance; Aid to Families With Dependent Children; Aid to the Blind; and Aid to the Permanently and Totally Disabled. *Id.* Additionally, the state has the option to provide Medicaid benefits to people deemed "medically needy." These people can become eligible for benefits only if their income and assets are insufficient to provide them with basic remedial health care and services. *Id.* North Carolina has opted to provide Medicaid benefits to such "medically needy" people who meet the income and resources limitations established by the General Assembly. N.C.G.S. §§ 108A-54, 55 (1988).

The statute governing the question present before this Court provides in relevant part that:

> When determining whether a person has sufficient resources to provide necessary medical care, there shall be excluded from consideration the person's primary place of residence and the land on which it is situated, and in addition *there shall be excluded real property contiguous with the person's primary place of residence* in which the property tax value is less than twelve thousand dollars ($12,000).

N.C.G.S. § 108A-55 (emphasis added). The Court of Appeals held that the petitioners were not entitled to the benefit of the "contiguous property" exclusion provided by the statute because they did not own their primary place of residence. *Correll*, 103 N.C. App. at 568, 406 S.E.2d at 637. The Court of Appeals reasoned that this statute merely was designed to protect homesite property so as not to force homeowners to give up their homes in order to qualify for Medicaid benefits. *Id.* at 569, 406 S.E.2d at 637. Based on such reasoning, the Court of Appeals concluded that "[o]nly if the exclusion of contiguous property is dependent on the exclusion of an owned homesite would the policy of protecting applicants' ownership of their homes be furthered." *Id.* We disagree with the Court of Appeals' interpretation of N.C.G.S. § 108A-55 and conclude that Medicaid applicants are not required to own their primary places of residence before being entitled to the benefit of the contiguous property exclusion.

Statutory interpretation properly begins with an examination of the plain words of the statute. *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). The legislative purpose of a statute is first ascertained by examining the statute's plain language. *Id.* "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Boy Scouts of America, Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 688, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988). Here, the plain statutory language is clear; the only requirements the legislature prescribed for an applicant to receive the benefit of the "contiguous property" exclusion provided by N.C.G.S. § 108A-55 were that the property be "contiguous" to the applicant's primary place of residence and that the tax value of the property excluded be below twelve thousand dollars ($12,000).

It is undisputed that the house the petitioners rent and occupy is their primary place of residence. The property in question is

"contiguous" to the petitioners' primary place of residence and has a tax value of only $3,640.00. No requirement that the applicant own his or her primary place of residence appears at any point in the plain language of the statute. If our General Assembly had intended to require that applicants own their primary places of residence before receiving the advantage of the contiguous property exclusion contained in N.C.G.S. § 108A-55, we must assume that it would have included plain language to that effect in the other plain language of the statute. *See Lemons*, 322 N.C. at 277, 367 S.E.2d at 658.

Our interpretation of the statute is also consistent with one of the basic purposes of the Medicaid program, which is to provide medical assistance to needy families whose income and resources are insufficient to meet these costs. 42 U.S.C. § 1396 (1984). Our interpretation avoids giving N.C.G.S. § 108A-55 a statutory construction that defeats the statute's purpose or results in unjust consequences. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989). In the present case, such unjust consequences clearly would result from adopting the respondents' interpretation of the statute. For example, following the respondents' reasoning, had the petitioners here owned *more* assets—their residence *plus* the contiguous property—all of their property would have been excluded under N.C.G.S. § 108A-55, and they would have been entitled to Medicaid benefits. However, under the respondents' interpretation, since the petitioners have *fewer* assets—only owning the contiguous property, while renting their primary place of residence—none of their property is excluded, and they are not eligible for Medicaid benefits. Thus, in addition to judicially adding a requirement to the plain meaning of the statute, the respondents' interpretation would tend to defeat a central purpose of the Medicaid program.

The wording of N.C.G.S. § 108A-55 is clear, and it does not include a requirement that a Medicaid applicant "own" his or her primary place of residence before receiving the advantage of the statute's "contiguous property" exclusion. Accordingly, the decision of the Court of Appeals is reversed and this case is remanded to the Court of Appeals for reinstatement of the judgment of the Superior Court, Gaston County.

Reversed and remanded.

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

BUMGARNER v. RENEAU

No. 101A92

Case below: 105 N.C.App. 362

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 16 July 1992.

CARDWELL v. SMITH

No. 207P92

Case below: 106 N.C.App. 187

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

COLVARD v. FRANCIS

No. 206P92

Case below: 106 N.C.App. 277

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

DEVOE v. N.C. STATE PORTS AUTHORITY

No. 217P92

Case below: 106 N.C.App. 231

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 16 July 1992.

DUNN v. PATE

No. 170PA92

Case below: 106 N.C.App. 56

Appeal from the North Carolina Court of Appeals by defendants pursuant to G.S. 7A-30 retained 9 July 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 9 July 1992.

FRANKLIN COUNTY v. BURDICK

No. 374A91

Case below: 103 N.C.App. 496

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 16 July 1992.

FRIZZELLE v. HARNETT COUNTY

No. 201P92

Case below: 106 N.C.App. 234

Petition by defendants for writ of supersedeas denied and temporary stay dissolved 16 July 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

GRYB v. HIATT

No. 172P92

Case below: 106 N.C.App. 228

Petition by plaintiff for writ of supersedeas denied and temporary stay dissolved 16 July 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

HARDING v. N.C. DEPT. OF CORRECTION

No. 243P92

Case below: 106 N.C.App. 350

Petition by defendant for writ of supersedeas and temporary stay denied 8 July 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 8 July 1992.

HENLINE v. MONTGOMERY

No. 205P92

Case below: 106 N.C.App. 231

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

IN RE SNODDY

No. 124P92

Case below: 105 N.C.App. 444

Petition by Edward Lee Snoddy for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

IN RE WILL OF HUBNER

No. 214P92

Case below: 105 N.C.App. 599

Petition by Ruth M. McGuire for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992. Petition by Florence Stephens for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

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

No. 169P92

Case below: 106 N.C.App. 66

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

MULBERRY-FAIRPLAINS WATER ASSN. v.
TOWN OF NORTH WILKESBORO

No. 94P92

Case below: 105 N.C.App. 258

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

OSBORNE v. CONSOLIDATED
JUDICIAL RETIREMENT SYSTEM

No. 45PA92

Case below: 106 N.C.App. 299

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 16 July 1992.

PERKINS v. CCH COMPUTAX, INC.

No. 185PA92

Case below: 106 N.C.App. 210

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 16 July 1992.

STATE v. BAKER

No. 269P92

Case below: 106 N.C.App. 687

Petition by Attorney General for writ of supersedeas and temporary stay denied 23 July 1992.

STATE v. BRAYBOY

No. 128P92

Case below: 105 N.C.App. 370

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

STATE v. BUNCH

No. 215P92

Case below: 106 N.C.App. 128

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

STATE v. LUNSFORD

No. 200P92

Case below: 106 N.C.App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

STATE v. MARSHALL

No. 109P92

Case below: 105 N.C.App. 518

Temporary stay dissolved 16 July 1992. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

STATE v. MOORE

No. 556A90

Case below: Superior Court

Upon petition by defendant for writ of certiorari to the Forsyth County Superior Court, the Court finds that the defendant has not made a sufficient showing to be entitled to any of the relief requested and the petition is denied 16 July 1992.

STATE v. MOSELY

No. 245P92

Case below: 106 N.C.App. 395

Petition by defendant for temporary stay allowed 8 July 1992.

STATE v. THOMPSON

No. 162P92

Case below: 105 N.C.App. 716

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 16 July 1992.

TRIPLE E ASSOCIATES v. TOWN OF MATTHEWS

No. 127P92

Case below: 105 N.C.App. 354

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 16 July 1992.

STATE OF NORTH CAROLINA v. JAMES EARL WILLIS AND DONNA SUE COX

No. 569A87

(Filed 4 September 1992)

1. **Jury § 7.14 (NCI3d)— peremptory challenges—racial grounds—failure to show race of challenged jurors**

Assuming that the trial court erred in excluding defendant's evidence tending to show that he considered himself to be an Indian in a hearing on a motion to bar the exercise of peremptory challenges on racial grounds and in holding that it could not find defendant to be a member of a cognizable minority, these errors were not prejudicial where the State exercised nine peremptory challenges to which defendant objected but the record does not show the race of any challenged juror.

Am Jur 2d, Jury §§ 233-237.

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

2. **Evidence and Witnesses § 2473 (NCI4th)— plea bargain—motion to disclose—no showing bargain made**

The trial court did not err in the denial of one defendant's motion to compel the State to disclose any plea bargain made by any codefendant or accomplice where there is nothing in the record to indicate that a plea bargain had been made by any witness against the defendants. N.C.G.S. § 15A-1054.

Am Jur 2d, Criminal Law § 774.

3. **Criminal Law § 217 (NCI4th)— Speedy Trial Act—discovery motion—time tolled—trial after discovery completed**

Defendant's right to a speedy trial under the Speedy Trial Act was not violated where defendant made a motion for discovery before the indictment was returned, the period between the return of the indictment and the completion of discovery should be excluded from the speedy trial period, and the trial began within 120 days after discovery was completed.

Am Jur 2d, Criminal Law §§ 662, 854, 855.

4. Constitutional Law § 327 (NCI4th)— speedy trial—constitutional right—delay during discovery

Defendant's Sixth Amendment right to a speedy trial was not violated where discovery was not completed until August 1987 and the trial commenced in September 1987, and there was no evidence that the delay was oppressive to defendant or that he was prejudiced by the delay.

Am Jur 2d, Criminal Law §§ 652-659.

5. Jury § 7.11 (NCI3d)— death penalty views—excusal for cause—no opportunity for rehabilitation

The trial court did not err in excusing for cause two prospective jurors who stated unequivocally that they could under no circumstances vote for the death penalty and in refusing to permit defense counsel to attempt to rehabilitate the two jurors by asking whether they could apply the law as given to them by the judge where there was nothing in the record to indicate that either of the two excused jurors would have given different answers if questioned further.

Am Jur 2d, Jury §§ 195-212.

6. Jury § 7.9 (NCI3d)— prospective juror—bias in favor of defendant—challenge for cause—no opportunity for rehabilitation

When a prospective juror stated that because he knew the defendant "so well" the State would have to satisfy him beyond a shadow of a doubt before he would vote to find defendant guilty and that he knew the difference between beyond a shadow of a doubt and beyond a reasonable doubt, the trial court did not err in refusing to permit defense counsel to ask the juror whether he could apply the law as given to him by the court before it allowed the State's challenge for cause of the juror.

Am Jur 2d, Jury §§ 195-212.

7. Jury § 6.4 (NCI3d)— prospective juror—death penalty views—question disallowed—no error

The trial court did not err in sustaining the State's objection to defense counsel's question to a prospective juror as to how she felt "about a life sentence as opposed to a death sentence in a case where a person is convicted of first degree

murder" where the juror had previously stated that she was not opposed to the death penalty but did not think it was necessarily appropriate in every case in which a defendant was convicted of first degree murder.

Am Jur 2d, Jury §§ 195-212.

8. **Evidence and Witnesses § 1134 (NCI4th)— statements by nontestifying codefendant—implied admissions by defendant—Bruton rule inapplicable**

The trial court properly admitted testimony by one witness as to what the nontestifying codefendant said in defendant's presence about plans to divide a murder victim's jewelry and money after he was killed and testimony by a second witness that the codefendant stated in defendant's presence that defendant had a chance to get the victim when the victim was beating her and not to worry about a friend's talking because the friend was "cool," since these statements were admissible against defendant as implied admissions and were not barred by the rule of *Bruton v. United States*, 391 U.S. 123.

Am Jur 2d, Evidence §§ 610, 638, 639.

9. **Evidence and Witnesses § 1150 (NCI4th)— prima facie case of conspiracy—admissibility of declarations by defendant**

Where the State established a prima facie case of a conspiracy between defendant and the codefendant to murder the victim, the trial court properly admitted testimony by one witness that he heard defendant say, "You do your part and . . . I'll take care of the rest" and testimony by a second witness that, after the codefendant complained when the first attempt to kill the victim was aborted, defendant said, "Don't worry, Baby, it will get done," since these statements by defendant were admissible as declarations made in furtherance of the conspiracy.

Am Jur 2d, Evidence § 642.

Admissibility as against conspirator of extrajudicial declarations of coconspirator—Supreme Court cases. 1 L. Ed. 2d 1780.

10. **Evidence and Witnesses § 391 (NCI4th)— other bad acts—propensity to commit crime—harmless error**

The trial court in a first degree murder case erred in the admission of testimony that a witness on one occasion

went with defendant to the courthouse in Lumberton to answer a charge of breaking or entering and that on another occasion he went with defendant to engage in a fight since this testimony was not relevant to any issue in the case except to show that defendant had a propensity for bad acts and acted in conformity therewith in killing the victim. However, this error was harmless in light of the strong substantive evidence against defendant as well as other evidence of defendant's bad acts, including the ingestion of illegal drugs.

Am Jur 2d, Evidence §§ 339, 340, 366.

11. Evidence and Witnesses § 787 (NCI4th)— exclusion of evidence—similar testimony by same witness

Any error in the trial court's sustention of the State's objection to a question as to whether the witness had been told by officers that it was defendant they wanted was cured when the witness later answered the same question.

Am Jur 2d, Witnesses §§ 858-861.

12. Evidence and Witnesses § 2873 (NCI4th)— cross-examination—exclusion of repetitious question

The trial court did not abuse its discretion in sustaining the State's objection to a repetitious question asked by defense counsel on cross-examination of a State's witness.

Am Jur 2d, Witnesses §§ 858-861.

13. Criminal Law § 465 (NCI4th)— jury argument—inference of malice

The district attorney's jury argument that "the law . . . says that malice is merely the doing of a wrongful act without just cause or excuse, and when a person dies at the business end of a deadly weapon you, the jury, may infer that" was not an incorrect statement of the law.

Am Jur 2d, Trial §§ 640, 641, 643.

Counsel's right in criminal prosecution to argue law or to read law books to the jury. 67 ALR2d 245.

14. Criminal Law § 466 (NCI4th)— jury argument—defense tactic—no comment on counsel's credibility

The district attorney's jury argument about defendant's tactic of shifting the blame for a killing to his codefendants

was not an improper comment on defense counsel's credibility and effective assistance and was not error.

Am Jur 2d, Trial §§ 683, 684.

Propriety and effect of attack on opposing counsel during trial of a criminal case. 99 ALR2d 508.

15. Criminal Law § 439 (NCI4th)— jury argument—type of witnesses available—no improper characterization of defendant

The district attorney's statement in his jury argument that "when you try the devil, you have to go to hell to find your witnesses" was not an improper characterization of defendant as the devil but was merely an illustration of the type of witnesses available in this case.

Am Jur 2d, Trial §§ 681, 682.

Negative characterization or description of defendant by prosecutor during summation of criminal trial, as ground for reversal, new trial, or mistrial—modern cases. 88 ALR4th 8.

16. Criminal Law § 445 (NCI4th)— State's handling of evidence—propriety of jury argument

The district attorney's jury argument about the State's handling of the evidence was not an improper expression of opinion on the evidence but was a proper argument that the State had been careful in preserving the evidence and the jury should believe it.

Am Jur 2d, Trial §§ 632, 634-637.

17. Criminal Law § 463 (NCI4th)— jury argument—comment supported by evidence

The district attorney's jury argument in a first degree murder case that "the only practical one in the whole bunch seems to be the little sixteen year old girl . . . who says—'[w]e will never get the blood out of the cracks [of the floor]' " was supported by the evidence, although the girl did not testify, where there was testimony that the girl made this statement during a discussion about how the victim should be killed when it was suggested that defendant kill the victim while he was sitting on a sofa in the codefendant's living room.

Am Jur 2d, Trial § 632.

18. Criminal Law § 741 (NCI4th)— instructions—codefendant acting in concert—no expression of opinion on defendant's guilt

The trial court's instruction in a first degree murder case that, in order to find the codefendant guilty of murder by lying in wait, the State must prove, *inter alia*, that the codefendant acted in concert with defendant "who lay in wait for [the victim]" and that the codefendant was acting in concert with defendant "who intentionally assaulted [the victim]" did not constitute an expression of opinion on the evidence that defendant was guilty.

Am Jur 2d, Trial §§ 1191, 1204.

19. Criminal Law § 480 (NCI4th)— juror contact by family member—sufficiency of inquiry by court

The trial court did not commit prejudicial error in failing to make further inquiry when the court asked a juror whether a family member of one of the parties had talked to him and the juror said that no family member had done so where defendant did not request any further inquiry or make a motion for a mistrial pursuant to N.C.G.S. § 15A-1061.

Am Jur 2d, Trial §§ 1637-1639.

20. Constitutional Law § 342 (NCI4th)— trial court's communication with juror—absence of defendant—harmless error

The trial judge erred in communicating with a juror out of the presence of defendant and her attorneys when he inquired of a juror whether a family member of one of the parties had spoken to him and the juror said that no family member had done so. However, this error was harmless where the trial judge placed in the record information about this inquiry and this error could not have contributed to the result of the trial.

Am Jur 2d, Criminal Law §§ 692-695, 908, 909, 914.

21. Constitutional Law § 342 (NCI4th)— capital trial—absence of defendant from courtroom—questions to prospective jurors—identification of photographs—no prejudicial error

A defendant on trial for first degree murder was not prejudiced when the prosecutor examined three prospective jurors while defendant and one of her attorneys were absent from the courtroom where the questions asked by the prosecutor dealt with residences, occupations, church memberships,

reading habits and preferred television programs, and the prosecutor did not excuse any juror while defendant was absent from the courtroom. Nor was defendant prejudiced when a pathologist identified photographs of the victim's body while defendant was absent from the courtroom.

Am Jur 2d, Criminal Law §§ 692-695, 908, 913.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling a final jury panel for specific cases. 33 ALR4th 429.

22. Constitutional Law § 342 (NCI4th)— capital trial—absence of defendant during testimony—harmless error

Any error by the trial court in permitting the defendant in a capital case to be absent from the courtroom while a detective was reading a statement made by another prosecution witness was harmless beyond a reasonable doubt where defendant became visibly upset during the detective's testimony and asked permission to leave the courtroom; the trial court informed defendant that she had a right to be present and that the trial would continue if her request to leave was honored; and the statement read by the detective did not implicate defendant.

Am Jur 2d, Criminal Law §§ 698, 699, 930, 934.

23. Homicide § 374 (NCI4th)— first degree murder—actual or constructive presence—acting in concert—sufficiency of evidence

The evidence was sufficient for the jury to find that defendant was actually or constructively present when a killing occurred so as to support the trial court's submission to the jury of a charge of first degree murder on the theory that defendant was acting in concert with the codefendant, although defendant contends she was at least sixty-five feet away and inside the fence which enclosed her yard when the victim was killed outside the fence, where the evidence showed that defendant was able to see the attack on the victim and was close enough for the victim to call to her for help, and that defendant went into the house when the victim called to her. Furthermore, the evidence was sufficient for the jury to find that defendant acted in concert with the codefendant at the time of the killing, although she testified that she discovered the victim did not have any money with him the night he

was killed and tried to signal the codefendant not to kill the victim on that date, when evidence tending to show that defendant had agreed with the codefendant and others that the victim would be killed is considered with the evidence that she was actually or constructively present when the killing occurred, ready to lend whatever aid was necessary.

Am Jur 2d, Homicide §§ 28, 29.

24. Homicide § 372 (NCI4th)— first degree murder—submission of accessory before fact not required

The trial court in a first degree murder case did not err in failing to submit to the jury the lesser included offense of accessory before the fact of first degree murder where all the evidence showed that defendant was on the front porch of her house within sight of the killing when the victim was attacked at the end of her driveway and that she was thus constructively present at the time the victim was killed.

Am Jur 2d, Homicide §§ 28, 535; Trial §§ 1255, 1256.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

25. Criminal Law § 751 (NCI4th)— acting in concert—instruction on burden of proof—no plain error when considered in context

Although the trial court's instruction in a first degree murder case that "the burden of proof which the State must meet to obtain a conviction under the principle of acting in concert is less than its burden to prove that a defendant actually committed every element of the offense charged" was erroneous standing alone, the jury was not misled thereby and the instruction was not plain error where the context of this statement makes it clear that the court was referring to not having to prove that defendant did all the things which constitute the elements of murder; this language did not mean that the State did not have to prove the elements involving defendant beyond a reasonable doubt; and the court correctly instructed the jury as to the State's burden of proof in the case involving defendant at several other places in the charge.

Am Jur 2d, Trial §§ 1291, 1292.

Supreme Court's views as to prejudicial effect in criminal case of erroneous instructions to jury involving burden of proof or presumptions. 92 L. Ed. 2d 862.

26. Criminal Law § 793 (NCI4th)— acting in concert—constructive presence—sufficiency of instructions

The trial court's acting in concert instructions did not permit the jury to find that defendant was constructively present even though the jury did not find that she intended to aid or encourage the actual perpetrator of a murder, that she did not convey that intent to the perpetrator, and that the perpetrator was not aware of that intent, but the instructions properly informed the jury that defendant was constructively present if the jury found that she shared the criminal intent with the perpetrator and the perpetrator knew this and that the perpetrator knew either that defendant was aiding or encouraging him or was in a position to aid or encourage him when the killing occurred.

Am Jur 2d, Trial §§ 1120, 1121, 1241, 1244-1256.

27. Criminal Law § 460 (NCI4th)— jury argument—reasonable inference from evidence

The prosecutor's jury argument that defendant's blowing of her car horn when she met a codefendant's car on the day the victim was killed was not an attempt to stop the killing as defendant testified but was a signal to the occupants of the codefendant's car to proceed with the killing was a reasonable inference from the evidence and was not improper.

Am Jur 2d, Trial §§ 632, 634.

28. Jury § 6.4 (NCI3d)— jury selection—statement that death penalty is crux or central issue

The district attorney's repeated statement to prospective jurors that the death penalty was the "crux" or "central issue" in jury selection in a capital case did not convey to the jurors the impression that defendant's guilt was foreordained and was not improper.

Am Jur 2d, Trial § 499.

29. Jury § 6.4 (NCI3d)— death penalty views—request for unequivocal answers

The district attorney's request that prospective jurors give unequivocal answers to questions about their death penalty views was not error, it being mere speculation that these statements forced the jurors into pigeonholes and made those

who favored the death penalty more likely to vote to impose the death penalty.

Am Jur 2d, Jury §§ 201, 202, 289, 290.

30. Jury § 6.4 (NCI3d)— death penalty—jury selection—questions by prosecutor—necessity for death penalty—jurors' roles not minimized

The district attorney's question as to whether prospective jurors thought the death penalty was "necessary" did not convey to the jury the impression that the death penalty is a deterrent to crime and was not improper. Furthermore, the district attorney did not minimize the importance of the jurors' roles in imposing the death penalty by asking if they could be a part of the machinery that brought it about.

Am Jur 2d, Jury §§ 201, 202, 289, 290.

31. Jury § 6.3 (NCI3d)— jury selection—guilt of both defendants—improper question—error cured by charge

The district attorney's question asking prospective jurors whether, if the State satisfied them beyond a reasonable doubt that "one or both of the defendants is guilty of murder in the first degree," they could vote to find "them" guilty was improper. However, this error was cured by the trial court's charge that the jury would have to be satisfied beyond a reasonable doubt as to each defendant before it could find that defendant guilty.

Am Jur 2d, Jury §§ 201-203, 212.

32. Criminal Law § 1352 (NCI4th)— McKoy error—new sentencing hearing

Two defendants sentenced to death for first degree murder are entitled to a new sentencing hearing because of *McKoy* error in the court's instructions requiring unanimity for mitigating circumstances.

Am Jur 2d, Criminal Law § 600.

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

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

APPEALS as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing death penalties entered by *Barnette, J.*, at the 28 September 1987 Criminal Session of Superior Court, ROBESON County, upon jury verdicts finding defendants guilty of first degree murder. Heard in the Supreme Court 13 December 1990.

Each of the defendants was charged with the first degree murder of Jerry Richardson. These cases were consolidated for trial. Evidence introduced at the trial showed that for approximately four years prior to 12 July 1986, the defendant, Donna Sue Cox, lived in a house in Parkton, North Carolina, provided for her by Jerry Richardson. Mr. Richardson also furnished Ms. Cox with a telephone, an automobile and credit cards.

The defendant Willis met Donna Sue Cox in January 1986 and Willis began coming to Cox's house when Richardson was not present. In early July of 1986, the defendants, with other accomplices, formed a plan to kill Jerry Richardson. On the night of 9 July 1986 Willis, Tony Owens, and Roy Grooms waited outside the house in which Cox was living for the purpose of killing Jerry Richardson, who was in the house with Cox. The plan to kill Mr. Richardson that night was aborted when Mr. Richardson came out of the house and drove away before the three men could get close enough to kill him.

On the night of 12 July 1986 Willis and Owens waited outside the house until Jerry Richardson left it at approximately 12:00 midnight. Cox came out with Mr. Richardson and stood on the porch as he drove down the driveway. Mr. Richardson left his automobile and opened the gate. He then drove through the gate and left his automobile to close the gate. At this time, Willis, who had been hiding in the bushes, attacked Mr. Richardson and beat him to death with a crowbar. When Willis started to attack him, Mr. Richardson called Cox who was on the front porch of the house. She turned and walked into the house.

The jury found both defendants guilty and recommended they be put to death. From a sentence imposing the death penalty in both cases, the defendants appealed to this Court.

Lacy H. Thornburg, Attorney General, by Doris J. Holton, Assistant Attorney General, and Joan H. Byers, Special Deputy Attorney General, for the State.

William L. Davis, III and Donald W. Bullard for defendant-appellant James Earl Willis.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, Benjamin S. Sendor, Special Assistant to the Director, North Carolina Death Penalty Resource Center, for defendant-appellant Donna Sue Cox.

WEBB, Justice.

[1] The defendant Willis' first assignment of error deals with a pre-trial motion. Willis made a motion to prohibit the State from exercising peremptory challenges to jurors "based on group bias." The defendant contended he was an Indian which made him a member of a cognizable racial group and entitled him to object to peremptory challenges to jurors on racial grounds under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

A hearing was held on Willis' motion. He testified that his father was white and his mother was an Indian. His birth certificate showed he was white. His driver's license and school records also showed him to be white but he testified these notations were taken from his birth certificate.

At the end of the hearing, the court made the following finding, "[t]his motion is probably premature at this time . . . I will just make this ruling. I cannot find that the defendant is a member of a cognizable racial minority[.]" The court denied Willis' motion.

The defendant Willis says that there was error in the conduct of the voir dire hearing because the court sustained the objections of the State to his testimony in regard to the race with which he principally associated, of which race he considered himself to be, and some of the forms and applications he had filed which showed his race.

Assuming it was error to sustain the objections to this testimony by defendant Willis and that it was error for the court to hold that it could not find Willis was a member of a cognizable minority, we cannot hold this was prejudicial error. The State exercised nine peremptory challenges to which Willis objected. The record does not show the race of the juror as to any of these challenges. An appellant must make a record which shows the race of a challenged juror in order to show purposeful discrimination. *State v. Mitchell*, 321 N.C. 650, 365 S.E.2d 554 (1988). No such showing has been made in this case. No prejudicial error can be shown for rulings at the hearings on the motion to bar the exercise of

peremptory challenges on racial grounds. This assignment of error is overruled.

[2] The defendant Willis next assigns error to the denial of his motion to compel the State to disclose any plea bargains made by any of his co-defendants or accomplices. N.C.G.S. § 15A-1054(c) and the Fourteenth Amendment to the Constitution of the United States require that any plea bargain with a person who is to testify against a defendant be disclosed to the defendant. *Giglio v. United States*, 405 U.S. 150, 31 L. Ed. 2d 104 (1972).

In this case there is nothing in the record to indicate that a plea bargain had been made by any witness against the defendants. Each of the co-defendants and accomplices who testified said he had not entered into a plea bargain. It was not error to deny this motion because there was no showing of a plea bargain. This assignment of error is overruled.

[3] The defendant Willis assigns error to the denial of his motion to dismiss the charge against him for a violation of his right to a speedy trial under the Speedy Trial Act, N.C.G.S. § 15A-701, and a violation of his right to a speedy trial under the Sixth and Fourteenth Amendments to the Constitution of the United States. The Speedy Trial Act applies to this case although it was repealed after the case was tried. *See State v. Coker*, 325 N.C. 686, 386 S.E.2d 196 (1989). The Speedy Trial Act required that the defendant be tried within 120 days of the date the defendant was arrested, served with criminal process, waived indictment or was indicted, whichever occurred last, unless that time was extended by certain specified events. Among those events is the delay from the time a pretrial motion was made until a judge made a final ruling on the motion. *See State v. Kivett*, 321 N.C. 404, 364 S.E.2d 404 (1988).

In this case, the record shows the defendant made a motion for discovery on 27 August 1986, which was prior to the date the bill of indictment was returned on 29 September 1986. The motion was not heard until 2 September 1987. At that time, the defendant's counsel informed the court that discovery had been completed three or four weeks earlier. We held in *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984), that when a motion, which tolls the running of the time under the Speedy Trial Act, is made before the bill of indictment is returned, the excluded time begins when the indictment is returned. In this case, the excluded period began on 29 September 1986 and ran at least until discovery was

completed which was three or four weeks before 2 September 1987. The trial commenced on 28 September 1987 which was within the 120 day period as required by the Speedy Trial Act.

[4] We also hold that the defendant Willis' right to a speedy trial under the Sixth and Fourteenth Amendments to the Constitution of the United States was not violated. In determining whether a delay in a trial violates the Sixth Amendment, interrelated factors which must be examined are: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay. *State v. McKoy*, 294 N.C. 134, 240 S.E.2d 383 (1978); *State v. Smith*, 289 N.C. 143, 221 S.E.2d 247 (1976); *State v. Jackson*, 287 N.C. 470, 215 S.E.2d 123 (1975). The length of the delay is not by itself the determining factor. In this case, the record shows discovery was not complete until August 1987 and the trial was commenced in September. There is not an intimation that the delay was oppressive to the defendant or that he was prejudiced by the delay. His Sixth Amendment right to a speedy trial was not violated. This assignment of error is overruled.

[5] In his next assignment of error, the defendant Willis contends he was unduly restricted in his voir dire examination of the jury. Two of the prospective jurors stated unequivocally that they could under no circumstances vote for the death penalty. The defendant's attorney then attempted to rehabilitate these two jurors by asking whether they could apply the law as given to them by the judge. The court sustained objections to these questions and allowed the State's challenge for cause to the two prospective jurors. There is nothing in the record to indicate that either of the two excused jurors could have given different answers if questioned further as to their inabilities to vote for the death penalty. The court did not abuse its discretion when it sustained the objections to further questioning and allowed the challenges for cause. *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990).

[6] One of the prospective jurors stated that because he knew the defendant Willis "so well" the State would have to satisfy him beyond a shadow of a doubt before he would vote to find Willis guilty. He said he knew the difference between beyond a shadow of a doubt and beyond a reasonable doubt which is that

"one [was] less than the other." The court then sustained an objection to a question by Willis' attorney as to whether the juror could apply the law as given to him by the court and allowed the State's challenge for cause. In this we find no error. It was not an abuse of discretion for the court to stop the questioning of this juror and excuse him after he had answered as he did. *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987).

[7] Finally, defendant Willis says it was error to sustain an objection to the question, "[h]ow do you feel about a life sentence as opposed to a death sentence in a case where a person is convicted of first degree murder?" The juror had previously stated that she was not opposed to the death penalty, but she did not think the death penalty was necessarily appropriate in every case in which a defendant was convicted of first degree murder. In light of this answer, the defendant should have been able to get what information he needed although the objection was sustained to his later question. This assignment of error is overruled.

In his next assignment of error, defendant Willis argues that two witnesses were allowed to testify as to statements that nontestifying persons made to them which incriminated him in violation of the rule of *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968).

Tony Owens testified for the State that approximately one week before Jerry Richardson was killed, he was at a motel in Kure Beach. The defendant Willis was with him, as was Michael Johnson and the defendant Cox. Cox told the three men they would have to leave because Jerry Richardson was coming. They left and went to a motel in Wilmington. Mr. Owens testified that he, the defendant Willis and a woman named Tracie Phillips returned to the motel in Kure Beach. The defendant Cox was there and the four of them made plans to kill Jerry Richardson. While they were out of the presence of the defendant Willis, Cox asked Owens if he thought Willis loved her and what would Willis think if she were pregnant. Owens told Cox he thought Willis loved her and would be happy if she were pregnant. Owens testified further that he and Cox then went into a room at the motel with Willis and Tracie Phillips and the four of them discussed how they would divide Mr. Richardson's jewelry after they had killed him. Cox said she wanted his most expensive ring and one other ring. The four of them also talked about what they would do with the money

they expected Mr. Richardson would be carrying. They planned to use it to deal in drugs. Cox said, "[t]here's good money in cocaine."

Owens also testified that the four of them left Kure Beach and went to Cox's home in Robeson County where she told them that Richardson would call her that day and would be upset because she would not be at home. The four of them then went to a field where they drank vodka and smoked marijuana. While they were in the field Cox said, "[w]hat are we going to do about Jerry tomorrow night?" Willis replied, "[y]ou do your part and get him drunk and I'll take care of the rest."

Roy Grooms, who was a co-defendant, testified for the State that he had agreed with the defendant Willis to help him kill Jerry Richardson. During his testimony, he said he was with Cox and Willis on one occasion when Cox said Mr. Richardson had beaten her. He testified that Willis said, "[j]ust wait, I'll kick his God damn ass[,]" to which Cox replied, "[y]ou had a chance to do that while he had me on the bed, choking me." Grooms also testified that Cox told him that Mr. Richardson "has it fixed" so that in the event he was killed in a wreck "or something" that she would have the house she was living in and a certain sum of money.

Grooms testified further that on one occasion when he was in the company of Willis and Cox when Willis asked Cox whether Mr. Richardson was coming back to the house and she replied that Mr. Richardson was supposed to call her and let her know whether he would meet her at the house or in Fayetteville. Grooms testified that on another occasion Cox was talking on the telephone and when she finished Willis said, "[w]hat are you doing, telling her our business?" to which Cox relied, "[m]an, she's cool. She ain't going to say anything."

Grooms also testified that after the first aborted attempt to kill Mr. Richardson he entered Cox's home with Willis and Cox said, "[m]an, after [I] got him drunk and thinking something was going to happen, and you all don't do nothing," to which Willis replied, "[d]on't worry, Baby, it will get done." Finally, Grooms testified that on one occasion he saw Tracie Phillips who told him Mr. Richardson had put her out of Cox's house because he had caught Willis and Tony Owens at the house.

Bruton holds that it is a violation of a defendant's rights under the Sixth Amendment of the Constitution of the United States to introduce into evidence a confession of a nontestifying co-defendant which implicates the defendant. The defendant contends that the testimony we have recited violates this rule. The holding of *Bruton* is based on the right of a litigant to confront the witnesses against him. Consequently, if testimony is admitted under the hearsay rule, or as an exception to it, there is no right of confrontation and *Bruton* does not prohibit the use of such testimony. *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977). It is with these principles in mind that we examine this assignment of error.

Some of the testimony to which the defendant Willis takes exception does not implicate him. The testimony of Owens that Cox told Willis, Michael Johnson and Owens they would have to leave the motel because Mr. Richardson was coming to the motel does not implicate defendant Willis in the killing of Mr. Richardson. Neither does the testimony of Owens that Cox asked him whether he thought Willis loved her and whether Willis would be happy if she were pregnant, nor does his testimony that Cox said Mr. Richardson would be upset if she was not at home implicate the defendant Willis. The testimony of Owens that Cox told him she was to have the house and a certain sum of money if Richardson was killed did not implicate Willis. Owens' testimony that Cox told Willis Mr. Richardson would call to tell her whether to meet him at the house or in Fayetteville and his testimony that Tracie Phillips told him Mr. Richardson had put her out of the house did not implicate Willis. This testimony was not barred by *Bruton*.

[8] In *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828, we held that when a statement is made in a person's presence in such circumstances that the person would be naturally expected to deny it if it were not true, the statement is admissible as an implied admission and is not barred by *Bruton*. Under this rule, the testimony of Mr. Owens was admissible as to what Cox said in the presence of Willis in regard to dividing the jewelry and money after Mr. Richardson had been killed. Under the rule, the testimony of Grooms was admissible that Cox said in the presence of Willis that Willis had had a chance to get Richardson when Richardson was beating her and not to worry about a friend's talking because the friend was "cool." Defendant Willis invited these statements and did not deny them when they were made.

[9] If the State establishes a prima facie case of a conspiracy to commit a crime independently of the declarations sought to be admitted, a statement by a co-conspirator during the course and in furtherance of the conspiracy is admissible and not barred by *Bruton*. *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). N.C.G.S. § 8C-1, Rule 801(d)(e) (1988). In this case, there was ample evidence, independent of the statements to which Willis now takes exception, of an agreement between Cox and Willis to kill Mr. Richardson. The testimony of Owens that he heard Willis say, "[y]ou do your part and . . . I'll take care of the rest[,]" as well as the testimony by Grooms that after Cox had complained when the first attempt at killing Mr. Richardson had aborted that Willis said, "[d]on't worry, Baby, it will get done[,]" were admissible under this rule. This assignment of error is overruled.

[10] The defendant Willis next assigns error to the admission of testimony by Tony Owens that on one occasion he left Cox's home with Willis and went to the courthouse in Lumberton to answer a charge of breaking or entering and on another occasion he went with Willis to engage in a fight. This testimony was not relevant to any issue in this case except the defendant Willis' character to show that he had a propensity for bad acts and acted in conformity therewith in killing Mr. Richardson. It should not have been admitted. *State v. Cashwell*, 322 N.C. 574, 369 S.E.2d 566 (1988). N.C.G.S. § 8C-1, Rule 404(b) (1988). Although it was error to admit this testimony, we hold it was harmless. In light of the strong substantive evidence against the defendant Willis, as well as other evidence of bad acts including the ingestion of illegal drugs, we cannot hold that the result would have been different had this testimony been excluded. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981); N.C.G.S. § 15A-1443 (1988). This assignment of error is overruled.

[11] The defendant Willis next assigns error to what he contends was an unconstitutional restriction on his right to cross-examine three witnesses. When Tony Owens was testifying, Willis' attorney asked him if the officers had told him during the investigation that it was Willis they wanted. The court sustained the State's objection to this question and Willis says this is error. Later in the cross-examination, the following colloquy occurred:

Q. You have been told that it's James Willis we want on this case and not you, not Roy Grooms; haven't you been told that, sir?

A. I was told they wanted to try the person who killed the man.

Q. Answer my question if you would, sir. Weren't you told by someone that this is the man we want? We don't want you, we want him.

A. That is correct.

Any error there may have been in sustaining the objection to this question on cross-examination was cured when the witness later answered the same question. *State v. Matthews*, 299 N.C. 284, 261 S.E.2d 872 (1980).

[12] When Roy Grooms was testifying, the following colloquy occurred on cross-examination:

Q. Mr. Grooms, are you guilty of murder in the first degree of Jerry Richardson?

A. I'm guilty of something. I was there on the Wednesday night. I helped dispose of the body, but I did not kill Jerry Richardson, and I was not there when he was killed.

Q. Then I ask you again, sir: Are you guilty of—

MR. BRITT: Object. He just answered it.

THE COURT: Sustained.

This defendant Willis contends it was error to sustain the objection to this question. The question was repetitious. It was within the discretion of the judge to put this restriction on the cross-examination of Grooms. *State v. Satterfield*, 300 N.C. 621, 268 S.E.2d 510 (1980).

Steven Barnhill, who was charged as accessory after the fact to the murder, testified for the State. On cross-examination, the following colloquy occurred:

Q. So no one forced you to participate in any events on July 12, 1986; did they?

A. Well, I was scared.

Q. You were scared?

A. Yes, sir.

Q. Now,—well, did you tell your lawyer you were scared?

A. Yes, sir.

Q. Did your lawyer tell you that maybe [sic] a defense?

MR. BRITT: Object to that, now.

THE COURT: Sustained.

MR. BRITT: Move to strike.

THE COURT: Motion to strike allowed.

The defendant has not said how he was prejudiced by the sustaining of this objection and we can see no prejudice by it. This assignment of error is overruled.

[13] The defendant Willis next assigns error to the argument of the district attorney to the jury. At one point the district attorney argued, "the law looks at it in an enlarged sort of view and says that malice is merely the doing of a wrongful act without just cause or excuse, and when a person dies at the business end of a deadly weapon you, the jury, may infer that." The defendant Willis says this is a misstatement of the law. This argument is not an incorrect statement of the law. *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982).

[14] The defendant Willis contends it was error for the district attorney to argue as follows:

I wanted to go through that because I didn't want you to get back there in that jury room and get misguided in your deliberations.

. . . .

Now there's a legal tactic in this lawsuit. . . .

And, indeed, you have seen one here, Ladies and Gentlemen of the Jury, as old as men have been arguing and women have been arguing before bars of justice, and it goes something like this—it's a good technique for defending a murder case: Put somebody else on trial if you can.

Have you sensed a little bit of that in the cross examination here, Ladies and Gentlemen of the Jury?

The defendant Willis says this argument bore "directly on the credibility and the effective assistance of defendant's counsel." It appears from the record that one tactic of Willis was to shift the blame for the killing to his co-defendants. The district attorney could properly comment on this tactic.

[15] At one point the district attorney argued, "when you try the devil, you have to go to hell to find your witnesses." Defendant Willis says it was prejudicial error to characterize him as the devil. We do not believe the district attorney was characterizing Willis as the devil. He used this phrase to illustrate the type of witnesses which were available in a case such as this one.

[16] At one point the district attorney argued as follows:

> Did you notice how the State was so careful in handling the evidence to show you, even though it got very boring from time to time. . . .
>
> Hey, everybody knows that it is boring, but you are entitled to know that that evidence was handled properly and you are entitled to know that the evidence that came into this case is proper evidence taken in this case and properly investigated and properly assessed up in the State Bureau of Investigation Laboratory, and the State has done that for you so that there will be no reasonable doubt of any kind—in this case.

The defendant Willis says this was an improper expression of the district attorney's opinion on the evidence. We believe it is more properly interpreted as an argument that the State had been careful in preserving the evidence and the jury should believe it.

[17] The district attorney at one point argued, "[t]he only practical one in the whole bunch seems to be the little sixteen year old girl, Tracie [Phillips], who says—'[w]e [will] never get the blood out of the cracks [of the floor].' " The defendant Willis says Tracie Phillips did not testify and there is no evidence in the record to support this argument. There was evidence that while discussing how to kill Mr. Richardson, it was suggested that Willis kill him while he was sitting on a sofa in Cox's living room. Tracie Phillips said that if Mr. Richardson was killed in Cox's home they would never get the blood out of the cracks in the floor. This was evidence in the record which would support this argument. This assignment of error is overruled.

[18] The defendant Willis next assigns error to the court's charge, which he says amounted to a comment on the evidence. After correctly charging as to what the State must prove to convict the defendant Willis of murder by lying in wait, the court charged as follows as to Cox:

> So, I charge that for you to find the defendant, Donna Sue Cox, guilty of first degree murder, perpetrated by lying in wait, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant, Donna Sue Cox, acted in concert with James Earl Willis, who lay in wait for Jerry Richardson, waiting and watching for Jerry Richardson in secret ambush.
>
> And second, that the defendant, Donna Sue Cox, was acting in concert with James Earl Willis who intentionally assaulted Jerry Richardson.
>
> And third, that the defendant, Donna Sue Cox, was actually or constructively present when this occurred.
>
> And fourth, that the act of James Earl Willis was a proximate cause of Jerry Richardson's death.

The defendant Willis says this instruction intimated to the jury that the court felt Willis was guilty. We do not believe this is a proper inference from this instruction. This charge makes it clear that the State must prove beyond a reasonable doubt that Willis lay in wait for Mr. Richardson and assaulted Mr. Richardson proximately causing his death and that Cox acted in concert with Willis while he was doing so. This assignment of error is overruled.

[19] The defendant Cox first assigns error to an incident that occurred during the trial. The transcript shows the following occurred:

> THE COURT: Okay. I want the jurors taken to the jury room.
>
> (The following was had outside the presence of the Jury:)
>
> THE COURT: Okay. It has been called to my attention that one of the family members of one of the parties may have talked to one of the jurors. I inquired of the juror whether that in fact took place. The juror denied it.

I don't know whether it took place or not, but nobody is to talk to any juror about anything. If this is violated, the offender could be subject to contempt of Court. I don't want to hear about this again.

All right.

The defendant Cox says that the court's action constituted prejudicial error in two respects. She says first that the court's inquiry was not adequate to resolve the question of whether there had been an improper contact with a juror and second that it was error for the court to talk to a juror when she was not present.

In the event of some contact with a juror it is the duty of the trial judge to determine whether such contact resulted in substantial and irreparable prejudice to the defendant. It is within the discretion of the trial judge as to what inquiry to make. *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984), *disc. rev. denied*, 313 N.C. 335, 327 S.E.2d 894 (1985); *State v. Selph*, 33 N.C. App. 157, 234 S.E.2d 453 (1977); *State v. Drake*, 31 N.C. App. 187, 229 S.E.2d 51 (1976). In this case, the judge asked the juror as to whether any contact had been made and was satisfied with the answer. The defendant Cox did not request any further inquiry or make a motion for a mistrial pursuant to N.C.G.S. § 15A-1061. Under these circumstances, we cannot hold it was prejudicial error for the court not to make further inquiry.

[20] As to the court's communicating with a juror out of her presence and out of the presence of her attorneys, this was error. *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991); *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). The question is whether the State has shown this error was harmless beyond a reasonable doubt. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 331 N.C. 746, 417 S.E.2d 227 (1992); *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991). We hold that the State has so shown. This case is not like *McCarver* and *Smith*, in which there was no way of telling what happened out of the defendant's presence. The judge put it in the record that he had inquired of a juror whether a family member of one of the parties had spoken to him. The juror said that no family member had done so. There is nothing in the record to show that there was any other communication with a juror. We hold this error could not have contributed to the result

of the trial and was harmless beyond a reasonable doubt. This assignment of error is overruled.

[21] The defendant Cox also assigns error to four other occasions in which she said the trial was conducted without her presence. The record shows that on one occasion when the jury was being selected, she and one of her attorneys left the courtroom. During the time she was absent, the district attorney was conducting an examination of the prospective jurors. He asked questions of three different persons. The questions dealt with the residences, occupations, church memberships, reading habits and the preferences of television programs of the three persons. The district attorney did not excuse any jurors while Cox was absent from the courtroom. We do not believe what occurred during her brief absence could have contributed to the result of the trial.

The record shows that on one occasion when a pathologist testifying for the State was identifying photographs of Jerry Richardson's body, Cox was not in the courtroom but returned before the pathologist's testimony was completed. What occurred during this short absence could not have affected the outcome of the trial.

[22] While a detective with the Sheriff's Department was testifying for the State, the court placed the following in the record:

> DURING THE TESTIMONY OF DETECTIVE GARTH LOCKLEAR CONCERNING THE STATEMENT OF STEVE BARNHILL, THE DEFENDANT DONNA SUE COX BECAME VISIBLY UPSET AND STARTED CRYING. HER ATTORNEYS ASKED TO APPROACH THE BENCH—THIS WAS GRANTED. THEY ASKED THAT BECAUSE OF HER UPSET CONDITION COULD SHE (THE DEFENDANT DONNA SUE COX) BE ALLOWED TO LEAVE THE COURTROOM UNTIL DETECTIVE LOCKLEAR HAD COMPLETED THE STATEMENT OF STEVE BARNHILL. THE COURT INQUIRED IF SHE UNDERSTOOD THAT SHE HAD A RIGHT TO BE PRESENT AND THEN IF HER REQUEST TO LEAVE WAS HONORED WE WOULD STILL CONTINUE. THEY SAID SHE UNDERSTOOD.
>
> BASED ON THIS, THE COURT ALLOWED HER TO LEAVE THE COURTROOM, WHICH SHE DID. DETECTIVE LOCKLEAR WAS ALLOWED TO CONTINUE READING THE STATEMENT OF STEVE BARNHILL.

AT THE CONCLUSION OF THAT STATEMENT THE COURT HAD THE DEFENDANT, DONNA SUE COX, RETURNED TO THE COURTROOM[.]

The statement of Steve Barnhill which the detective read into the record did not implicate Cox. It could not reasonably have affected the outcome of the trial. Any error was harmless beyond a reasonable doubt. *See State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991). This assignment of error is overruled.

[23] The defendant Donna Sue Cox assigns error to the court's submission to the jury of the charge of murder on the theory she was acting in concert with Willis at the time of the killing. She says that the evidence shows she was an accessory before the fact. She argues she was not actually or constructively present when the killing took place and that the evidence did not show that she acted together with Willis to kill Mr. Richardson on the night of 12 July 1986. She contends that for these reasons, there was not enough evidence to submit to the jury that she was acting in concert with Willis.

The defendant says that although the record does not show how far she was from where the killing took place, she was at least sixty-five feet away and inside the fence which enclosed her yard. The evidence does show that she was able to see the attack on Mr. Richardson and he was close enough to her to call to her for help. When he called, she went into the house. This is evidence from which the jury could find she was actually present.

If the jury did not find Cox was actually present, the evidence showed she was constructively present. A person is constructively present during the commission of a crime if he or she is close enough to be able to render assistance if needed and to encourage the actual perpetration of the crime. *State v. Price*, 280 N.C. 154, 184 S.E.2d 866 (1971); *State v. Gregory*, 37 N.C. App. 693, 247 S.E.2d 19 (1978). If the jury believed the evidence in this case, it should have found Donna Sue Cox was at least constructively present when the killing occurred.

The defendant Cox also contends the evidence does not show she was acting in concert with Willis at the time the killing occurred on 12 July 1986. She concedes she had agreed with Willis and

others on 6 July 1986 to kill Mr. Richardson. She says she intended that Mr. Richardson be killed on 9 July 1986. When the effort to kill him was aborted on that date, she encouraged Willis and another person to kill Mr. Richardson on 12 July 1986. She says the evidence shows that she discovered Mr. Richardson did not have any money with him on 12 July 1986 and she tried to give a signal to Willis not to kill Mr. Richardson on that date. Although Cox's testimony was that she did not want Mr. Richardson killed on 12 July 1986 because he was not carrying enough money on that date, we hold that the jury could find from all the evidence that Cox had agreed with Willis and some other persons that Mr. Richardson would be killed and she was actually or constructively present when the killing occurred, ready to lend whatever aid was necessary. This would be acting in concert. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). This assignment of error is overruled.

[24] Defendant Cox also assigns error to the failure of the court to submit to the jury as a possible verdict accessory before the fact of murder. N.C.G.S. § 14-5.2 provides:

> All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony. However, if 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.

Defendant Cox contends that there was evidence from which the jury could find she was an accessory before the fact of first degree murder and the evidence against her consisted of the uncorroborated testimony of principals or accessories. If the jury had so found, she would have escaped the death penalty.

> An accessory before the fact is one who is absent from the scene when the crime was committed but who participated in the planning or contemplation of the crime in such a way as to "counsel, procure, or command" the principal(s) to commit it. Thus, the primary distinction between a principal in the second degree and an accessory before the fact is that the

latter was not actually or constructively present when the crime was in fact committed.

State v. Small, 301 N.C. 407, 413, 272 S.E.2d 128, 132 (1980) (citations omitted). The crime of accessory before the fact to first degree murder is a lesser included offense of first degree murder. *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977). If there is evidence showing the commission of a lesser included offense, the judge must instruct on this offense. If all the evidence shows the commission of the greater offense, the court should not charge on the lesser included offense simply because the jury might not believe some of the evidence. *State v. Clark*, 324 N.C. 146, 377 S.E.2d 54 (1989).

In this case, all the evidence showed that when the killing occurred, the defendant Cox was on the front porch of her house within sight of the killing, which was done at the end of her driveway. If the jury believed this evidence, it would have to find the defendant Cox was at least constructively present as we have defined it. *See State v. Reese*, 319 N.C. 110, 353 S.E.2d 352; *State v. Ruffin*, 90 N.C. App. 712, 370 S.E.2d 279 (1988); *State v. Hockett*, 69 N.C. App. 495, 317 S.E.2d 416 (1984); *State v. Pryor*, 59 N.C. App. 1, 295 S.E.2d 610 (1982); *State v. Torain*, 20 N.C. App. 69, 200 S.E.2d 665 (1973), *cert. denied*, 284 N.C. 622, 202 S.E.2d 278 (1974). It was not error to decline to submit accessory before the fact as a lesser included offense. This assignment of error is overruled.

[25] The defendant Cox next assigns error to a portion of the charge which she says lessened the State's burden of proof as to her. She did not except at the trial to this portion of the charge, but she contends it was plain error under the standard of *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

At one point the court charged as follows:

> In order to obtain a conviction under this principle, the principle of acting in concert, the State need not prove that the defendant, Donna Sue Cox, committed any acts which constitute an element of the crime of first degree murder by lying in wait.
>
> *Thus, the burden of proof which the State must meet to obtain a conviction under the principle of acting in concert*

is less than its burden to prove that a defendant actually committed every element of the offense charged. (Emphasis added.)

The defendant Cox correctly says the burden of proof is no less for a person charged for acting in concert than for any other defendant. She says that the error was compounded in this case because the district attorney argued to the jury this incorrect statement of the law. The italicized portion of the charge was taken from our opinion in *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981).

Although the statement was erroneous standing alone, we do not believe it misled the jury in this case. The statement followed a sentence in which the court correctly charged the jury that to convict the defendant Cox it was not necessary for the State to prove she did all the things which constitute elements of murder. The next sentence began with the word "[t]hus." This connected the italicized sentence with the preceding sentence and we believe made it clear that the "burden of proof" to which the court referred was not having the burden of proving the defendant Cox did certain things. This language did not mean that the State did not have to prove the elements involving the defendant Cox beyond a reasonable doubt. The court correctly instructed the jury as to the State's burden of proof in the case involving Cox at several other places in the charge. This assignment of error is overruled.

[26] The defendant Cox next assigns error to a portion of the charge dealing with constructive presence. The court charged as follows:

> So, even if the State has not satisfied you beyond a reasonable doubt that the defendant, Donna Sue Cox, was actually physically present at the scene when the crime was committed, if the State has satisfied you beyond a reasonable doubt that the defendant, Donna Sue Cox, shared the criminal purpose of James Earl Willis, and to James Earl Willis' knowledge, she was aiding or encouraging him, *or was in [a] position to aid or encourage him at the time the crime was committed*, then this is constructive presence. (Emphasis added.)

The defendant says that constructive presence requires that the defendant intends to help or encourage the commission of the crime, that such intent was conveyed to the one who perpetrates the crime and that the perpetrator believes that the defendant intended to help or encourage him. *State v. Gilmore*, 330 N.C. 167, 409

S.E.2d 888 (1991); *State v. Hunt*, 323 N.C. 407, 373 S.E.2d 400 (1988), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 330 N.C. 501, 411 S.E.2d 806 (1992). The defendant Cox says the italicized portion of the charge allowed the jury to find her constructively present although the jury did not find she intended to aid or encourage James Willis or that she conveyed that intent to him, or that he was aware of that intent. We do not agree with this argument. It seems clear to us that the court told the jury that it would have to find that Cox shared the criminal intent with Willis and Willis knew it. The jury was also instructed that it must find Willis either knew that Cox was aiding or encouraging him or was in a position to aid or encourage him when the killing occurred. This would make her constructively present and acting in concert with Willis. *State v. Price*, 280 N.C. 154, 184 S.E.2d 866. This assignment of error is overruled.

[27] The defendant Cox next assigns error to a portion of the district attorney's argument. The evidence showed that in the afternoon before the evening Mr. Richardson was killed, the defendant was driving an automobile followed by Mr. Richardson in his automobile. She was met by an automobile occupied by Willis and Tony Owens. She blew her horn and offered evidence to show she did this as a signal to Willis and Owens that they should not kill Mr. Richardson that night because he was not carrying a sufficient sum of money.

During his argument to the jury, the district attorney argued that when Cox blew her horn, it was not an attempt to stop the killing that night, but rather it was a signal to Willis and Owens to proceed with the killing. Defendant says all the evidence showed the blowing of the horn was to postpone the killing from that night and the district attorney argued something that was contrary to the evidence. *See State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975).

We find no error in this argument by the district attorney. It is undisputed that defendant Cox blew her horn at Willis and Owens as they were approaching her. The district attorney could argue reasonable inferences from the evidence. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). Although defendant Cox offered evidence as to her intent when she sounded the horn, the district attorney could argue for a different inference. If defendant Cox was trying to save Mr. Richardson's life that night, she was not trying very hard. It is a reasonable inference that her intent was

as argued by the district attorney. This assignment of error is overruled.

The defendant Cox argues under her next assignment of error that the district attorney, through improper questions asked during the jury selection, erroneously conditioned the jury to return the death penalty. She says the district attorney accomplished this by asking improper questions in five different ways.

The defendant Cox says first that by telling the jurors repeatedly that the death penalty was the "crux" or "central issue" in jury selection, the district attorney conveyed to them the impression that her guilt was foreordained. The second way Cox says the district attorney improperly conditioned the jury is based on a question he asked the jury and his follow up on this question. The district attorney asked each juror a question substantially as follows:

> Mr. Rich, how do you feel about the death penalty, sir, are you opposed to it or you feel like it's a necessary law?

He then told the jurors that in answering the question they should not equivocate, but should answer the questions "yes" or "no" because neither the State nor the defendants could act on the answers if the answers were not clear. The defendant Cox contends that these statements by the prosecution had the effect of forcing the jurors into pigeonholes. She says this is so because by forcing jurors who might have different shades of feeling about the death penalty to give categorical answers, the district attorney drove them away from their true feelings and into polarized positions. Cox says those who answered they were opposed to the death penalty very naturally fell prey to the leading questions equating the opposition to the death penalty as an inability under any circumstances to vote for the death penalty. Cox says those who were placed in the pro-death penalty pigeonhole may well have altered a feeling of only moderate support for the death penalty to strong support for it.

The third way in which defendant Cox says the district attorney improperly prejudiced the jury was by his repeated use of the word "necessary" in his questions in regard to the death penalty. Cox says that was to convey to the jury the message that the death penalty was necessary to deter crime, and this

is not proper to convey to the jury. *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

The fourth way in which the defendant Cox contends the district attorney improperly prejudiced the jury was through a question he repeatedly asked the jury in regard to imposing the death penalty. The question was "[d]o you feel that you could be part of the legal machinery which might bring it about in this particular case?" The defendant Cox says this minimized the jury's part in imposing the death penalty by saying it was a part of a machine in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985) and *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979).

The fifth way in which the defendant Cox contends the district attorney improperly prejudiced the jurors was in blurring the distinction between the two defendants. She says that forty-four times the district attorney asked a question substantially as follows:

> So I take it you are saying that, first of all, that if the State satisfies you beyond a reasonable doubt that *one or both* of these defendants is guilty of murder in the first degree you could vote to find *them* guilty; is that correct? (Emphasis added.)

The defendant Cox says this question, which was phrased so as to say to the jury that if it was satisfied that one of the defendants was guilty it should find both defendants guilty, was improper and completed the district attorney's plan to turn a process intended for discovery of bias into one for the creation of bias.

In determining the questions raised under this assignment of error, we are not so naive as not to understand that during a jury selection a prosecuting attorney attempts to condition a jury to return a verdict of guilty and, if it is a capital case, to recommend the death penalty. On the other hand, defense attorneys attempt to condition jurors to return a verdict of not guilty and if there is a verdict of guilty in a capital trial, not to recommend the death penalty. A party may question prospective jurors to determine whether a challenge for cause exists and to determine whether to exercise a peremptory challenge. The overall purpose is to select an impartial jury. The regulation of the manner and extent of the inquiry rests largely in the trial court's discretion. *State v. Parks*, 324 N.C. 420, 378 S.E.2d 785 (1989); *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).

[28] We cannot find error in the questions and statements by the district attorney during jury selection. Although the question of the imposition of the death penalty did not arise until after the defendants had been found guilty, it was a very important part of the case and the State had a right to have jurors who could impose it. The State was entitled to let the jury know the imposition of the death penalty was an important part of the case and we cannot say that the use of the words "crux" and "central issue" caused the jury to feel a finding of guilt was foreordained.

[29] Nor can we say that the request by the district attorney to prospective jurors that they give unequivocal answers to questions was error. In determining whether a person should sit as a juror in a capital case, it is helpful for that person to answer questions in a precise manner. It is speculation that these statements forced the jurors into pigeonholes and made those who favored the death penalty more likely to vote to impose the death penalty.

We also cannot say that the question as to whether the jurors thought the death penalty was "necessary" conveyed to the jury the impression that the death penalty is a deterrent to crime. The question does not imply why the death penalty is necessary and the members of the jury might have different reasons for thinking it is necessary. We cannot speculate as to what each juror felt was the reason for the necessity or the lack of necessity for the death penalty.

[30] We also cannot hold that the district attorney minimized the importance of the jurors' roles in imposing the death penalty by asking them if they could be a part of the machinery that brought it about. There are several parts to the process of imposing the death penalty. The jury is one of them. To say that the jury is a part of the process does not minimize the importance of the jury.

[31] As to the district attorney's question asking the jurors whether, if they were convinced one or both was guilty, they would find them guilty, this was an improper question. Obviously, if the jury was satisfied that only one of the defendants was guilty it should find only that one guilty. However, we hold that this is not reversible error. The court correctly charged the jury that it would have to be satisfied beyond a reasonable doubt as to each defendant before it could find that defendant guilty. If the jury was influenced by the nuance in the district attorney's question, such influence was removed by the charge of the court. This case is distinguish-

able from *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988), in which we ordered a new trial because the court's charge could have been interpreted as instructing the jury to find both defendants guilty if it was satisfied beyond a reasonable doubt that one of them was guilty. In that case, the court gave an erroneous charge. In this case, the district attorney misstated the law. The court corrected this misstatement. This assignment of error is overruled.

[32] The defendants assign error and the State concedes there was error in the penalty phase of the trial in that the jury was instructed it must unanimously find a mitigating circumstance before it could consider it. *See 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). For this error, there must be a new sentencing hearing for both defendants.

Each of the defendants has made numerous other assignments of error. They consist of errors which the defendants say were committed during the sentencing hearing and may not recur at a new sentencing hearing, or issues which have been decided contrary to the defendants' contentions and they wish to preserve them. We do not discuss these assignments of error.

For the reasons stated in this opinion, we find no error in the guilt phases of the trials. For errors committed, we order new sentencing hearings for both defendants.

No error in guilt phase; new sentencing hearing.

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

MICHELLE K. HARRIS, THROUGH HER GUARDIAN *AD LITEM*, DAVID B. FREEDMAN, DAVID A. HARRIS, AND ELLEN E. HARRIS v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 305A91

(Filed 4 September 1992)

1. **Insurance § 527 (NCI4th)— underinsured highway vehicle—meaning of "applicable limits of liability"**

In determining whether a tortfeasor's vehicle is an "underinsured highway vehicle" within the meaning of N.C.G.S. § 20-279.21(b)(4), the "applicable limits of liability" referred to in the statute are those under the UIM coverage in the owner's policy. Therefore, the proper comparison is between the tortfeasor's liability coverage and plaintiff's UIM coverage rather than between the tortfeasor's liability coverage and plaintiff's liability coverage.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability under uninsured or underinsured motorist coverage of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

2. **Insurance § 528 (NCI4th)— underinsured vehicle—intrapolicy stacking of UIM coverages**

The language "applicable limits of liability" in N.C.G.S. § 20-279.21(b)(4) refers to all UIM limits available in a policy applicable to plaintiff's claim and allows the intrapolicy stacking of UIM coverages in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle." Therefore, the tortfeasor's vehicle qualified as an underinsured vehicle where plaintiff's aggregate UIM coverages exceed the aggregate liability of the tortfeasor.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability under uninsured or underinsured motorist coverage of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

3. Insurance § 528 (NCI4th) — intrapolicy stacking of UIM coverages — nonowner family member

The minor plaintiff, as a nonowner family member living in the same household as the named insured, is entitled to stack UIM coverages in her parents' policy in determining whether the tortfeasor's vehicle is underinsured. Intrapolicy stacking of UIM coverages is allowed when the injured party is a person insured of the first class.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability under uninsured or underinsured motorist coverage of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

4. Insurance § 529 (NCI4th) — intrapolicy stacking by nonowner — not excess insurance

Stacking multiple vehicles on one policy by a nonowner is not "excess" or "additional" coverage not subject to the compulsory provisions of the Financial Responsibility Act under N.C.G.S. § 20-279.21(g).

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability under uninsured or underinsured motorist coverage of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Justice MEYER dissenting.

Justice LAKE joins in this dissenting opinion.

Justice WEBB dissenting.

Justice LAKE joins in this dissenting opinion.

APPEAL by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 103 N.C. App. 101, 404 S.E.2d 499 (1991), affirming the entry of summary judgment for the plaintiff by *Long, J.*, at the 14 June 1990 Session of Superior Court, FORSYTH County. Heard in the Supreme Court 11 February 1992.

Womble Carlyle Sandridge & Rice, by Richard T. Rice and Clayton M. Custer, for plaintiff-appellees.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellant.

FRYE, Justice.

Defendant Nationwide Mutual Insurance Company (Nationwide) presents two distinct issues on this appeal: (1) whether the Court of Appeals erred in holding that intrapolicy stacking is permitted in determining an insurer's limit of liability when the injured party is the minor daughter of the named insured; and (2) whether the tortfeasor's vehicle in which the minor plaintiff was riding when injured was an "underinsured highway vehicle," even though the liability coverage on the vehicle was equal to the liability limit under the Nationwide policy issued to the minor's parents. As to the first issue, we hold that the Court of Appeals did not err. We answer the second question in the affirmative, thus agreeing with the implicit holding of both the trial court and Court of Appeals.

Plaintiff Michelle K. Harris, the minor daughter of plaintiffs David and Ellen Harris, was injured in an automobile accident while traveling as a passenger in a vehicle owned by George Wayne Faust and operated by his daughter, Mary Elizabeth Faust, on 25 September 1989. The Faust vehicle was insured under a State Farm Insurance Company policy having liability limits of $100,000/$300,000. Michelle's medical expenses alone exceeded $102,000. At the time of the accident, Michelle's parents owned three vehicles insured under a single policy issued by Nationwide. This policy provided uninsured and underinsured motorist (UM/UIM) coverage of $100,000 per person for each vehicle insured. Plaintiffs paid to defendant separate premiums on each vehicle for UM/UIM coverage.

Plaintiffs filed this action for declaratory judgment on 2 March 1990, requesting that the trial court determine whether Michelle was entitled to stack the UIM coverages of three separate vehicles covered under the single policy issued by Nationwide. Plaintiffs subsequently moved for judgment on the pleadings or, in the alternative, summary judgment. Nationwide also made a motion for summary judgment pursuant to N.C. R. Civ. P. 56(b). In a judgment dated 14 June 1990, the trial court granted plaintiffs' motion for summary judgment and denied Nationwide's motion. The trial court's judgment included the following significant "findings of fact":

2. That the coverage for the three vehicles listed in the insurance policy referred to in the Complaint and issued by the defendant to the plaintiffs David A. Harris and Ellen E. Harris can be stacked so as to provide underinsured motorist coverage in the amount of $300,000 for injuries and damages sustained by the plaintiffs arising out of the accident described in the Complaint, and that the underinsured motorist coverage available to Michelle Harris is identical to the coverage available to David A. Harris and Ellen E. Harris under the insurance policy issued by defendant;

3. That the defendant's limit of liability to the plaintiff shall be $300,000, less the primary coverage paid to the plaintiffs pursuant to N.C.G.S. § 20-279.21(b)(4).

The Court of Appeals affirmed the trial court's decision, with Judge Greene dissenting. *Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499 (1991). Nationwide appealed to this Court based on Judge Greene's dissent, and we granted its petition for discretionary review as to additional issues. *Harris v. Nationwide Mut. Ins. Co.*, 329 N.C. 788, 408 S.E.2d 521 (1991).

We address Nationwide's second issue first. Nationwide contends that the Faust vehicle in which the minor plaintiff was riding when injured was not an "underinsured highway vehicle" because the $100,000 per person liability limit on the Faust vehicle was equal to the per person liability/UIM limit of $100,000 in plaintiffs' Nationwide policy.[1] UIM coverage is deemed to apply when "all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance or use of the **underinsured highway vehicle** have been exhausted." N.C.G.S. § 20-279.21(b)(4) (1989) (emphasis added). Therefore, the determination of whether the tortfeasor's (Faust) vehicle is an underinsured highway vehicle is crucial in determining if UIM coverage is available under the Nationwide policy.

The threshhold question, then, is whether the tortfeasor's vehicle is an "underinsured highway vehicle" as the term is used in N.C.G.S. § 20-279.21(b)(4). An "underinsured highway vehicle" is defined as

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1. Under N.C.G.S. § 20-279.21(b)(4), as it existed at the time of the accident, the UIM limits in any given policy were identical to the liability limits. N.C.G.S. § 20-279.21 was amended by the General Assembly in 1991. 1991 N.C. Sess. Laws ch. 646, §§ 1-4. However, the amendments do not affect claims arising or litigation pending prior to the amendments. *Id.* § 4. Unless otherwise noted, any citation

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the **applicable limits of liability under the owner's policy** . . . .

N.C.G.S. § 20-279.21(b)(4) (1989) (emphasis added). In essence, defendant's second issue can be divided into two subissues: first, whether the proper comparison outlined in the statute above is between the tortfeasor's liability coverage and plaintiff's liability coverage or between the tortfeasor's liability coverage and the plaintiff's UIM coverage;[2] and second, if the proper comparison is to plaintiff's UIM coverage, whether the UIM coverage limits can be stacked to determine if the tortfeasor's vehicle is an "underinsured highway vehicle."

[1] The resolution of these subissues hinges upon the interpretation of the phrase "applicable limits of liability under the owner's policy." We note that this language is found in N.C.G.S. § 20-279.21(b)(4), which deals exclusively with underinsured motorist coverage. While it may be argued that "limits of liability" refers to the limits under the plaintiff's liability coverage,[3] we are convinced that the limits referred to are the limits of liability under plaintiff's UIM coverage. Following an automobile accident, a tortfeasor's liability coverage is called upon to compensate the injured plaintiff, who then turns to his own UIM coverage when the tortfeasor's liability coverage is exhausted. In this situation, the injured plaintiff's liability coverages are not applicable to the accident and a comparison to the plaintiff's liability coverage is inappropriate. Taken in context with the surrounding subsection on underinsured motorist coverage, the "liability limits" referred to are clearly those under the UIM coverage portion of the owners' policy. Therefore, the limits of liability in the instant case are the limits of liability under the UIM coverage portion of the minor plaintiff's parents' policy and not under the liability portion of their policy.

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to or discussion of N.C.G.S. § 20-279.21 in this opinion will be with respect to that version of the statute in effect at the time of the accident.

2. This same issue is before us in another case, *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652, *disc. rev. allowed*, 330 N.C. 193, 412 S.E.2d 52 (1991). Because this issue affects both of these cases, and is implicit in all UIM cases, we will decide it here.

3. This is North Carolina Farm Bureau Mutual Insurance Company's contention in *Amos v. N.C. Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652.

The Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is a "remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). A treatise on North Carolina automobile insurance law discusses the concept of UIM coverage and concludes that it "allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate the injured party for his full damages." J. Snyder, Jr., *North Carolina Automobile Insurance Law* § 30-1 (1988). Our interpretation of the statute is in accord with this approach.

Another noted treatise on automobile insurance has evaluated the various legislative definitions of an "underinsured motor vehicle" and has classified them in three categories which demonstrate the different approaches used by the various states for determining whether a tortfeasor is underinsured. 2 A. Widiss, *Uninsured and Underinsured Motorist Insurance* § 35.2 (2d ed. 1990). "There are three primary types of comparisons which are defined in these statutes: determinations based on comparisons of the *tortfeasor's liability insurance* (1) with the amount of *underinsured* motorist insurance, (2) with the amount of *uninsured* motorist insurance, or (3) with the *damages* or *injuries* sustained by the insured." *Id.* (emphases in original). Noticeably absent from these categories is any comparison of the tortfeasor's liability insurance with the amount of a plaintiff's liability insurance. We have found no authority which leads us to believe that the determination of whether a tortfeasor's vehicle is an "underinsured highway vehicle" requires a comparison between the tortfeasor's liability insurance and the plaintiff's liability coverage. "[T]he obligation to provide uninsured motorist coverage was tied to liability coverage to facilitate its purchase and to determine the persons who must be provided with uninsured motorist coverage, and not to provide insurers a means of limiting the coverage to situations in which liability coverage would be in effect." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 148-49, 400 S.E.2d 44, 50 (quoting *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 35-36, 294 N.W.2d 141, 151 (1980)), *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

[2] Having decided the proper comparison in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle," we now address the question of whether UIM coverages may be stacked

when making this determination. Anticipating this Court's rejection of a liability to liability comparison argument, Nationwide contends that, even under a liability to UIM coverage comparison, the automobile owned and operated by Faust (the tortfeasor) is not an "underinsured highway vehicle" as defined by N.C.G.S. § 20-279.21(b)(4). Nationwide argues that, as a threshold issue, plaintiffs must show that the limits of UIM coverage under their policy with Nationwide exceed the limits of liability coverage under Faust's policy with State Farm. Thus, Nationwide contends that the comparison between the tortfeasor's liability limit and the plaintiff's UIM limit must occur prior to the stacking of any UIM coverage. As such, Nationwide argues that in cases like the instant case, where the tortfeasor's liability coverage is equal to the plaintiff's UIM limit before stacking, the plaintiff fails to meet the "threshold" definition of an underinsured highway vehicle, and there is no underinsured motorist coverage to stack. We reject this contention.

When examining cases to determine whether insurance coverage is provided by a particular automobile insurance policy, careful attention must be given to the type of coverage, the terms of the policy, and the relevant statutory provisions. *Smith*, 328 N.C. at 142, 400 S.E.2d at 47. In the present case, the type of coverage sought by plaintiffs is UIM coverage. The policy in question is a personal automobile insurance policy issued to the parents of the minor plaintiff. This Nationwide policy includes UIM coverage, but Nationwide argues that the policy prohibits "stacking" in determining whether a vehicle is an "underinsured motor vehicle."

The Nationwide policy in question defines an underinsured motor vehicle in the "uninsured/underinsured motorists coverage" endorsement as follows:

> A land motor vehicle . . . of any type . . . [t]o which . . . the sum of the limits of liability bonds and insurance policies applicable at the time of the accident is:
>
> a. equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina; and
>
> b. less than the **limit of liability for this coverage.**

(Emphasis added.) Nationwide notes that the word "limit" in this definition is singular, and therefore argues that the policy refers to a singular limit. As such, Nationwide contends that "the singular limit of the policy with defendant ($100,000) must be greater than

the liability coverage of the tortfeasor in order for the tortfeasor's vehicle to qualify as underinsured." We recognize that our Court of Appeals has treated similar language in the medical payments provision of automobile insurance policies as prohibiting stacking of medical payments. *See, e.g., Tyler v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 713, 401 S.E.2d 80 (1991). Assuming, *arguendo*, that the provision in the Nationwide policy would prohibit stacking to determine the "limit of liability," we must then consider the statutory provisions relevant to this issue.

As discussed above, the statute provides that an "underinsured highway vehicle" is

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than **the applicable limits of liability under the owner's policy**.

N.C.G.S. § 20-279.21(b)(4) (emphasis added). The statute does not define "the applicable limits of liability under the owner's policy." While Nationwide interprets "the applicable limits of liability" as meaning a single limit of UIM coverage under the owner's policy, this language may also be interpreted to mean the sum of all UIM limits under the policy which are applicable to the particular claim.

When interpreting a statute, the cardinal principle is to ensure that the purpose of the legislature is accomplished. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). Accordingly, "a court must consider the act as a whole, weighing the language of the statute, its spirit, and that which the statute seeks to accomplish." *Shelton v. Morehead Memorial Hospital*, 318 N.C. 76, 82, 347 S.E.2d 824, 828 (1986). Also, "[i]t is presumed that the legislature acted in accordance with reason and common sense and that it did not intend an unjust or absurd result" when it enacted the particular legislation. *King v. Baldwin*, 276 N.C. 316, 325, 172 S.E.2d 12, 18 (1970) (citations omitted). Furthermore, "the statute's words should be given their natural and ordinary meaning unless the context requires them to be construed differently." *Shelton*, 318 N.C. at 82, 347 S.E.2d at 828.

Applying these rules to the language "applicable limits of liability," we are convinced that the "applicable limits" are the sum

of all UIM coverages provided in the Nationwide policy which are applicable to the plaintiff's claim. Initially, we note that the statute refers to "applicable limits of liability." Given the natural and ordinary meaning of the plural form of the word limit, we are convinced that, with reference to a single policy, "applicable limits" refers to all available UIM limits under the policy. Furthermore, we find that this result is consistent with our previous decision in *Sutton*. In *Sutton*, we held that stacking is required by the provisions of N.C.G.S. § 20-279.21(b)(4) when determining an insured's recovery under the UIM provisions of an automobile insurance policy. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763. To deny an insured access to the recovery approved in *Sutton* by prohibiting stacking of UIM coverages in determining whether the tortfeasor's vehicle is an "underinsured highway vehicle" would be inconsistent with the rationale of *Sutton* and the purpose of the Financial Responsibility Act.

Thus, we conclude that the language of N.C.G.S. § 20-279.21(b)(4) allows the stacking of an insured's UIM coverages in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle." The statute compares the aggregate liability coverage of the tortfeasor's vehicle to the applicable limits of liability under the owner's policy, meaning the aggregate or stacked UIM "limits" under the policy. To the extent that the provisions of a statute and the terms of the policy conflict, the provisions of the statute will prevail. *Id.* at 263, 382 S.E.2d at 762; *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977). Because the tortfeasor's aggregate liability coverage is less than the aggregate limits of liability under the UIM provisions of the Nationwide policy, the tortfeasor's vehicle in this case qualifies as an underinsured highway vehicle. In the language of the statute, the Faust vehicle was an "underinsured highway vehicle" because it was "a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds [$0] and insurance policies [$100,000] applicable at the time of the accident [was] less than the applicable limits of liability under the owner's policy [$300,000]." N.C.G.S. § 20-279.21(b)(4) (1989).

[3] Nationwide next argues that even if this Court rejects its "threshold" argument and allows stacking in determining whether a vehicle is an "underinsured highway vehicle," the Court of Appeals nevertheless erred in holding that a nonowner family member

is entitled to such stacking. Nationwide relies upon the following portion of the statute:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the **owner's** underinsured motorist coverages provided in the **owner's** policies of insurance; *it being the intent of this paragraph to provide to the* **owner,** in instances where more than one policy may apply, *the* **benefits** *of all limits of liability of underinsured motorist coverage under all such policies . . . .*

N.C.G.S. § 20-279.21(b)(4) (emphasis added). Nationwide contends that the statute's repeated references to "owner" and "owner's policy" demonstrate that only the owners of the policy or vehicle may avail themselves of benefits under the statute, such as the intrapolicy stacking approved in *Sutton.* Thus, Nationwide argues, because Michelle is not the owner of the policy or vehicle, she is not entitled to stack UIM coverages.

Assuming, without deciding, that Nationwide is correct in interpreting the statute to mean that only "owners" are intended to benefit from the stacking of UIM coverages, there is no factual dispute that Mr. and Mrs. Harris "benefit" when their child Michelle is allowed to stack. To accept Nationwide's argument would be to say that the legislature intended for Michelle's parents, the policy owners, to benefit financially from their UIM coverage when **they** are injured by an underinsured motorist, but did not intend for them to benefit financially when their minor daughter, a member of their household, is injured by an underinsured motorist. Clearly, the legislature "did not intend [such] an unjust or absurd result." *See King,* 276 N.C. at 325, 172 S.E.2d at 18.

When one member of a household purchases first-party UIM coverage, it may fairly be said that he or she intends to protect all members of the family unit within the household. The legislature recognized this family unit for purposes of UIM coverage when it defined "persons insured" of the first class as "the named insured and, while resident of the same household, the spouse of any named insured and relatives of either . . . ." *See Bass v. North Carolina Farm Bureau Mut. Ins. Co.,* 332 N.C. 109, 418 S.E.2d 221 (1992) (quoting *Crowder v. North Carolina Farm Bureau Mut. Ins. Co.,* 79 N.C. App. 551, 554, 340 S.E.2d 127, 129, *disc. rev. denied,* 316

N.C. 731, 345 S.E.2d 387 (1986)). These persons insured of the first class are protected, based on their relationship, whether they are injured while riding in one of the covered vehicles or otherwise. *See id.* Certainly, the policy owner "benefits" when a spouse or family member residing in his or her household can stack UIM coverages. We conclude that the principles enumerated in *Sutton* which allow intrapolicy stacking when the owner is injured also allow intrapolicy stacking of UIM coverages when the injured party is a person insured of the first class.

The facts of this case demonstrate perfectly the logical reasoning behind allowing a member of the family unit and a person insured of the first class to stack UIM coverages. Because of her minority status, Michelle was under no duty to honor any contract of insurance she might have purchased on her own. 3 Robert E. Lee, *North Carolina Family Law* § 270 (4th ed. 1981). Therefore, Michelle was dependent on her parents for insurance coverage. Also, since Michelle was a minor at the time of the accident, it was her parents' duty to support her to the best of their abilities. *See id.* § 229; N.C.G.S. § 50-13.4(b) (1989). Purchasing insurance to benefit their daughter Michelle is an example of such support. By discharging their duty of support and protecting their daughter, the Harrises plainly "benefit" by limiting their out-of-pocket expenses, as well as increasing their peace of mind. Therefore, we hold that Michelle, as a nonowner family member living in the same household as the named insured, is entitled to stack UIM coverages under her parents' policy with Nationwide.

Nationwide also contends that our decision in *Smith* supports its argument that intrapolicy stacking should not be allowed in the instant case. We find this argument unconvincing. Nationwide argues that this Court in *Smith* rejected intrapolicy stacking for nonowner family members and allowed only interpolicy stacking. We disagree. Whether intrapolicy stacking is permissible for a nonowner family member was not at issue in *Smith*, and we confined our decision to the interpolicy stacking issue presented on appeal. Therefore, *Smith* should not be read to reject intrapolicy stacking, an issue not before the Court in that case.

[4] Nationwide further argues that stacking multiple vehicles on one policy by a nonowner is "excess" or "additional" coverage within the meaning of N.C.G.S. § 20-279.21(g), and therefore not subject to the compulsory provisions of the Financial Responsibility Act.

We rejected this argument in *Sutton*; we reject it again today. *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765.

We hold that intrapolicy stacking of UIM coverages is permissible when determining whether the tortfeasor's vehicle is an "underinsured highway vehicle." We further hold that the tortfeasor's vehicle in this case qualifies as an underinsured highway vehicle, since the plaintiff's aggregate UIM coverages exceed the aggregate liability coverage of the tortfeasor. We also hold that the minor plaintiff, as a nonowner family member living in the same household as the named insured, is entitled to stack UIM coverages in her parents' policy in determining Nationwide's limit of liability. For the reasons stated herein, the decision of the Court of Appeals, which affirmed the judgment of the trial court, is affirmed.

Affirmed.

Justice MEYER dissenting.

The majority errs in two major respects. First, it errs in holding that the tort-feasor's vehicle is an "underinsured highway vehicle" within the meaning of the statute and the language of the policy of insurance in question. It further errs in holding that the minor plaintiff, a nonowner, is entitled to intrapolicy stack UIM coverages in determining Nationwide's limit of liability under the policy.

I.

I disagree with the majority's adoption of Judge Greene's conclusion, in part I of his dissent below, that the tort-feasor's vehicle here qualifies as an underinsured vehicle. I concur completely with the dissent of Justice Webb, in which he concludes that the plain language of the statute requires a comparison of *liability coverages* to determine whether there is underinsured motorist coverage.

N.C.G.S. § 20-279.21(b)(4) requires insurers to provide insureds with UIM coverage, affording their insureds additional compensation when injured by an "underinsured highway vehicle." "Underinsured highway vehicle" is defined by that same section as "a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the *applicable limits of liability under the owner's policy*." N.C.G.S. § 20-279.21(b)(4) (1989) (subsequently amended 1991)

(emphasis added). Thus, in determining whether a "person insured" is entitled to UIM benefits, it must first be determined whether the vehicle at fault for the insured's injuries was "underinsured." N.C.G.S. § 20-279.21(b)(4) provides that this determination is to be made by comparing "the sum of the limits of liability" insurance for the at-fault vehicle with the "applicable limits of liability under the owner's policy." Only if the at-fault vehicle's *liability* insurance is less than the applicable limits of the *liability* insurance under the owner's policy is the injured insured entitled to UIM benefits. This interpretation fully comports with the General Assembly's purpose of offering the added protection of UIM coverage only to insureds who have provided to third persons protection greater than that required by law.

Having compared the liability coverage of the two vehicles at issue here, it is evident to me that plaintiff was not injured by an underinsured highway vehicle within the meaning of N.C.G.S. § 20-279.21(b)(4), and plaintiff is therefore not entitled to the UIM benefits under the Nationwide policy. To say, as does the majority, that plaintiff is entitled to UIM benefits as a result of this accident completely ignores the fact that the applicable limits of liability under the Nationwide policy are equal to the liability insurance on the at-fault vehicle, and therefore the at-fault vehicle is not underinsured within the meaning of N.C.G.S. § 20-279.21(b)(4).

Even if the statute is read to require a comparison of the owner's UIM coverage (before stacking) to the tort-feasor's threshold liability coverage for one person under the policies in question here, the coverages are equal. Since the tort-feasor's limit of liability insurance is equal to (not less than) the Nationwide underinsured limit before stacking, the plaintiff here fails to meet the threshold definition of an underinsured highway vehicle, and there is no underinsured motorist coverage to stack.

II.

Even if I agreed with the majority that the tort-feasor's vehicle here was an underinsured vehicle, both the language of the policy and the statute prohibit Michelle K. Harris from intrapolicy stacking the UIM coverages to determine Nationwide's limit of liability. This was the conclusion reached by Judge Greene in part II of his dissent below. With only minor changes in his language, I reiterate his reasoning with regard to both the provision of the policy and the statute.

POLICY

The "Uninsured/Underinsured Motorists Coverage" endorsement in the insurance policy provides in pertinent part:

> If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your or a **family member's** injuries shall be the sum of the limits of liability for this coverage under all such policies.

In *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991), this Court read this policy language to allow "the stacking of UIM coverages for a family member when the family member is covered by more than one policy issued to the named insured." *Id.* at 146, 400 S.E.2d at 49. However, the unambiguous language of the policy *sub judice* prevents stacking of the UIM coverages contained in it.

The above endorsement language requires two or more policies before stacking is allowed by a family member. Here, Michelle Harris was covered by only one policy. This interpretation becomes irrefutable in light of the policy definition of "limit of liability," which limits the defendant's liability for UIM coverage to $100,000 "regardless of the number of . . . [v]ehicles or premiums shown in the Declarations." Therefore, the endorsement language, read in connection with the "limit of liability" provision, prohibits the stacking by a family member of multiple UIM coverages contained in a single policy.

STATUTE

Whether under the statute a nonnamed insured, such as Michelle Harris, is entitled to stack UIM coverages to determine the insurer's limit of liability is an issue that has not been addressed by this Court. In *Sutton v. Aetna Casualty & Surety Co.*, the plaintiff injured party was the policyholder (owner) and named insured of all of the policies of insurance that the Court allowed to be stacked. *Sutton*, 325 N.C. 259, 261-62, 382 S.E.2d 759, 761, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). When presented with a case where the injured party was not the policyholder, this Court refused to apply the statutory analysis used in *Sutton* to determine the issue of stacking of UIM coverages. *Smith*, 328 N.C. at 151-52, 400 S.E.2d at 52. Instead, in *Smith*, this Court allowed stacking, not under the provisions of the statute, but *under the terms of the policy. Id.*

The UIM statute provides in pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the *owner's underinsured motorist coverages* provided in the *owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply,* the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10).

N.C.G.S. § 20-279.21(b)(4) (emphasis added). The statute is unambiguous in its language that only the "owner" is allowed "the benefit of all limits of liability of underinsured motorist coverage under all such policies." In other words, only the "owner" can stack underinsured motorist's "coverages and policies." *See Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (statute allows stacking of coverages and policies). Unlike the case at bar, in *Sutton*, the plaintiff was the owner of both the policies of insurance and the insured vehicles. The statute reference to "owner," in context, refers to the owner of the policies or policy of insurance containing underinsured motorist coverages. *See* N.C.G.S. § 20-4.01(26) (Supp. 1991) (unless context of statute requires a different definition, definition of words in N.C.G.S. § 20-4.01 applies to statute). Therefore, under the statute, Michelle Harris, who is not the owner of the policy in question, is not allowed to stack the underinsured motorist coverages available on the policy of insurance issued by the defendant Nationwide to Michelle's parents. I find this reasoning entirely convincing.

The statute *requires* UIM stacking for owners only. However, it also makes an express provision for coverage "in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article." N.C.G.S. § 20-279.21(g) (1989). Hence, if a policy provided nonrequired coverage for nonowners, such as intrapolicy stacking, such coverage would be "additional coverage" as that term is contemplated by the Financial Responsibility Act. While stacking for owners is required, nonowners obtain more coverage as "additional" or "excess" coverage, which is allowed by N.C.G.S. § 20-279.21(g). To the extent that a nonowner

has additional or excess coverage, the excess amounts represent voluntary coverage that is not subject to the compulsory provisions of the statute. *Id.* Stacking multiple vehicles on one policy by a nonowner is "in addition to" the coverage required by the terms of N.C.G.S. § 20-279.21(b)(4).

In the case *sub judice*, Michelle Harris is neither the owner of the policy at issue nor of the vehicles on the policy. The UIM statute does not change the antistacking language of the policy to require that Michelle be allowed to intrapolicy stack the coverages on her parents' policy.

The explicit language of the statute is: "It being the intent of this paragraph to provide to the *owner* . . . the benefit of all limits of liability . . . ." N.C.G.S. § 20-279.21(b)(4) (emphasis added). Disregarding completely the explicit language of the statute and the policy as to who is an "owner" of the policy, the majority permits a nonowner to intrapolicy stack UIM coverage because, by doing so, the owners would "benefit financially when their minor daughter, a member of their household, is injured by an underinsured motorist." Resorting to the question of which interpretation of a statute or contract of insurance will result in the greater financial benefit as opposed to the plain words of the statute and the policy is completely unacceptable to me.

I now address two other matters that I believe merit consideration: the majority's disregard of the recent legislative amendment to the statute in question, prohibiting intrapolicy stacking, and the public policy reasons for not allowing stacking under the facts of this case.

This Court should not read the present subsection (b)(4) expansively to allow intrapolicy stacking in light of the recent legislative amendment to the statute. *See* 1991 N.C. Sess. Laws ch. 646, § 2. The amended statute contains the following provision:

> The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

N.C.G.S. § 20-279.21(b)(4) (Supp. 1991). Although the amendment to the statute is inapplicable to this case by reason of its effective date, it should nevertheless be considered by this Court as support for the proposition that the legislature never intended intrapolicy

stacking even under the present statute. Unless they expressly say so, amendments to statutes are not necessarily clarifications of legislative intent. Nevertheless, the fact that the legislature has amended N.C.G.S. § 20-279.21(b)(4) since the accident in this case to eliminate intrapolicy stacking is some additional evidence that the statute's general purpose, which has not been changed, is best served when the statute is interpreted so as not to extend stacking privileges to all covered or insured persons. *See Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 225, 376 S.E.2d 761, 765 (1989). This recent amendment, at the very least, should serve to curb any further expansion of the category of persons who are allowed to stack coverages of multiple vehicles on a single policy under the present statute.

The majority makes the point that separate UIM premiums are charged for each vehicle covered under a single policy. A premium is charged for each covered vehicle because of the increased risk of all of the insured vehicles being involved in an accident or accidents during the same policy term. Several motor vehicles belonging to one household can be, and frequently are, on the road at the same time, thereby justifying separate premiums for coverage on each vehicle due to the increased exposure of the several vehicles, as opposed to a single vehicle, being involved in separate accidents. A treatise on insurance law and practice is instructive on this point:

> A few of the decisions adhering to the rule against the stacking, or accumulation of UM coverages, use the correct reasoning. That is, the actual exposure of an insurer is multiplied by the number of vehicles, since different persons will be driving them upon separate occasions and the risk is thereby multiplied, so that separate coverage must be carried upon each whenever that particular vehicle is used.
>
> Although some courts . . . pay considerable attention to policy language, actually the intent of most policies is reasonably clear. This is true of the "each person" proviso in the insuring agreements, irrespective of the number of vehicles insured. There is no rule which forbids a single insurer, ordinarily, from providing against the tacking, or stacking, of the coverages available to the several vehicles of a single insured. Nor is this considered to be against public policy, if it at least meets the minimum amount required by statute.

8C John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 5106, at 517 (1981) (footnotes omitted). The treatise further states:

> If it is not reasonable to argue for a doubling or tripling of liability limits when there is a single policy owner, and a single company, then it is not reasonable to urge such a position for uninsured motorist coverages. Yet . . . the majority of courts have confused themselves upon this issue, feeling that unless they double up such UM coverage, the insurer somehow receives a windfall, since it charges a separate premium for each coverage as it applies to a separate automobile.
>
> Let us analyze this reasoning, for a moment. If there were but a single insured, and only he ever drove an automobile, obviously he can drive only one vehicle at a time and the reasoning of such courts might then be logical. But, in considering basic underwriting and the actuarial computation of rate structures, we must take into consideration the customary procedures of mankind. Automobile policies are now written so as to afford liability protection not only to the named insured, who is usually the owner, but to members of his family, perhaps persons residing in the same household, and—with a few exceptions—anyone operating with the permission of the named insured or adult members of his household. When it comes to UM coverages, we have a like multiplication of exposure, since we have classes of risk, including all of the persons stated above, and pedestrians as well, with benefits granted in many circumstances when one may be in another vehicle or even upon the highway.
>
> When the insured then owns more than a single vehicle, almost always it is with the contemplation that the second, or third, vehicles will be operated by others. And those others may, also, if injured by an uninsured motorist, expose the insurer to loss under that aspect of the contract.
>
> Now it could reasonably be argued that an insured owning several automobiles could insure only one of them for liability, or for collision, or comprehensive, damages—yet collect as to any loss inflicted by, or upon, any of those vehicles he elected not to insure. Yet this is precisely the result for which policyholders, or their counsel, contend under UM coverages and which has been upheld repeatedly by the courts. Similarly,

> it is no more logical to double, or triple, a single limit of UM coverage, the amount of which the insured deliberately selected, and tender it free to the insured.
>
> We may summarize the situation where there is a single policy owner, single company, and multiple vehicles by saying that the proper result is: "What you buy is what you get—and no more." It is time for those courts, which have been so generous with the funds of others, to take a new look at this problem.

Id. § 5101, at 449-51 (footnotes omitted).

Another commonly made argument is also relied upon by the majority, as it was by Judge Greene in part I of his dissent, with which I have previously stated I disagree. Judge Greene wrote:

> In *Sutton*, our Supreme Court held that the statute should be construed to prevent the " 'anomalous situation that an insured is better off—for purposes of the underinsured motorist coverage—if separate policies were purchased for each vehicle.' " [325 N.C.] at 267, 382 S.E.2d at 764 (citation omitted).
>
> To construe "applicable limits of liability under the owner's policy" to be the amount of UIM coverage on any one vehicle shown in the policy declarations, here $100,000, would result in an anomalous situation where the insured would be better off had he purchased separate policies for each vehicle. If separate policies had been purchased, providing the same coverage on each of the three vehicles, the "limits of liability" under the UIM endorsement would have been $300,000.

Harris v. Nationwide Mut. Ins. Co., 103 N.C. App. 101, 107, 404 S.E.2d 499, 503 (1991) (Greene, J., dissenting).

As a result of hindsight gained since this Court's decision in *Sutton*, I now question whether I voted correctly to allow stacking in that case. As the record in this case reveals, there may indeed be adequate justification for treating the two situations differently. I am now convinced that this is not necessarily an anomalous result, since different premiums are charged under these two different circumstances. When separate policies are purchased, the premiums paid are typically higher to cover the increased risk assumed by the insurer. When multiple vehicles are covered on

a single policy, the premium is generally less because multivehicle discounts are provided to the policyholders.

In the policy issued by Nationwide to the Harrises, the first vehicle has a total premium of $289.60, whereas the second vehicle only has a premium totalling $131.30, as does the third vehicle. This discount is noted on the declarations page as "discounts applied," referring to "multi car."

Automobile insurance, although regulated by statute, is still governed by contract law, where private parties are allowed to determine their respective rights as long as their private agreement does not conflict with the applicable statutory provisions. An insurer accepts a specifically defined risk in exchange for an agreed upon premium amount that adequately compensates the insurer for the risk being assumed. Thus, the premium is by necessity related to the risk being undertaken.

Accordingly, as the majority of this Court liberalizes the statute beyond its terms and allows more and more persons to stack multiple car coverages, the premiums charged by the insurers will inevitably be increased. Premiums will likely increase to the point (and indeed they may already have) where many insureds will begin to reject UIM coverage. This result can only be detrimental to the public good in the long run, as motorists will begin to carry less and less protection.

The issue becomes not how much coverage one can voluntarily choose to purchase, but rather, how much coverage will be required and at what costs to society and the consuming public. Continued expansion of UIM coverage may eventually have the unwanted and deleterious result of reducing an accident victim's ability to recover, thereby thwarting the remedial purpose for the Financial Responsibility Act.

For the reasons stated, I respectfully dissent from the majority opinion and vote to reverse the decision of the Court of Appeals.

Justice LAKE joins in this dissenting opinion.

Justice WEBB dissenting.

I dissent. The majority correctly says that the determination as to whether the tortfeasor, Mary Elizabeth Faust, is an under-

insured motorist depends on the interpretation of N.C.G.S. § 20-279.21(b)(4), which defines an "underinsured highway vehicle" as

> a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy.

There is no question in this case that the "applicable limits of liability under the owner's policy" in this case would be $100,000 if Michelle Harris had been liable for injuries and damages suffered in the accident. This is the amount of insurance coverage which the tortfeasor had and she was not an underinsured motorist under N.C.G.S. § 20-279.21(b)(4).

The majority cites treatises dealing with the subject of uninsured motorist coverage and says that noticeably absent from any of them is a comparison of the tortfeasor's liability coverage with the plaintiff's liability insurance. Whatever the treatises may say, I believe the plain language of the statute requires a comparison of liability coverages to determine whether there is underinsured motorist coverage. The plain language requires us to hold that Mary Elizabeth Faust was not an underinsured motorist.

I vote to reverse the Court of Appeals.

Justice LAKE joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. TAMMIE LEE THOMPSON

No. 424A91

(Filed 4 September 1992)

1. Evidence and Witnesses § 1629 (NCI4th)— tape recorded telephone conversation—no constitutional violation—no ethical violation

The trial court did not err in a noncapital first degree murder prosecution by admitting transcripts of two tape recorded conversations between defendant and Jose Sanchez where defendant voluntarily drove from Florida to North Carolina

and was interviewed with his attorney present on 25 May 1988; defendant was not placed under arrest at the end of the interview and gave his home and work numbers to officers; Sanchez was arrested in Florida on 26 May 1988 for the murder of the victim; Sanchez implicated defendant in the murder and indicated a willingness to cooperate and to testify against defendant; the assistant district attorney in North Carolina directed an SBI agent in Florida to ask Sanchez if he would call defendant and have the call recorded in an attempt to incriminate defendant; Sanchez agreed and made the call; the assistant district attorney felt that a second call might be more incriminating; a second call was made; and law enforcement officers told the assistant district attorney after the arrest that, when they read the warrant to defendant, defendant's mother immediately produced a letter purportedly written by an attorney dated 24 May 1988 stating that he represented defendant and that defendant was not to be questioned without the attorney being present. Defendant was not in custody at the time the telephone calls were made and was therefore not entitled to *Miranda* warnings; no adversarial judicial proceedings had commenced against defendant and his Sixth Amendment right to counsel had not attached; and the evidence amply supports the trial court's findings and conclusions that the conduct of the assistant district attorney and the officers was not unethical and that they had acted in a good faith belief that defendant was still amenable to maintaining contact with them.

Am Jur 2d, Evidence § 436.

Admissibility, in criminal prosecution, of evidence secured by mechanical or electronic eavesdropping device. 97 ALR2d 1283.

2. Evidence and Witnesses § 1088 (NCI4th)— recorded telephone conversation with defendant—implied admissions—tapes and transcripts admissible

The trial court did not err in a noncapital first degree murder prosecution by denying defendant's motion to suppress tapes and transcripts of two telephone conversations pursuant to N.C.G.S. § 8C-1, Rule 801(d)(B), the implied admission rule. A portion of the telephone conversations did constitute an implied admission; there is no question that defendant could hear

and understand Sanchez, with whom he was talking; Sanchez clearly had firsthand knowledge of the circumstances contained in the telephone conversations between defendant and himself; and, given the gravity of the implications flowing from Sanchez's questions, the appropriate response for defendant in the instant case would have been an unequivocal denial of guilt, or at least an expression of surprise or confusion.

Am Jur 2d, Evidence § 638; Homicide § 339.

Impeachment of defendant in criminal case by showing defendant's prearrest silence—state cases. 35 ALR4th 731.

3. Evidence and Witnesses § 1617 (NCI4th)— murder—telephone call tapes and transcripts—contemporaneous introduction of transcript of prior interview denied—no abuse of discretion

The trial court did not abuse its discretion in a noncapital murder prosecution by denying defendant's motion to require the State to introduce defendant's prior interview contemporaneously with the tapes and transcripts of telephone calls with Sanchez, who did the actual killing, or by failing to instruct the jury regarding Sanchez's subsequent recantation at his own trial contemporaneously with the State's introduction of the recorded telephone calls. Defendant did not demonstrate that the tapes and transcripts of the two telephone calls were somehow out of context when they were introduced into evidence or that the prior interview was either explanatory of or relevant to the telephone calls. It was defendant's responsibility, not the State's, to introduce evidence about his exculpatory interview. N.C.G.S. § 8C-1, Rule 106.

Am Jur 2d, Evidence §§ 436, 599.

4. Evidence and Witnesses § 1481 (NCI4th)— murder—pistol found several miles from murder scene—photograph of pistol—admissible

The trial court did not err in a noncapital murder prosecution by admitting into evidence a pistol found several miles from the murder scene and a photograph of the pistol where the circumstantial evidence showing the connecting factors was sufficient to render the gun and photograph relevant and admissible. Moreover, the prejudicial effect of the admission

of the gun and photograph did not outweigh their probative value.

Am Jur 2d, Homicide §§ 414, 416.

5. Evidence and Witnesses § 1745 (NCI4th)— drawings of crime scene by codefendant—codefendant refused to testify—hearsay—no prejudice

Any error in introducing crime scene sketches by a nontestifying codefendant in a murder prosecution was harmless where, assuming that the sketches were inadmissible hearsay, the information in the sketches had already been testified to in great detail by other witnesses. Also, although not requested by defendant when the sketches were introduced, the trial court nevertheless gave a limiting instruction in its charge to the jury.

Am Jur 2d, Evidence § 802; Homicide § 415.

6. Constitutional Law § 355 (NCI4th)— murder—codefendant awaiting appeal of conviction—State informed that Fifth Amendment would be invoked—State allowed to call as witness

The trial court did not err in a noncapital first degree murder prosecution by allowing the State to call as a witness a codefendant awaiting appeal of his conviction even though the State and the court had been informed that the codefendant would invoke the Fifth Amendment and would not answer questions. The prosecutor's case would have been seriously prejudiced by failure to offer the codefendant as a witness in light of his role in the murder.

Am Jur 2d, Criminal Law §§ 703, 937.

Propriety and prejudicial effect of prosecution's calling as witness, to extract claim of self-incrimination privilege, one involved in offense charged against accused. 19 ALR4th 368.

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

Justice MITCHELL concurring.

APPEAL by defendant as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Ellis, J.*, at the 28 January 1991 Special Session

of Superior Court, JONES County, upon a verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 15 April 1992.

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

William J. Morgan for defendant-appellant.

FRYE, Justice.

Defendant, Tammie Lee Thompson, was indicted on one count of first-degree murder by a Duplin County grand jury. By consent of the parties and with court approval, venue was changed from Duplin County to Wake County. Defendant was tried twice in Wake County; in each trial, the jury deadlocked and a mistrial was ordered. Again by consent of the parties and with court approval, venue was changed from Wake County to Jones County. Defendant was tried noncapitally to a jury, which returned a verdict of guilty of murder in the first degree. The trial judge imposed the mandatory sentence of life imprisonment. Defendant gave notice of appeal to this Court on 7 February 1991.

Defendant brings forward several assignments of error. After a thorough review of the record, we conclude that defendant received a fair trial, free of prejudicial error.

I.

The State presented evidence tending to show the following facts and circumstances:

On Monday, 23 May 1988, the body of Raymond McKay (the victim) was found lying between a truck and a car in the parking lot of an abandoned store in the southwest corner of the intersection of North Carolina Highway 111 and Rural Paved Road 1803 known as "Lyman's Crossroads" in Duplin County.

Cecil Davis, a self-employed carpenter, testified that the victim worked for him as a framer. In May, 1988, Davis was framing small houses in the Wilmington area, about sixty miles from Lyman. He and the victim would meet at Lyman's Crossroads in the mornings in order to travel to work together. On 23 May, Davis and the victim met around 6:10 a.m. While waiting for the rest of the construction crew to arrive, Davis left the victim waiting in

the victim's car while Davis went to help his father with a van that would not start. Davis was gone for about thirty minutes. When he returned, he saw the victim lying on the ground, with a wound to his head. Davis noticed that McKay's car had been moved approximately fifty feet towards the main road, and that the victim's body was now lying where his car had originally been parked. Davis identified various photographs of Lyman's Crossroads, and used them to illustrate his testimony to the jury.

Several witnesses, including Jimmy Register, Mary Ann Futrell and Dianne Miller, testified that at approximately 6:15 a.m. on 23 May, while on their way to work, they saw the victim talking to a person seated in the driver's side of a car which appeared to be a yellow Monte Carlo or Grand Prix. Register, with the aid of a previously identified and admitted exhibit depicting Lyman's Crossroads, testified to the position of the cars located at the scene of the crime. Futrell, with the aid of a sketch that she had drawn previously, testified to the position of the victim in relation to the yellow car. Miller testified that she heard two gunshots and saw a man who had been standing by the yellow car fall. Another witness, Bernice Bryant, who lived near Lyman's Crossroads, testified that she heard three gunshots in rapid succession.

Dr. Walter Gable testified as an expert in forensic pathology. He performed an autopsy on the victim and determined that the cause of death was a gunshot wound to the head. In Dr. Gable's opinion, the wound to the head was caused by a large caliber pistol and was consistent with either a .38 caliber or .357 Magnum. No bullets, shell casings, or lead fragments were found in the body or at the scene.

Earl Thomas testified that he was at a service station in Beulaville on Sunday, 22 May, at approximately 7:30 a.m. and talked with a man who came into the store asking for directions to Lyman's Crossroads. The man showed Thomas a road map and a handwritten map. Thomas had difficulty understanding the man because he did not speak English well. The man was dark skinned, drove a yellow two-door Oldsmobile, and was alone.

Dale Tucker, who was employed by the North Carolina Department of Transportation, testified that he found a pistol in a ditch on Highway 24 about one and a half miles west of Beulaville during the morning of 25 May while he and a co-worker were removing a tree that had been blown down the previous night during a

severe storm. The pistol was a .38 caliber revolver and had three live cartridges and three spent cartridges in it. Tucker gave the pistol to the Duplin County Sheriff's Department later that evening.

State Bureau of Investigation (S.B.I.) Agent Bruce Kennedy testified that he had conducted an investigation of the victim's murder. His investigation revealed that a slender, dark-skinned male driving a yellow car had been seen in the general vicinity of Lyman's Crossroads, but no license plate number from the car had been obtained. The investigation also revealed that the victim had been romantically linked with Joy Thompson, defendant Tammie Thompson's wife, while the victim was in Florida working for defendant, and that Joy Thompson and the victim had both left Florida for North Carolina some weeks before the murder.

Agent Kennedy's investigation revealed that defendant had been working in Florida on the morning of 23 May. Of the six men who worked with defendant in his roofing business, one of them, Eduardo Pellot, owned a yellow Oldsmobile Cutlass, and only one of them, Jose Sanchez,[1] also known as Pepe, was not working that day. Later testimony revealed that Sanchez had borrowed Pellot's car after telling him that he was going to Disney World. A check of various motels indicated that someone using the name "Jose Sanchez" registered at Days Inn in Jacksonville, North Carolina at 11:18 p.m. on Saturday, 21 May, and checked out of the motel early Monday morning, 23 May, the morning of the murder. The registering person's driver's license identified him as Jose Sanchez, and the vehicle was later found to be registered to Eduardo Pellot.

Eunice Polloway, an employee of Southern Bell Telephone, identified some customer service records for the telephone number assigned to defendant's Florida address. Polloway testified that a collect call was made from a Jacksonville, North Carolina Days Inn on 22 May 1988 to defendant's number in Florida. She also testified that six short calls were made from defendant's number to the victim's number.

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1. In *State v. Sanchez*, 328 N.C. 247, 400 S.E.2d 421 (1991), this Court reversed Jose Sanchez' conviction of first-degree murder on the ground that the trial court erred in excluding expert testimony about the defendant's ability to understand the *Miranda* warnings. At his second trial, on 23 January 1992, after the jury was impaneled but before evidence was presented, Sanchez pled guilty to second degree murder and received a life sentence.

On Wednesday, 25 May, Agent Kennedy and Detective Jimmy Smith interviewed defendant in the Duplin County Sheriff's Department. The interview, conducted with defendant's attorney William Morgan present, lasted approximately two and one-half hours. At the end of the interview defendant, who had voluntarily driven to North Carolina from Florida, was not placed under arrest. Defendant gave the officers his home and work telephone numbers, and said he could be reached at a local number prior to his departure from North Carolina.

Joy Thompson, defendant's wife, testified that she and defendant had significant marital problems and were fighting over custody of the children after they had separated. She testified that she and the victim had been having an affair. She testified that on 10 May, the victim received a phone call from someone identifying himself as defendant and an argument ensued between the two. On 22 May, the evening before the murder, Joy Thompson called her husband, who told her that "something terrible was fixing to happen" and that when it did she would know it. Joy Thompson then called the victim to warn him. The victim responded that he was "a big boy" and could take care of himself. The next day Joy Thompson received a call from her cousin saying the victim had been killed. Joy Thompson called the sheriff's department and told them that defendant had either killed the victim himself or had someone do it for him.

On 26 May, Agent Bernie Mortonson of the Florida Department of Law Enforcement located Eduardo Pellot and his vehicle in Juno Beach, Florida. A consent search was done of the vehicle, and fingerprints were lifted. In the passenger side of the vehicle was a road atlas, which automatically opened up to a page containing the North Carolina map, upon which was a pencil mark on Interstate 95 indicating a turn at Fayetteville into the Duplin County area. A fingerprint from the road atlas was identified as that of Jose Sanchez. Sanchez was later arrested at his apartment. He was transported to the local police department where he gave a statement implicating defendant in the murder. Sanchez indicated a willingness to cooperate, and even to testify against defendant. Assistant District Attorney Dewey Hudson of Duplin County directed Agent Bruce Kennedy to ask Sanchez if he would be willing to make a controlled telephone call to Thompson. Sanchez agreed and gave written permission to record the telephone conversation. Believing that the first call was not sufficiently inculpatory of de-

fendant, Hudson had Sanchez make a second call. Thereafter, an arrest warrant was obtained and defendant was arrested at 1:30 a.m. on 27 May. At the time of his arrest, defendant's mother produced a letter dated 24 May which stated that defendant was not to be questioned without William Morgan being present.

Chris Dutton testified that he had been incarcerated with defendant at the Hoke County prison unit where they became friends. Dutton testified that he and defendant had several conversations about their charges. He testified that defendant told him that his wife had left him and was now testifying against him because he had had her boyfriend killed. According to Dutton, defendant paid "Pepe" (Jose Sanchez) $200 for the car trip to North Carolina. Defendant was to add $100 per week to Sanchez' regular paycheck. Dutton testified that he had not been threatened or promised anything by the State's attorneys in exchange for testifying against defendant. He had, however, entered into a plea bargain with the district attorney for the 30th prosecutorial district in which he would plead guilty to a lesser crime in exchange for testifying against defendant. Dutton was then cross-examined extensively concerning his past and present criminal record, which included providing false information to law enforcement officers.

Additional evidence will be discussed as it becomes relevant to a fuller understanding of the specific issues raised on appeal.

Defendant did not testify or present evidence.

II.

[1] In his first assignment of error, defendant contends that the trial court erred in denying his pretrial motion to suppress two tape-recorded telephone conversations and transcripts thereof between Jose Sanchez and himself. Defendant argues that his motion to suppress should have been granted because the tape-recorded telephone conversations were obtained "through fraudulent and impermissible conduct on behalf of law enforcement officers acting on behalf of the [assistant] district attorney." Defendant argues that the two telephone calls made to him by Jose Sanchez at the behest and under the supervision of law enforcement officials violated his Fifth Amendment right against self-incrimination because *Miranda*[2] warnings were not read to him prior to the telephone

2. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

conversations. Defendant further argues that D.R. 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility and Rule 7.4(A) of the North Carolina Rules of Professional Conduct were violated because Assistant District Attorney Dewey Hudson contacted defendant directly through police officers who knew that defendant was being represented by counsel.

The State responds that defendant's right to *Miranda* warnings was not violated because *Miranda* warnings are not required unless a custodial interrogation is about to begin, and no such custodial interrogation occurred here. The State argues further that the trial court's findings of fact and conclusions of law that Assistant District Attorney Hudson and the police officers under his supervision acted in good faith and committed no ethical violations are supported by competent evidence and should be upheld. We agree with the State.

The relevant facts surrounding defendant's first assignment of error are as follows: On 26 May 1988, Jose Sanchez was arrested in Florida for the murder of the victim, Raymond McKay. Sanchez was transported to the local police department,where he was interviewed for about one hour and fifteen minutes. During the interview, Sanchez implicated defendant in the murder and indicated a willingness to cooperate and to testify against defendant. Assistant District Attorney Dewey Hudson, who was in North Carolina, directed Agent Bruce Kennedy by telephone to ask Sanchez if he would agree to call defendant, in an attempt to incriminate him, and have the call recorded. Sanchez agreed and made the first call. The officers played the tape of the telephone conversation to Hudson over the telephone. Hudson felt the conversation was "somewhat incriminating" but decided that a second call might be more incriminating. A second call was made. The substance of the second call was played back to Hudson, who thereafter was convinced that sufficient evidence existed to charge defendant with murder. After defendant was arrested, Hudson spoke to Agent Kennedy and Detective Jimmy Smith, who told him that when they read the warrant to defendant, defendant's mother immediately produced a letter purportedly written by Attorney William Morgan. The officers read the letter to Hudson. The letter, dated 24 May 1988, stated that Morgan was representing defendant and that he was not to be questioned without Morgan being present.

Defendant first argues that the telephone calls made by Sanchez at the behest of police officers amounted to an interrogation of defendant requiring *Miranda* warnings. We disagree. It is well settled that *Miranda* warnings are not required when the defendant is not being subjected to custodial interrogation. *State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992). The test for whether a person is "in custody" for *Miranda* purposes is whether a reasonable person in the suspect's position would believe that he is being deprived of his freedom of action in a significant way or, to the contrary, would believe that he is free to go at will. *Id.* In the instant case, defendant does not argue, nor is there any evidence which suggests, that defendant was in custody at the time the telephone calls were made. In fact, the telephone calls were made from the police station to defendant's home. Moreover, there is no indication that defendant did not feel free to terminate his telephone conversations with Sanchez at any time. We hold that defendant was not in custody at the time the telephone calls were made to him and was therefore not entitled to *Miranda* warnings.

We also note, contrary to the implicit assertions underlying defendant's contention, that none of defendant's other constitutional rights were violated at the time Sanchez made the two telephone calls to him. First, defendant concedes, and we agree, that his Sixth Amendment right to counsel had not attached at the time of the telephone calls because no adversary judicial proceedings had been commenced against him. *See State v. Bromfield*, 332 N.C. 24, 39, 418 S.E.2d 491, 499 (1992); *State v. Nations*, 319 N.C. 318, 354 S.E.2d 510 (1987). Nor were defendant's rights under the Fourth Amendment violated by the introduction into evidence of the tape recordings made by the police of the telephone conversations between Sanchez and defendant. *See United States v. White*, 401 U.S. 745, 752, 28 L. Ed. 2d 453, 459 (1971) ("If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.").

Defendant next argues under this assignment of error that the telephone conversations were the result of intentionally misleading, fraudulent and unethical conduct on the part of Assistant District Attorney Hudson and the police officers who contacted defendant directly, in violation of D.R. 7-104(A)(1) of the A.B.A.'s Code of Professional Responsibility and Rule 7.4(A) of the N.C.

Rules of Professional Conduct, although he was being represented by counsel. The State responds that neither the assistant district attorney nor the officers engaged in fraudulent or impermissible conduct in having Sanchez agree to and make two recorded telephone calls to defendant, and, accordingly, the trial court did not err in denying defendant's motion to suppress the tapes and transcripts of the calls. We agree with the State.

It is well settled that a trial court's findings of fact are binding on appeal when supported by competent evidence. *State v. Ross*, 329 N.C. 108, 123, 405 S.E.2d 158, 166 (1991). In the instant case, prior to denying defendant's motion to suppress, the trial court found as fact that "there was no evidence indicating that either Mr. Hudson or any of the officers acting under his direction acted in any manner designed to circumvent any rights of the defendant," and that "it was not fraudulent misconduct on the part of the State that led to the defendant . . . making certain comments to Sanchez during the taped telephone conversations but was rather his voluntary engaging in conversation and his willingness to discuss the issues raised by Sanchez during the phone conversations." The trial court concluded that "the reasonable interpretation of the totality of circumstances surrounding the meeting on May 25, 1988 indicated that the defendant Thompson was willing to cooperate and that the defendant Thompson was not foreclosing additional contact between himself and the law enforcement officers." Therefore, "Mr. Hudson did not violate either DR7-104(a)(1) of the American Bar Association's Code of Professional Responsibility or Rule 7.4(a) of the North Carolina Rules of Professional Conduct and . . . the defendant's statements made on the taped phone conversations were not the product of unethical conduct." The trial court concluded further that "the taped conversations were not the product of any misconduct on the part of the agents of the State of North Carolina and did not amount to any due process violation of the defendant." The evidence presented at the suppression hearing supports the trial court's findings and conclusions.

Assistant District Attorney Hudson testified at the suppression hearing that he thought Attorney William Morgan had been representing defendant solely for purposes of the interview conducted in Duplin County on 25 May, two days after the murder. Hudson thought that Morgan's representation of defendant was in a limited capacity because defendant was a resident of Florida. Hudson testified that he learned otherwise by virtue of the letter,

dated 24 May, that was presented to police officers at the time of defendant's arrest. Special Agent Kennedy testified that he too believed that Morgan was representing defendant for the limited purpose of the Duplin County interview. He testified that he likewise learned otherwise when the letter was produced during his presence at defendant's arrest in Florida. Agent Kennedy testified that at the end of the Duplin County interview, defendant gave the officers his home and work telephone numbers, and said he could be reached at a local number prior to his departure from North Carolina. We conclude that the above evidence amply supports the trial court's findings of fact and conclusions of law that the conduct of Assistant District Attorney Hudson and the police officers was not unethical and that Hudson and the officers acted with a good faith belief that defendant was still amenable to maintaining contact with them. Accordingly, the trial court did not err in denying defendant's motion to suppress.

[2] In his second assignment of error, defendant contends that the trial court erred in denying his motion to suppress the tapes and transcripts of the two telephone conversations pursuant to N.C.G.S. § 8C-1, Rule 801(d)(B). Defendant argues that the requirements of Rule 801(d)(B), the "implied admission" rule, were not met. N.C.G.S. § 8C-1, Rule 801(d) provides in pertinent part:

> (d) Exception for Admissions by a Party-Opponent.—A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual capacity or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth[.]

N.C.G.S. § 8C-1, Rule 801(d) (1988).

Relying on this Court's decision in *State v. Spaulding*, 288 N.C. 397, 219 S.E.2d 178 (1975), *judgment vacated in part*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976), which was decided prior to the adoption of the North Carolina Rules of Evidence in 1984, defendant argues that the following requirements must be met before the silence or failure of a defendant to deny a statement may be admissible against him as an implied admission:

> (1) The statement must be made in the defendant's presence; (2) The statement must be made by a person having firsthand knowledge of the facts contained in the statement; (3) The

> statement must be made under such circumstances that a denial would be naturally expected if the statement were untrue; (4) The defendant must be in a position to hear and understand what was said; and (5) The defendant must have had the opportunity to speak.

Id. at 406, 219 S.E.2d at 183. Defendant argues that the absence of elements (1) and (2) above prohibits the use of his responses as an implied admission. Defendant argues further that his responses to Sanchez' questions on the telephone did, in fact, constitute a denial of any implication of himself in the murder of the victim.

The State responds that the requirements of Rule 801(d)(B) were met and that, while a denial would have been natural to the questions asked by Sanchez of defendant if defendant were innocent, no such denial occurred. In its brief, the State set forth the following relevant portion of the recorded telephone calls between Sanchez and defendant in support of its argument that defendant's responses amounted to an implied admission of his guilt:

> Pepe [Sanchez]: I have tomorrow a my money, I need at least tomorrow. You told me, me go to North Carolina kill a Raymond, I kill him, now I need a my money for me leave.
>
> Tammie [defendant]: Uh-huh.
>
> Pepe: You give a me my money tomorrow?
>
> Tammie: I'll have your check for you tomorrow—
>
> Pepe: No my—
>
> Tammie: For which you work.
>
> Pepe: No—
>
> Tammie: Yeah.
>
> Pepe: No my money for killing Raymond.
>
> Tammie: Yeah.
>
> Pepe: You have my money?
>
> Tammie: Yeah.

We agree with the State that the above portion of the telephone conversations between Sanchez and defendant constitutes an implied admission as contemplated by Rule 801(d)(B). We also agree

with the State that the requirements of Rule 801(d)(B) and *Spaulding* are satisfied and that, contrary to what defendant argues, defendant did not, in fact, deny his guilt.

In *Spaulding*, this Court held that the failure of the defendant to deny a statement made in his presence by a co-defendant and implicating him in a murder was not an implied admission of his guilt because there was no evidence that the defendant was in a position to hear or understand the statement and make a denial since the defendant was at a table some distance away talking to other people at the time the statement was made. *Spaulding*, 288 N.C. at 406, 219 S.E.2d at 184. Defendant contends that *Spaulding* and other cases require that the person making the statement be in the physical presence of the defendant. We disagree. We believe that the proper focus is on the defendant's ability to hear and understand the statement being made to him. Unlike in *Spaulding*, in the instant case, based upon the above-quoted transcript of the telephone conversations, there is no question that defendant could hear and understand Sanchez, whom defendant had known and worked with for a number of years. We conclude, therefore, that the requirement that the statement be made in defendant's presence was satisfied in the instant case.

Defendant also argues that the second requirement of firsthand knowledge was not met because Sanchez was "a person of limited intelligence and dependent personality," who made telephone calls consisting of pre-programmed and pre-planned questions created by the police officers. We disagree. At the time of his arrest, Sanchez gave a detailed statement about the murder which implicated defendant. Based on his statement, Sanchez was asked to make two telephone calls to defendant. It seems clear that the questions which formed the basis of the telephone conversations were created as a result of and designed to conform to Sanchez' initial statement. In that respect, we believe, Sanchez clearly had firsthand knowledge of the circumstances contained in the telephone conversations between defendant and himself.

We also disagree with defendant that the tapes and transcripts show that defendant, in fact, denied his guilt. The Official Commentary to Rule 801(d) reads in part:

> Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement

> made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior.

N.C.G.S. § 8C-1, Rule 801(d) official commentary (1988). Given the gravity of the implications flowing from Sanchez' questions, the appropriate response for defendant in the instant case, if he were indeed innocent, would have been an unequivocal denial of his guilt, or at least an expression of surprise or confusion. A response which is not the equivalent of a denial may indicate acquiescence and be considered by the jury for what it is worth. *E.g., State v. Peterson*, 212 N.C. 758, 194 S.E. 498 (1938). Where the evidence leaves the matter in doubt, it is the jury's province to determine whether the remarks were heard and understood, and to draw inferences from the person's silence. *State v. Martin*, 182 N.C. 846, 109 S.E. 74 (1921). For the reasons stated above, we hold that the trial court did not err in denying defendant's motion to suppress the tapes and transcripts.

[3] Defendant next assigns error to the trial court's denial of his motion to require the State to introduce a transcript of defendant's 25 May 1988 interview in Duplin County contemporaneously with the tapes and transcripts of the phone calls. Defendant relies upon N.C.G.S. § 8C-1, Rule 106 for support. That rule provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

N.C.G.S. § 8C-1, Rule 106 (1988). We find defendant's contention to be without merit.

While we have found no decisions of this Court which are instructive on this point, we note that the federal rule is identical to our rule and has been the subject of many federal decisions. This Court frequently looks to federal decisions for guidance with regard to the Rules of Evidence. *See, e.g., State v. Smith*, 315 N.C. 76, 337 S.E.2d 883 (1985).

The lessons of the federal decisions discussing Rule 106 are well settled. Rule 106 codifies the standard common law rule that when a writing or recorded statement or a part thereof is introduced by any party, an adverse party can obtain admission of the entire statement or anything so closely related that in fairness

it too should be admitted. The trial court decides what is closely related. *United States v. Burreson*, 643 F.2d 1344 (9th Cir.), *cert. denied*, 454 U.S. 847, 70 L. Ed. 2d 135 (1981). The standard of review is whether the trial court abused its discretion. *United States v. Abroms*, 947 F.2d 1241 (5th Cir. 1991), *cert. denied*, --- U.S. ---, 120 L. Ed. 2d 869 (1992). "The purpose of the 'completeness' rule codified in Rule 106 is merely to ensure that a misleading impression created by taking matters out of context is corrected on the spot, because of 'the inadequacy of repair work when delayed to a point later in the trial.' " *United States v. LeFevour*, 798 F.2d 977, 981 (7th Cir. 1986) (quoting Advisory Committee Note).

Federal decisions also make clear that Rule 106 does not require introduction of additional portions of the statement or another statement that are neither explanatory of nor relevant to the passages that have been admitted. *See, e.g., United States v. Walker*, 652 F.2d 708 (7th Cir. 1981) (trial court properly admitted parts of defendant's grand jury testimony and excluded other portions); *accord United States v. Garrett*, 716 F.2d 257 (5th Cir. 1983), *cert. denied*, 466 U.S. 937, 80 L. Ed. 2d 459 (1984); *United States v. Crosby*, 713 F.2d 1066 (5th Cir.), *cert. denied*, 464 U.S. 1001, 78 L. Ed. 2d 696 (1983).

Applying these principles to the instant case, in sum, defendant must demonstrate that the tapes and transcripts of the two telephone calls were somehow out of context when they were introduced into evidence, and he must also demonstrate that his Duplin County interview was either explanatory of or relevant to the telephone calls. Defendant does neither. First, there is no indication that the tapes and transcripts were introduced other than as a whole. Second, defendant has not shown how the Duplin County interview was either explanatory of or relevant to the telephone calls. Defendant's 25 May interview with the Duplin County Sheriff and other investigating officers was basically exculpatory. As defendant states in his brief, the interview was a clear denial of any implication or involvement in the victim's death. The telephone conversations, however, were inculpatory. At the time of defendant's interview on 25 May, Sanchez had neither been located nor arrested. The idea of placing recorded telephone calls to defendant arose after Sanchez' arrest on the morning of 27 May. There appears to be no nexus between defendant's prior exculpatory interview and the subsequent telephone calls made to him by Sanchez. This situation clearly falls outside the parameters of Rule 106. It was defendant's

responsibility, not the State's, to introduce evidence about his exculpatory interview. *See* Advisory Committee Note to Rule 106 (Rule 106 "does not in any way circumscribe the right of the adversary to develop the matter on cross-examination or as part of his own case."). We hold, therefore, that the trial court did not abuse its discretion in denying defendant's motion to require the State to introduce defendant's 25 May interview contemporaneously with the tapes and transcripts of the telephone calls.

In his fourth assignment of error, defendant contends that the trial court erred in failing to instruct the jury regarding Sanchez' "subsequent recantation" at his own trial contemporaneously with the State's introduction of the recorded phone calls. Defendant again relies on Rule 106 in support of his contention, arguing that "the State was allowed to selectively introduce vague and 'inherently dangerous' phone conversations without being required to introduce the previous denial of [defendant] or the subsequent recantation by Sanchez." For reasons similar to those stated in response to the preceding argument, we reject this assignment of error.

[4] Defendant next contends, in his fifth assignment of error, that the trial court erred in denying his motion to exclude the pistol and the photograph of the pistol from evidence. Defendant made a pre-trial motion to exclude all evidence of the pistol found several miles from the murder scene and the photograph of the pistol shown to Sanchez. Defendant renewed this motion at trial. The trial court denied the motion. The State presented the testimony of Dale Tucker, who found the gun in a ditch after a severe storm, and of Agent Kennedy, who showed the photograph of the gun to Sanchez while interviewing him in Florida.

First, defendant argues that the evidence was irrelevant and lacked a sufficient evidentiary basis. However, the circumstantial evidence surrounding the gun was plentiful. Dr. Walter Gable testified that, in his opinion, the fatal wound to the victim's head was caused by a large caliber pistol, consistent with either a .38 caliber or .357 Magnum. Dale Tucker, an employee of the North Carolina Department of Transportation, testified that he found a .38 caliber revolver in a ditch on a road leading to Lyman's Crossroads two days after the murder. The gun contained three spent cartridges and three that had not been fired. The gun's condition demonstrated that it had not been exposed to the elements for any great length of time. Fingerprints could not be lifted from

the gun's surface because they were smudged. A witness who lived near the scene of the crime testified that she heard three gunshots in rapid succession. We hold that this circumstantial evidence showing connecting factors—spent cartridges, the caliber, the location and the short time lapse before discovery—was sufficient to render the evidence of the gun and the photograph relevant and admissible. *State v. King*, 287 N.C. 645, 215 S.E.2d 540 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976).

Moreover, we disagree with defendant that the prejudicial effect of the admission of the gun and the photograph of the gun into evidence far outweighed their probative value. *See generally* N.C.G.S. § 8C-1, Rule 403 (1988). Such a determination rests in the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Defendant has failed to show that the trial court abused its discretion in denying his motion to exclude the gun and the photograph of the gun from evidence.

[5] In his sixth assignment of error, defendant contends that the trial court erred in admitting into evidence sketches of the crime scene drawn by or upon by Jose Sanchez. Defendant argues that these sketches should have been excluded as hearsay not fitting into any recognized exception to the hearsay rule, and that their admission into evidence deprived him of his constitutional right of confrontation. During the trial, the State called Sanchez to the stand. Sanchez gave his name and date of birth, and then invoked the protection of his Fifth Amendment privilege not to testify further. Subsequently, the State called Agent Bruce Kennedy, who identified two drawings Sanchez had made: one of the murder scene, and one showing the local highways in the vicinity of Lyman's Crossroads. Agent Kennedy also identified an official crime scene sketch prepared by Detective Jimmy Smith, which Sanchez had modified to show the position of his vehicle and the fact that the victim's car door was found open.

Assuming, *arguendo*, that the sketches are inadmissible hearsay and that the question of their admission into evidence is one of constitutional magnitude, we conclude that the State has met its burden of demonstrating that the error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988).

A review of the transcript discloses that other witnesses—Cecil Davis, Jimmy Register, Mary Ann Futrell, and Dianne Miller—had previously testified, without objection, to the physical details

of the murder scene. By the time the sketches were introduced, these witnesses had used photographs of the murder scene to describe their testimony. The witnesses testified, in accordance with the sketches, to the exact position of all the vehicles, including the yellow car Sanchez was driving. Some witnesses testified that they observed the victim leaning on Sanchez' car talking to the occupant. There was also testimony regarding the position of the victim after he had been shot; the fact that his car had been moved from its original position and that its driver's door was open; and the location of the roads and highways leading to Lyman's Crossroads, the direction of nearby towns, and the buildings at the crossroads. In short, the information contained in the sketches had already been testified to in great detail by other witnesses. We note that although defendant failed to request a limiting instruction at the time the sketches were introduced, the trial court nevertheless gave such an instruction in its charge to the jury. We conclude that any error in admitting the sketches into evidence was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443.

[6] In his seventh and final assignment of error, defendant contends that the trial court erred in allowing the State to call Sanchez to the witness stand when it knew that Sanchez was intending to invoke his Fifth Amendment right against self-incrimination. At the time of defendant's trial, Sanchez was awaiting appeal on his first-degree murder conviction. Through his appellate counsel, Sanchez informed the trial court and the State that he would not answer any questions and would invoke the Fifth Amendment. The trial court nonetheless allowed the State to call Sanchez to the witness stand in the presence of the jury to require him to give his name and invoke his rights. We believe that this was permissible because the prosecutor's case would be "seriously prejudiced" by failure to offer Sanchez as a witness in light of Sanchez' role in the murder. *United States v. Vandetti*, 623 F.2d 1144, 1147 (6th Cir. 1980); *see also State v. Bumgarner*, 299 N.C. 113, 261 S.E.2d 105 (1980). Thus, we hold that the trial court did not err in allowing the State to call Sanchez as a witness.

For the foregoing reasons, we hold that defendant's trial was free of prejudicial error.

No error.

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

Justice MITCHELL concurring.

I concur in the decision of the majority. To avoid any lingering confusion on the part of any lawyer or law student in North Carolina, however, I wish to point out that the American Bar Association's Code of Professional Responsibility does not have the force of law and is not binding on anyone. Therefore, it is not necessary for this Court to consider whether the prosecutors or police officers violated that code in the present case since the answer to any such inquiry is irrelevant.

STATE OF NORTH CAROLINA v. HENRY LIGON, JR.

No. 451A91

(Filed 4 September 1992)

1. **Evidence and Witnesses § 967 (NCI4th)— murder—sales ticket for pistol ammunition—business record—admissible**

The trial court did not err in a noncapital murder prosecution by allowing into evidence a sales ticket and testimony concerning a purchase of pistol ammunition where the use of the sales ticket fits neatly within the parameters of N.C.G.S. § 8C-1, Rule 803(6) in that the ticket was filled out by the witness at the time defendant's driver's license was presented to him at the sale; the ticket was kept in the course of a regularly conducted business activity; it was the regular practice of the business to keep such a record; and the witness was qualified to give the testimony. The witness's failure to identify defendant as the man who presented the driver's license goes to the weight and not the admissibility of the evidence.

Am Jur 2d, Evidence §§ 478, 937-939, 945, 947.

2. **Evidence and Witnesses § 357 (NCI4th)— murder—evidence of defendant's drug dealings—admissible to show motive**

The trial court did not err in a noncapital murder prosecution by allowing testimony about defendant's drug dealings

where the disputed evidence was relevant to show defendant's motive for murder. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence §§ 325, 363.

3. Evidence and Witnesses § 186 (NCI4th)— murder—reputation of neighborhood—admissible

The trial court did not err in a noncapital murder prosecution by allowing testimony that the neighborhood where the shooting occurred has a reputation as an area where drugs are frequently bought and sold because defendant was not charged with any drug offense and the testimony was offered to explain why the victim went there and why defendant was there.

Am Jur 2d, Evidence § 249.

4. Evidence and Witnesses § 729 (NCI4th)— murder—law enforcement documents—defendant identified as suspect—no prejudice

There was no prejudice in a murder prosecution in allowing the jury to see documents from the Asheville Police Department, the S.B.I., and the F.B.I. which identified defendant as the suspect in the murder where defendant did not contend that the documents were otherwise inadmissible, only that the references to defendant as the suspect should have been deleted. Assuming error, there was no prejudice because it is obvious that any criminal defendant standing trial is a suspect in the case.

Am Jur 2d, Appeal and Error §§ 797, 801.

5. Evidence and Witnesses § 3172 (NCI4th)— out of court statement—admitted for corroborative purposes—new information

The trial court did not err in a murder prosecution by allowing a detective to read to the jury a statement by a witness to police for corroborative purposes only. The out-of-court statement was properly admitted to corroborate the in-court testimony, and the only new information in the statement consisted of minor details which strengthened and added credibility to the in-court testimony.

Am Jur 2d, Witnesses § 1013.

6. Evidence and Witnesses § 3081 (NCI4th)— State's witness—prior statements—introduced to impeach—no error—additional material—no prejudice

The trial court did not err in a murder prosecution by allowing into evidence three out-of-court statements for purposes of corroboration and impeachment where a State's witness testified that he had been present at the scene and had heard shots but had not seen anyone with a gun and the State introduced a transcript of the witness's testimony from a prior sentencing hearing for an unrelated crime to which the witness had pled guilty and two written statements the witness had given police. Defendant conceded at oral argument that it was proper for the State to impeach the witness with prior inconsistent statements concerning what he had seen the night of the shooting and, while some of the other statements, such as the suggestion that defendant was the person who had gotten him hooked on drugs, should not have been read to the jury, defendant cannot demonstrate prejudice given the evidence against him.

Am Jur 2d, Witnesses §§ 1013 et seq.; Appeal and Error §§ 797, 801.

7. Homicide § 566 (NCI4th)— murder—instruction on voluntary manslaughter as lesser included offense—imperfect self defense—denied

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on imperfect self defense where, even assuming defendant's version of the evidence is accurate, there was absolutely no evidence that defendant believed it necessary to kill the victim in order to save himself from death or great bodily harm and, even if he had such a belief, it certainly would not have been reasonable, given that the victim's car was speeding away when the shots were fired.

Am Jur 2d, Homicide §§ 498, 510, 511, 525.

8. Homicide § 562 (NCI4th)— murder—instruction on voluntary manslaughter as lesser included offense—provocation—denied

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on provocation where, assuming

defendant's version of the evidence was accurate, there was absolutely no evidence that defendant shot the victim in the heat of passion upon adequate provocation. While defendant may have been "provoked" that the victim stole his cocaine, that is hardly what the law regards as adequate provocation.

Am Jur 2d, Homicide §§ 479, 485.

9. **Homicide § 609 (NCI4th)— murder—instruction on self defense refused—no evidence of reasonable apprehension of death or great bodily harm**

The trial court did not err in a murder prosecution by refusing to instruct the jury on perfect self defense where the undisputed evidence at trial was that the back windshield of the victim's car was blown out by gunshots and that two bullets entered his back as he drove away in his car.

Am Jur 2d, Homicide §§ 480, 485, 519.

10. **Criminal Law § 40 (NCI4th)— murder—instruction on presence—denied—no error**

The trial court did not err in a murder prosecution by denying defendant's request for an instruction on mere presence where witnesses either saw defendant with a gun in his hand after hearing gunshots or did not see him at all and there was thus no evidence that defendant was "merely present" at the scene.

Am Jur 2d, Homicide § 485.

11. **Criminal Law § 466 (NCI4th)— murder—closing argument—reference to defense counsel raising smoke screens—no prejudice**

The prosecutor's closing arguments in a murder prosecution were not so grossly improper as to require intervention *ex mero motu* where the prosecutor mentioned smoke or smoke screen four times during his closing argument to obscure the fact that defendant was guilty of murder.

Am Jur 2d, Appeal and Error § 624; Trial §§ 554 et seq.

12. **Appeal and Error § 502 (NCI4th)— murder—cumulative effect of errors—not prejudicial**

The cumulative effect of "numerous" errors in defendant's murder trial did not require a new trial where the Supreme

Court did not find "numerous" errors and, although defendant may not have received a perfect trial, he received a fair trial free of prejudicial error.

Am Jur 2d, Appeal and Error § 789.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Downs, J.*, upon a jury verdict of guilty of first-degree murder, at the 13 and 20 May 1991 Criminal Sessions of Superior Court, BUNCOMBE County. Heard in the Supreme Court on 11 March 1992.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Elmore & Elmore, by David W. Cartner, for defendant.

FRYE, Justice.

Defendant, Henry Ligon, Jr., was indicted by a Buncombe County grand jury on 4 February 1991 on charges of first-degree murder and discharging a firearm into occupied property. Defendant was tried noncapitally to a jury and found guilty on both counts on 22 May 1991. On appeal, defendant asks this Court to grant him a new trial, arguing that seven alleged errors by the trial judge, individually or cumulatively, deprived him of a fair trial. After a thorough review of the trial transcript, record on appeal, written briefs and oral arguments, we conclude that defendant received a fair trial, free of prejudicial error.

I.

The State's evidence showed that the victim, twenty-five-year-old Oscar Ray Walker, Jr., was shot to death on 27 November 1990 while attempting to steal cocaine from what can best be described as an outdoor drug supermarket in west Asheville. The State's first witness, George Alvin (Al) Davis, told jurors that on the evening of 27 November 1990, he was selling drugs for defendant at the intersection of Burton and Buffalo Streets in Asheville. More specifically, Davis testified that defendant supplied him with several small packets of cocaine to sell. Around 9 p.m., a yellow Volkswagen Rabbit driven by a "white fellow [with] stringy hair" pulled up to the intersection. Davis approached the car on the driver's side, asked the driver what he wanted and handed him a packet of cocaine. Davis then walked around to the passenger's

side of the car, opened the door and began to get inside to collect his money. Before Davis could sit down, however, the driver "hollered" at him to get out. Davis testified that he did as he was told, and the driver "throwed the car in gear and [took] off down the road." It was at this point, according to Davis, that the shots rang out. Davis said he turned around and saw "Mr. Ligon with the gun." Although Davis did not see defendant fire the gun, he testified that he saw defendant "on the sidewalk with the gun pointed down the street." Davis told jurors that the back windshield of the Volkswagen Rabbit was blown out, and the driver momentarily lost control of the car. The driver then regained control and "went on down Burton Street."

Ricky Morris was the State's next witness. He testified that he was currently in prison for selling drugs, and on the night in question he was selling drugs on Burton Street. Morris testified that he saw Davis approach a car and "then I seen him walk away from the car. I heard some shots, but I don't know where it came from." Morris said he did not see anyone with a gun. The State then impeached Morris with two prior inconsistent statements in which Morris said he saw defendant shoot at a yellow car.

Another witness for the State, Regina Hadden, testified that she was shooting pool at the community center on Burton Street the night Walker was shot. After hearing three gunshots, Hadden testified, she saw defendant put a gun in his pocket and heard him say, "That will teach people not to rip Burton Street off."

Asheville Police Detective Jon Kirkpatrick testified that on the evening of 27 November 1990, he was dispatched to a grassy area located at the off-ramp of I-240 at Brevard Road in Asheville. Upon his arrival, emergency medical personnel were removing the driver of a yellow Volkswagen from his car. The driver was subsequently identified as Oscar Ray Walker, Jr. Kirkpatrick testified that the distance from the I-240/Brevard Road off-ramp where Walker's car was found to the intersection where the shooting occurred is 2.65 miles.

Dr. Richard Landau, a pathologist at Memorial Mission Hospital, performed the autopsy on Walker. Landau testified that he found two bullet wounds on the body. Both bullets entered the victim's back. The cause of death, according to Dr. Landau, was a "gunshot wound with organ destruction and second hemorrhage." In layman's

terms, "there was massive destruction of the liver and he bled to death in combination with destruction of the lung."

Although the murder weapon was never recovered, the State presented a series of witnesses in an effort to place the murder weapon in the hands of defendant at the time of the shooting. First, Bobby Lynn Davidson, an Asheville bail bondsman, testified that on 6 October 1990, his 10-millimeter Delta Elite pistol was stolen by one of his clients, Greg Anderson. Anderson, whom Davidson had just bailed out of jail, stole the pistol from Davidson's pickup truck, Davidson testified. Davidson provided police with thirty-nine spent cartridge cases from his stolen pistol.

Greg Anderson followed Davidson to the witness stand and told jurors that he had, indeed, stolen Davidson's pistol on 6 October. Anderson testified that he immediately went to West Asheville and sold the weapon to defendant for $170.

Four days after the gun was stolen, on 10 October 1990, a man displaying defendant's driver's license purchased thirty rounds of Winchester and Remington 10-millimeter automatic ammunition from Finkelstein's store, according to the testimony of Finkelstein's employee Charles Bassett. Bassett testified that federal law requires that records be kept of pistol ammunition sales. Finkelstein's therefore requires identification from anyone purchasing pistol ammunition, and a copy of the sales ticket is retained for its records. On 10 October, Bassett testified, he sold ammunition to someone with Henry Ligon's driver's license. Bassett copied the name, date of birth, address and license number from the driver's license onto the sales ticket. The store's copy of this ticket was later introduced into evidence; another witness, Detective Kirkpatrick, testified that the information on Finkelstein's ticket matched the information on a certified copy of defendant's driver's license obtained from the North Carolina Division of Motor Vehicles. On cross-examination, however, Bassett conceded that he could not identify the person to whom he had sold the ammunition.

Detective Kirkpatrick told jurors that two days after the shooting he and another police officer found a spent 10-millimeter cartridge case in a dirt area at the intersection of Burton and Buffalo Streets—the same intersection where the shooting occurred.

Finally, in an attempt to tie together all these pieces of evidence, the State called to the witness stand firearms expert Gerald F.

Wilkes of the Federal Bureau of Investigation in Washington, D.C. Wilkes testified that, at the request of Asheville police, he compared the thirty-nine spent cartridge cases from bail bondsman Anderson's stolen pistol with the spent cartridge case found at the scene of the crime. The cartridge case found at the scene, Wilkes testified, was made by Winchester. Wilkes said that, in his opinion, the Winchester cartridge case from the crime scene and the cartridge cases from Anderson's pistol "were all fired in one weapon."

Defendant did not testify but presented evidence that the victim was intoxicated on the night of the shooting, had gone to Burton Street to steal cocaine, and that it was possible the victim had fired the first shots.

Thomas Cleveland Trull was a friend of the victim, Oscar Walker. On the night of the shooting, Walker, who lived with his parents, had gone to Trull's house to watch movies and "drink a little bit." After a few drinks, Walker told Trull that he was going to Burton Street to "rip off some niggers." In a statement to police after the shooting, Trull had said that Walker was intoxicated when he left Trull's house, and that Trull had tried to talk him into spending the night.

Dr. Landau, the pathologist, testified on cross-examination that he performed two tests to determine Walker's alcohol level at the time of his death. The blood ethanol test registered .15; the urine ethanol test registered .29—both above the .10 legal limit in North Carolina.

Anthony DeWayne Summey, Walker's best friend, testified that Walker was not a violent person and he had never seen Walker with a gun. "He was very gentle. Oscar, he'd never been in a fight in his life." However, in a statement to police after the shooting, Summey said that Walker would get "brave" after he had been drinking.

Finally, S.B.I. Agent and forensic chemist Charles Frank McClelland, Jr., testified that he conducted tests on Walker's hands to determine whether Walker had fired a gun on the night in question. McClelland, at the request of defendant's attorney, read to the jury his conclusion, contained in a written report, that, "these [test] results do not eliminate the possibility that [Walker] could have fired a gun." Pressed on cross-examination, however,

McClelland acknowledged that, "[b]asically what [the report] says is I don't have an opinion as to whether or not he shot a gun."

Defendant was convicted of discharging a firearm into occupied property, a motor vehicle, and first-degree murder based on the felony murder rule. The jury specifically did not find defendant guilty of first-degree murder based on malice, premeditation and deliberation. Judge Downs sentenced defendant to life imprisonment for the first-degree murder conviction. No sentence was imposed for discharging a firearm into occupied property, that felony having merged into the first-degree felony murder conviction. Defendant appeals to this Court as of right. N.C.G.S. § 7A-27(a) (1989).

II.

[1] In his first assignment of error, defendant argues that the trial judge erred by allowing into evidence a sales ticket and testimony concerning the purchase of ammunition from Finkelstein's. We agree with the State that this evidence was admissible under N.C.G.S. § 8C-1, Rule 803(6), the business records exception to the hearsay rule.

North Carolina Rule of Evidence 803(6) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (6) Records of Regularly Conducted Activity.—A memorandum, report, record, or date compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C.G.S. § 8C-1, Rule 803(6) (1988). State's witness Charles Bassett, an employee of Finkelstein's, testified that federal law requires

a record be kept of pistol ammunition sales. It is the regular practice of Finkelstein's, therefore, to ask for identification when selling pistol ammunition and to record certain information on a sales ticket. Finkelstein's then keeps a copy of the ticket for its records. On 10 October 1990, Bassett testified, he sold 10-millimeter ammunition to someone who presented a driver's license bearing the name Henry Ligon. Bassett recorded the name, license number, address, and date of birth on the sales ticket. Bassett, on cross-examination, was unable to identify defendant as the person who had purchased the ammunition and presented the driver's license.

The use of the sales ticket in this case fits neatly within the parameters of Rule of Evidence 803(6): the sales ticket was filled out by Bassett at the time the driver's license was presented to him; it was kept in the course of a regularly conducted business activity; it was the regular practice of the business to keep such a record; and Bassett, the person who sold the ammunition and made out the sales ticket, was qualified to give the testimony. We hold, on the facts of this case, that the sales ticket was properly admitted into evidence under Rule of Evidence 803(6). *See State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988) (federal firearms' form filled out by the defendant and gun salesman properly admitted into evidence under Rule of Evidence 803(6)).

Defendant argues, however, that notwithstanding Rule of Evidence 803(6), the sales ticket should have been excluded under this Court's decisions in *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), and *State v. Austin*, 285 N.C. 364, 204 S.E.2d 675 (1974). Defendant is mistaken. In *Fulcher* and *Austin*, this Court held that it was error for motel registration cards bearing the purported signatures of the respective defendants to be admitted into evidence. *Fulcher*, 294 N.C. at 515, 243 S.E.2d at 346-47; *Austin*, 285 N.C. at 367, 204 S.E.2d at 676-77. The reasoning in both cases was identical: the signatures had not been *authenticated*, that is, the State did not present evidence in either case that it was actually the respective defendants who had signed the cards. *Fulcher*, 294 N.C. at 515, 243 S.E.2d at 346-47; *Austin*, 285 N.C. at 367, 204 S.E.2d at 676-77. In this case, the authenticity of the sales ticket is not in dispute. Bassett is the person who saw defendant's driver's license, made out the sales ticket and testified at trial. No one disputes that Bassett wrote on the sales ticket what he saw on the driver's license. On cross-examination, Bassett conceded that

he could not identify defendant as the man who purchased the ammunition; he could only testify that someone with defendant's driver's license purchased the ammunition. We agree with the State that the witness' failure to identify defendant as the man who presented the driver's license goes to the *weight* and not the *admissibility* of the evidence. This assignment of error is rejected.

In his next assignment of error, defendant makes at least four different arguments: (1) the trial judge erred by allowing testimony about defendant's character as it related to his drug dealings; (2) the trial judge erred by allowing testimony that the neighborhood where the shooting occurred has a reputation as an area where drugs are frequently bought and sold; (3) the trial judge erred by allowing the jury to see several documents which listed defendant as a "suspect" in Walker's murder; and (4) the trial judge erred by allowing character testimony concerning the reputation and propensity for violence of defendant and defendant's family. We will address each argument separately.

[2] First, defendant argues that the trial judge erred by allowing testimony about defendant's drug dealings. For example, State's witness Al Davis testified that, on the night of the shooting, defendant gave him several packets of cocaine to sell. Davis also testified that he had sold drugs for defendant in the past, earning an average of $1,000 per week. Defendant argues that testimony concerning defendant's drug dealings was inadmissible character evidence used to inflame jurors. The State argues that this testimony was admissible under Rule of Evidence 404(b). We agree with the State.

Rule of Evidence 404(b) provides:

> (b) *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive*, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1988) (emphasis added). In recent years, this Court has emphasized that Rule of Evidence 404(b) is a "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); *see also State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990); *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). On the facts of this case, we agree with the State that the disputed evidence was relevant to show defendant's motive for murder. The State contended at trial that Walker was shot as he attempted to steal cocaine belonging to defendant. State's witness Regina Hadden testified that immediately after the shooting she heard defendant say, "That will teach people not to rip Burton Street off." Without the knowledge that defendant sold cocaine on Burton Street, the State's case would have made little, if any, sense. We hold this evidence was properly admitted under Rule of Evidence 404(b).

[3] Next, defendant argues that the trial judge erred by allowing testimony that the neighborhood where the shooting occurred has a reputation of being an area where drugs are frequently bought and sold.

Defendant is correct that the "applicable general rule is that in a criminal prosecution evidence of the reputation of a place or neighborhood is ordinarily inadmissible hearsay." *State v. Weldon*, 314 N.C. 401, 408, 333 S.E.2d 701, 705 (1985). However, it is noteworthy that the specific holding in *Weldon*, a drug trafficking case, is that "the trial court erred in admitting at defendant's trial *for trafficking in heroin* evidence that defendant's house had a reputation as a place where illegal drugs could be bought and sold." *Id.* at 411, 333 S.E.2d at 707 (emphasis added); *see also State v. Tessnear*, 265 N.C. 319, 144 S.E.2d 43 (1965) (error to admit testimony that the defendant's house had the general reputation of having whiskey for sale when defendant charged with possession of nontax-paid liquor at his premises); *State v. Crawford*, 104 N.C. App. 591, 410 S.E.2d 499 (1991) (error to admit testimony about the reputation of defendant's neighborhood when defendant charged with drug offenses).

In the instant case, defendant was not charged with any drug offense; he was charged with first-degree murder and discharging a firearm into occupied property. Testimony concerning the reputation of the neighborhood was offered, not because it proved that defendant was guilty of selling drugs, but because it explained why the victim went there in the first place, and why defendant was

at the scene. This testimony merely set the scene. On the facts of this case, we hold that the trial court did not err by admitting the disputed evidence.

[4] Next, defendant argues that the trial judge erred by allowing jurors to see documents from the Asheville Police Department, S.B.I. and F.B.I., which identified defendant as the suspect in Walker's murder. Defendant does not argue that the documents were otherwise inadmissible, only that references to defendant as the "suspect" in Walker's murder should have been deleted. It seems obvious that any criminal defendant standing trial before a jury is, by definition, a suspect in the case. Thus, even assuming error, defendant certainly cannot demonstrate that he suffered prejudice. *See* N.C.G.S. § 15A-1443(a) (1988) (to receive a new trial, defendant must demonstrate that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial"). This assignment of error is without merit.

Finally, defendant argues the trial judge erred by allowing testimony concerning his and his family's reputation and propensity for violence. Defendant argues that this evidence was inadmissible as its sole purpose was to show defendant's bad character. The disputed testimony is part of an out-of-court statement made by State's witness Ricky Morris and introduced by the State to impeach Morris' testimony at trial. This prior statement is also the subject of defendant's next assignment of error. We will therefore consider the admissibility of this testimony when we address defendant's next assignment of error.

[5] In his third assignment of error, defendant argues that the trial judge erred by allowing into evidence three out-of-court statements for purposes of corroboration and impeachment: one out-of-court statement by State's witness Al Davis, and two out-of-court statements by State's witness Ricky Morris. By "out-of-court statement" we mean any statement made by the witness other than while testifying at defendant's trial. We will address each statement individually.

Defendant first argues that the trial judge erred by allowing Detective Kirkpatrick to read to the jury a statement made by Al Davis to police. Prior to Detective Kirkpatrick reading the statement, the trial judge admonished jurors that the out-of-court statement was being admitted for corroboration purposes only. We agree

with the State that this out-of-court statement was consistent with Davis' in-court testimony and was therefore admissible for corroboration purposes.

It is now well settled that "[t]o be admissible as corroborative evidence, prior consistent statements must corroborate the witness' testimony, but the corroborative testimony may contain 'new or additional information when it tends to strengthen and add credibility to the testimony which it corroborates.' " *State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 794 (1987) (citations omitted) (quoting *State v. Kennedy*, 320 N.C. 20, 25, 357 S.E.2d 359, 368 (1987)); *see also State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991); *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48; *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). The State cannot, however, introduce prior statements which " 'actually directly contradict[ ] . . . sworn testimony.' " *McDowell*, 329 N.C. at 384, 407 S.E.2d at 212 (quoting *State v. Burton*, 322 N.C. 447, 451, 368 S.E.2d 630, 632 (1988)).

After a careful review of Davis' trial testimony and his statement to police, we conclude that the out-of-court statement was properly admitted to corroborate Davis' in-court testimony. The out-of-court statement tracks almost exactly Davis' description of what took place the night of the shooting. The only "new information" in the out-of-court statement consists of minor details which, we believe, strengthen and add credibility to Davis' in-court testimony. For example, in his in-court testimony, Davis says that he handed the victim a packet of cocaine through the driver's side window and then went around to the passenger's side to get into the car. In his statement to police, Davis added that he handed the packet of cocaine to Walker because, "the driver wanted to taste it." This "new information" certainly does not contradict Davis' in-court testimony; instead, it merely explains why Davis handed the cocaine to Walker before collecting his money. We hold that the trial judge did not err by allowing Davis' out-of-court statement to corroborate his in-court testimony.

[6] Next, defendant argues that the trial judge erred by allowing into evidence two out-of-court statements to impeach and/or corroborate the testimony of State's witness Ricky Morris. Shortly after calling Morris to the witness stand, the following exchange took place between Morris and prosecutor Ronald Moore:

Q. All right. Tell the ladies and gentlemen what you saw when that car drove up [on Burton Street], exactly.

A. I seen—I think it was Al Davis. He went up to the car, and then I seen him walk away from the car. I heard some shots, but I don't know where it came from.

Q. Are you afraid being here testifying today.

MR. LINDSAY: [defense counsel]: Objection.

COURT: Overruled.

A. Not really.

Q. All right. You heard some shots?

A. Yep.

Q. Did you look to see from where those shots came from?

A. Yep.

Q. Did you see somebody with a gun?

A. Nope.

Following this exchange, two out-of-court statements were read to the jury: (1) a lengthy transcript of Morris' sworn testimony from a sentencing hearing a few months earlier at which Morris pled guilty to an unrelated crime; and (2) a written statement Morris had given to police.

During the earlier sentencing hearing, Morris was questioned about what he had seen the night Walker was killed. In contrast to his testimony at defendant's trial, Morris said during the sentencing hearing that, "[t]he truth is I seen [defendant] shoot off in that car." In addition to this statement, however, the jury was read numerous other statements made by Morris during the sentencing hearing, such as: (a) defendant was the person who first gave Morris drugs, after which Morris "got hooked"; (b) Morris was afraid of defendant's family; (c) defendant's family was not "stable"; (d) Morris was pressured by members of defendant's family into signing a statement saying that he had lied to police about what he had seen the night of the shooting; (e) Morris had seen defendant's stepfather cut a man with a knife; (f) Morris heard a "lot of people" say defendant was the person who shot Walker; and (g) Morris had seen defendant purchase weapons.

At oral argument, defendant's attorney conceded that it was proper for the State to impeach Morris with prior inconsistent statements concerning what he had seen the night of the shooting; however, defendant's attorney argued that the trial judge erred by allowing the prosecutor, under the guise of impeaching his own witness, to get before the jury otherwise inadmissible evidence. *See State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989) (impeachment by prior inconsistent statement of State's own witness should not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible). The State, at oral argument, conceded that the trial judge probably should have excluded some of the statements set out above, but argued that any error was not prejudicial to defendant.

We agree with both parties that the trial judge did not err by allowing the prosecutor to impeach Morris with his prior inconsistent statements concerning what he had seen the night of the shooting. We also agree with both parties that some of Morris' other statements from the prior sentencing hearing should not have been read to the jury. For example, Morris' statement which suggested that defendant was the person who got him hooked on drugs neither impeached Morris' credibility nor corroborated his testimony at trial, and therefore should have been excluded. However, even assuming, *arguendo*, that only Morris' prior inconsistent statements about the shooting were properly allowed, we agree with the State that, given the evidence against defendant, he cannot demonstrate prejudice and therefore is not entitled to a new trial.

In order to receive a new trial, defendant has the burden of showing that there was a reasonable possibility the jury would have reached a different verdict had the error in question not been committed. N.C.G.S. § 15A-1443(a). Defendant cannot meet this burden. Al Davis testified that he saw defendant pointing a gun down the street immediately after hearing shots fired. Regina Hadden said she saw defendant put a gun in his pocket immediately after hearing gunshots and heard defendant say, "That will teach people not to rip Burton Street off." The State's evidence also showed that a cartridge case found at the scene of the crime came from the same 10-millimeter pistol which Greg Anderson testified he had sold to defendant less than two months before the shooting. Charles Bassett testified that he had sold 10-millimeter ammunition to someone with defendant's driver's license just four days after

Anderson said he sold the 10-millimeter pistol to defendant. Finally, defendant concedes that Morris' prior statement that he saw defendant shoot into the car was properly admitted to impeach his in-court testimony that he did not see anyone with a gun immediately after the shooting. Although other portions of Morris' prior statement were not flattering to defendant and his family, defendant cannot demonstrate that, had this evidence not been admitted, there was a reasonable possibility that the jury would have found him not guilty of felony murder.

Finally, defendant argues in his brief that the trial judge erred by allowing Morris to be impeached by another prior inconsistent statement—one he made to police after the shooting. The gist of that statement is that Morris saw Al Davis approach a yellow car and give the driver a packet of cocaine; the car then sped off, and defendant shot at the car with a 10-millimeter pistol. We agree with the State that this statement contradicted Morris' in-court testimony, and it was therefore proper for prosecutors to use this statement to impeach Morris' credibility.

[7] In his next assignment of error, defendant argues that the trial judge erred by not instructing the jury on the lesser included offense of voluntary manslaughter. Defendant argues there was evidence at trial that Walker was intoxicated on the night of the shooting and admitted to his friend that he was going to Burton Street to steal cocaine. There was also evidence, defendant argues, that the victim might have fired a gun at the crime scene. Thus, concludes defendant, there was evidence to support a voluntary manslaughter instruction based on two theories: (a) imperfect self-defense; and (2) killing under heat of passion upon sudden provocation.

It is, of course, "an elementary rule of law that a trial judge is required to declare and explain the law arising on the evidence and to instruct according to the evidence." *State v. Strickland*, 307 N.C. 274, 284, 298 S.E.2d 645, 652 (1983). The trial judge is not required, however, to instruct the jury on lesser included offenses " 'when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.' " *Id.* (quoting *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982)). Thus, the question in this case is whether there was evidence adduced at trial to support either of defendant's theories. We hold there was not.

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

State v. Norris, 303 N.C. 526, 529, 279 S.E.2d 570, 572 (1981). Under the law of imperfect self defense, a person may be found guilty of voluntary manslaughter if: (1) the person believed it necessary to kill the deceased in order to save himself from death or great bodily harm; *and* (2) the person'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; *but* (3) the person, without murderous intent, was the aggressor in bringing on the difficulty, *or* (4) the person used excessive force. *Id.* at 530, 279 S.E.2d at 573; *accord State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992). Even assuming defendant's version of the evidence is accurate,[1] he still would not be entitled to an instruction on voluntary manslaughter based on the law of imperfect self defense. The undisputed evidence at trial was that the back windshield of Walker's car was blown out by gunshots, and that two bullets entered Walker's *back* as he drove away in his car. There was absolutely no evidence that defendant believed it necessary to kill Walker in order to save himself from death or great bodily harm. Furthermore, even if he had such a belief, it certainly would not have been reasonable, given that Walker's car was speeding away when the shots were fired.

[8] Defendant also argues that he was entitled to an instruction on voluntary manslaughter because there was evidence that he acted in the heat of passion upon adequate provocation. In order to be entitled to an instruction based on this theory, there must be evidence that: (1) defendant shot Walker in the heat of passion; (2) this passion was provoked by acts of the victim which the law regards as adequate provocation; and (3) the shooting took place immediately after the provocation. *See State v. Weeks*, 322 N.C. 152, 173, 367 S.E.2d 895, 908 (1988). Again, accepting defendant's version of the evidence as accurate, there was absolutely no evidence that defendant shot Walker in the heat of passion upon adequate provocation. To the contrary, the evidence indicates that defendant watched as Walker took a packet of cocaine from one of defendant's surrogates; that Walker took off down the street without paying;

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1. Although S.B.I. Agent McClelland concluded in his report that test results "do not eliminate the possibility that [Walker] could have fired a gun," when pressed on cross-examination, he acknowledged that, "[b]asically what [the report] says is I don't have an opinion as to whether or not [defendant] shot a gun." Thus, it is by no means clear that there was evidence that Walker fired a gun at the crime scene.

and that defendant then shot at Walker's car as it fled the scene. Even if Walker fired a pistol, there was no evidence it was fired at defendant. Indeed, there was no evidence that Walker and defendant ever spoke or even saw one another. While defendant may have been "provoked" that Walker stole his cocaine, that is hardly what the law regards as "adequate provocation." This assignment of error is without merit.

[9] In his fifth assignment of error, defendant argues the trial court erred by failing to instruct the jury on the law of perfect self-defense. The first two elements of perfect self-defense are identical to the first two elements of imperfect self defense. *See Norris*, 303 N.C. at 530, 279 S.E.2d at 572-73. For the reasons set out above, this assignment of error is rejected.

[10] In his next assignment of error, defendant argues the trial judge erred by denying defense counsel's request for a jury instruction on "mere presence." We disagree.

If a party requests a jury instruction which is a correct statement of the law and which is supported by the evidence, the trial judge must give the instruction at least in substance. *State v. Fullwood*, 323 N.C. 371, 390, 373 S.E.2d 518, 529 (1988), *death sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990). Defendant is correct that the "mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense." *State v. Sanders*, 288 N.C. 285, 290, 218 S.E.2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 47 L. Ed. 2d 102 (1976). Thus, if there was evidence at trial that defendant was "merely present" at the scene, the trial judge should have instructed the jury on this principle of law. We agree with the State, however, that there was no evidence presented at trial to support this instruction.

Two witnesses testified that they saw defendant at the scene of the crime on the night of the murder: Al Davis testified that he saw defendant pointing a gun at the victim's car; and Regina Hadden testified that she saw defendant put a gun in his pocket immediately after hearing gunshots, and heard him make an incriminating statement. Ricky Morris testified that he saw Al Davis approach a car and heard gunshots, but did not see anybody with a gun. On cross-examination, Morris added he did not see defendant on the street when the shots were fired. In sum, witnesses either

saw defendant with a gun in his hand after hearing gunshots, or did not see him at all. Thus, there was no evidence that defendant was "merely present" at the scene. This assignment of error is without merit.

[11] In his seventh assignment of error, defendant argues he is entitled to a new trial because of "improper and prejudicial comments" made by the prosecutor during closing argument. Specifically, defendant argues that the prosecutor repeatedly accused defense counsel of raising "smoke screens," thus questioning defense counsel's integrity and truthfulness.

Four times during his closing argument, the prosecutor mentioned "smoke" or "smoke screen" to describe how defense counsel was trying to obscure the fact that defendant was guilty of murder. Defendant concedes in his brief that defense counsel did not object to the use of these phrases; thus, "appellate review is limited to whether the prosecutor's remarks were so extremely or grossly improper that the trial court should have intervened on its own motion." *State v. Shaw*, 322 N.C. 797, 806, 370 S.E.2d 546, 551 (1988). Assuming arguendo that the prosecutor's closing argument may be viewed as questioning his opponent's integrity, we agree with the State that the prosecutor's comments in this case were not so grossly improper as to require the trial judge to intervene *ex mero motu*. *Cf. U.S. v. De La Vega*, 913 F.2d 861, 872 n.11 (11th Cir. 1990) (improper for prosecutor to argue that defense tactics were "smoke screens"; however, error held harmless), *cert. denied*, --- U.S. ---, 114 L. Ed. 2d 99 (1991); *McGee v. State*, 435 So. 2d 854, 859 (Fla. Dist. Ct. App. 1983) ("smoke screen" argument condemned; however, error held harmless), *rev. denied*, 444 So. 2d 417 (Fla. 1984).

[12] Finally, defendant argues that, even if this Court does not find that any one error, standing alone, requires a new trial, the cumulative effect of "numerous" errors deprived him of a fair trial. *See State v. White*, 331 N.C. 604, 419 S.E.2d 557 (1992) (defendant entitled to new trial because, when considered cumulatively, errors prevented him from receiving a fair trial). We did not find "numerous" errors in defendant's trial. Although defendant may not have received a "perfect" trial, we are confident, after a thorough review of his case, that he received a fair trial, free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JOE LEWIS PITTMAN

No. 563A90

(Filed 4 September 1992)

1. **Criminal Law § 507 (NCI4th)— unrecorded bench and chambers conferences—no prejudice**

The trial court did not commit prejudicial error in a noncapital murder prosecution by failing to record bench and chambers conferences after granting defendant's motion for complete recordation where none of the conferences resulted in a significant ruling, if any ruling resulted at all, and defendant failed to specifically allege how he was prejudiced by the lack of complete recordation. N.C.G.S. § 15A-1241.

Am Jur 2d, Criminal Law § 916.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

2. **Criminal Law § 507 (NCI4th)— unrecorded jury charge conferences—no prejudice**

A defendant in a noncapital murder prosecution failed to demonstrate how he was materially prejudiced by two unrecorded jury charge conferences where all counsel for defendant and the State were present, defense counsel did not object to the failure to require recordation of these conferences, the trial court invited defense counsel to state its objections to the court's proposed instructions, and defense counsel took full advantage of its opportunity to do so. N.C.G.S. § 15A-1231(b).

Am Jur 2d, Criminal Law § 916.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law. 85 ALR2d 1111.

3. **Constitutional Law § 342 (NCI4th)— bench and chambers conferences—outside defendant's presence—no request or objection—waiver of right to appeal**

A defendant in a noncapital murder prosecution waived his right to be present at bench and chambers conferences where he failed to request to be present or to object to his

absence. Because the State did not try defendant for his life, his right to be present at every stage of his trial was a personal right which could be waived by his failure to assert it.

Am Jur 2d, Criminal Law §§ 910, 928.

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

4. **Evidence and Witnesses § 2479 (NCI4th)— murder—defendant's mental status—sequestration of witnesses denied—no abuse of discretion**

The trial court did not abuse its discretion in a noncapital murder prosecution by denying defendant's motion for sequestration of the State's witnesses where the trial court heard the arguments of counsel prior to denying defendant's motion and defendant gave no reason for suspecting that the State's witnesses would use previous witnesses' testimony as their own.

Am Jur 2d, Trial §§ 240-242.

Prejudicial effect of improper failure to exclude from courtroom or to sequester or separate state's witnesses in criminal case. 74 ALR4th 705.

5. **Homicide § 230 (NCI4th)— first degree murder—evidence sufficient**

There was substantial evidence of each element of two first degree murders where the evidence, taken in the light most favorable to the State, tended to show that neither of the victims provoked defendant; one victim was helpless when she was attacked by defendant; previous difficulties existed between defendant and each of the victims and there was some evidence that he had threatened each of them on previous occasions; and the killings were committed in a brutal manner during which defendant inflicted numerous wounds on the victims.

Am Jur 2d, Homicide §§ 44-48.

6. **Criminal Law § 113 (NCI4th)— murder—failure to provide statements and witness list—motion to suppress denied—no abuse of discretion**

The trial court did not abuse its discretion in a noncapital murder prosecution, and there was no prejudice, where defend-

ant contended that the State had not given an inculpatory statement to defendant or provided a list of witnesses interviewed by law enforcement officials at the scene, but defendant never informed the trial court that the statement had not been provided, did not request that the statement be suppressed, and did not inform the court that he thought he was entitled to the list of witnesses or that he had not been provided with the list. There can be no abuse of discretion when a party fails to bring a matter to the court's attention in order for the judge to exercise his discretion and rule thereon. There was no abuse of discretion in refusing to suppress another statement which was allegedly inaccurate as provided because the State presented substantial evidence on the issue even absent the statement.

Am Jur 2d, Criminal Law § 998.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

7. **Evidence and Witnesses § 3198 (NCI4th)— defense witness—recross examination—allowed to read suppression hearing testimony of State's witness into evidence—no error**

The trial court did not err in a noncapital murder prosecution by allowing a defense witness to read into evidence the prior suppression hearing testimony of a State's witness where defendant had called the witness to rebut the testimony of a State's witness, a Highway Patrol officer, concerning statements made by defendant, and the State asked the witness on recross examination to read into evidence the Trooper's prior suppression hearing testimony

Am Jur 2d, Criminal Law § 728.

8. **Homicide § 678 (NCI4th)— murder—instructions—diminished capacity—no error**

The trial court did not err in a murder prosecution by refusing defendant's request to include an instruction on diminished capacity in its final mandate where the court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill. The failure to include a similar charge in its final mandate could not have created

confusion in the minds of the jurors as to the State's burden of proof.

Am Jur 2d, Homicide § 561.

9. Evidence and Witnesses § 1274 (NCI4th)— murder—confession—waiver of rights—defendant's mental capacity

The trial court did not err in a noncapital murder prosecution by failing to suppress defendant's signed confession where defendant contended that the confession was involuntary due to his mental condition. Although there was substantial evidence that defendant had a history of schizophrenia and that he had sought and obtained medication for this condition approximately three days prior to the crimes at issue, that evidence alone fails to establish that defendant lacked the capacity to knowingly, intelligently, and voluntarily waive his rights. Defendant's psychiatric expert was unable to offer a professional opinion as to whether defendant could have properly waived his rights; there was no evidence that defendant exhibited bizarre behavior or that he was unable to care for himself; his confession was not illogical and nonsensical, but was consistent with statements he had made on prior occasions to two State's witnesses and with the physical evidence at the scene; several of the State's witnesses who were acquainted with defendant and his history of mental illness testified that defendant was rational and aware of what he had done on the night of the killing; and defendant was cooperative and generally followed instructions.

Am Jur 2d, Evidence §§ 526, 543, 582.

Validity or admissibility, under Federal Constitution, of accused's pretrial confession as affected by accused's mental illness or impairment at time of confession—Supreme Court cases. 93 L. Ed. 2d 1078.

10. Constitutional Law § 290 (NCI4th)— murder—effective assistance of counsel—refusal to hear argument—no error

Defendant was not denied effective assistance of counsel in his noncapital murder trial where, although defendant contended that the court refused to hear counsel's arguments in favor of a motion to suppress, it does not appear that defense counsel ever made any effort to argue in support of defendant's position. Defense counsel stated that he possessed three cases

discussing the State's burden of showing a knowing and voluntary waiver of rights and the judge stated that it would not be necessary to review those cases. Nothing in those proceedings indicates that the trial court denied defendant his right to the effective assistance of counsel.

Am Jur 2d, Criminal Law §§ 748, 751, 752.

Adequacy of defense counsel's representation of criminal client regarding confessions and related matters. 7 ALR4th 180.

11. Criminal Law § 446 (NCI4th)— murder—closing argument—if defendant not guilty, justice is dead—not improper

There was no error requiring the court to intervene *ex mero motu* in the prosecutor's closing argument in a murder prosecution where the prosecutor argued that if defendant was found not guilty, "justice in Halifax County will be dead," nor was there anything in the remainder of the argument so grossly improper that the trial court should have intervened.

Am Jur 2d, Trial §§ 554, 566-567, 654.

Propriety and prejudicial effect of prosecutor's argument to jury indicating his belief or knowledge as to the guilt of accused—modern state cases. 88 ALR3d 449.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two consecutive life sentences entered by *Booker, J.*, at the 20 August 1990 Criminal Session of Superior Court, HALIFAX County, upon two verdicts of guilty of first degree murder. Heard in the Supreme Court 12 March 1992.

Defendant was tried non-capitally for the first degree murders of Spencer Powell and Connie Williams. He relied on insanity as a defense. The evidence presented at trial showed that defendant, an honorably discharged veteran, lived in Scotland Neck with his mother and girlfriend. Defendant's girlfriend, Connie Williams, was one of the victims. On 5 May 1989, around 8:00 p.m., defendant went to the house of his neighbor, Durwood Lewis, and told Lewis, "[t]here's been a mercy killing at my house, call the sheriff." Defendant then left and returned to his house.

Law enforcement officers arrived at defendant's house approximately twenty minutes later. When they arrived they observed

one of the victims, Spencer Powell, lying on defendant's front porch in a puddle of blood. Powell was defendant's neighbor. Powell had suffered two severe wounds to the head. Defendant then appeared, walked out of the house, stepped over the body and onto the porch. Defendant was instructed to place his hands over his head and to walk down the steps. Defendant proceeded down the steps and said, "[y]ou might as well come on and get me, . . . I done killed both of 'em." Continuing, he said, "I killed both of them with a damn stick." Defendant was handcuffed and transported to the Sheriff's Department.

The officers who remained at the crime scene entered the house where they found Connie Williams lying face down on the floor in a puddle of blood. Williams suffered a large gaping wound to the head. The officers discovered an ax in the kitchen which was later determined to have inflicted the fatal wounds to the victims' heads.

Defendant was transported to the Sheriff's Department by a Highway Patrol officer. While en route, defendant stated to the officer, who had known defendant for some time, that, "I told 'em I was gone [sic] kill 'em. I went to the Sheriff's Department and told 'em that I was gone [sic] kill 'em. . . . I caught 'em together and I did what I had to do." Defendant was later met by a detective from the Sheriff's Department. The detective advised defendant of his rights pursuant to the decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). Defendant indicated that he understood his rights and that he would answer the detective's questions. Defendant signed a written waiver of his rights and then confessed to killing the two victims. The detective prepared a written summary of what defendant had told him and read it aloud to defendant. Defendant told the detective, "[y]ou got it right[,]" and signed the statement.

The State presented several lay witnesses who testified that they knew the defendant, that they were aware that he had a history of mental illness, and that he had a reputation in the community as being mentally unstable. These witnesses also testified that on the evening of the murders, defendant was coherent and that he acted normal in all aspects. There was some evidence that defendant had the odor of alcohol about his person, yet several witnesses testified as to defendant's apparent sobriety.

Defendant called three witnesses who presented testimony from which the jury could have found the defendant was not guilty by reason of insanity.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

William L. Livesay for defendant appellant.

WEBB, Justice.

On appeal, defendant brings forth numerous assignments of error. We conclude that defendant's trial was free from prejudicial error.

[1] Defendant first assigns as error the trial court's failure to require recordation of various bench and chambers conferences. Prior to trial, defendant moved for complete recordation of all proceedings, specifically including motion hearings, jury selection and bench conferences. Although these motions were allowed by the trial court, it held several unrecorded bench and chambers conferences, including two chambers conferences that concerned the jury charge. Defendant contends that the trial court's actions violated his due process rights under the federal and North Carolina constitutions and that he was prejudiced thereby. We disagree.

N.C.G.S. § 15A-1241 mandates that the trial judge require the court reporter to record "all statements from the bench and all other proceedings[.]" In non-capital cases, jury selection, opening statements, final jury arguments and arguments of counsel on questions of law are excepted from the recordation requirement. *Id.* However, upon proper motion jury selection, opening statements and final jury arguments must also be recorded. *Id.* In this case, the trial court, having allowed defendant's motion for complete recordation, should have required recordation of all conferences and its failure to do so constituted error. We must now determine whether defendant was prejudiced by this error.

Excluding the two unrecorded charge conferences, the record reveals that the trial court conducted seven unrecorded bench conferences and one unrecorded chambers conference. The first such bench conference occurred during defendant's suppression hearing after the State had completed its examination of its first witness and before it called its second witness. The record indicates that

no ruling, significant or otherwise, resulted from this conference. At its completion, the State simply proceeded to call its next witness.

The chambers conference occurred when the State announced that it was prepared to call defendant's case. This conference was held at the request of the trial judge and at its conclusion, the State proceeded to call defendant's case as it had done before.

The second bench conference occurred immediately after defendant's case had been called when defense counsel asked to approach the bench "for a little housekeeping matter[.]" The third bench conference was also initiated by defense counsel when, during jury selection, the prosecutor learned that a prospective juror was acquainted with defense counsel.

The next bench conference also occurred during jury *voir dire*. The State had challenged for cause a prospective juror who had revealed that his nephew had been convicted of murder three years earlier and that he would be unable to be an unbiased juror. This conference was initiated by the court and at its conclusion the court examined the juror before allowing the State's challenge for cause. The fifth bench conference was initiated by the court during defense counsel's examination of a prospective juror. From the context of defense counsel's initial line of examination and his examination subsequent to the conference, it appears that the conference was called for the purpose of cautioning defense counsel against asking the juror how she would decide the case under a particular set of circumstances.

The next bench conference occurred after defense counsel had indicated his satisfaction with a juror. At the conclusion of the conference, the judge instructed the clerk to place another juror in the jury box after which jury selection proceeded in ordinary fashion. The final bench conference was initiated by defense counsel prior to his examination of a juror whose husband worked as an administrative assistant in the District Attorney's office. This conference was preceded by another conference, also at defense counsel's initiation, between defense counsel and the prosecutor. Following the conference, defense counsel examined the juror and then unsuccessfully sought to have her excused for cause. Defense counsel then exercised a peremptory challenge against this juror.

In his brief, defendant does not say, and we cannot discern, how he was prejudiced by the trial court's failure to record these

various conferences. While the content of these conferences is unclear, the record shows that none of the conferences resulted in a significant ruling, if any ruling resulted at all.

The first chambers conference was held by the court before defendant's trial had actually begun. One of the bench conferences, in the words of defense counsel, concerned a "housekeeping matter." Three of the conferences clearly concerned the subject of juror bias. One juror stated that he could not be impartial. Another juror was the wife of an administrative assistant with the District Attorney's office. The third potentially biased juror was acquainted with all trial counsel and had at sometime been represented by defense counsel. The record indicates that another conference was called for the purpose of cautioning defense counsel against improper juror *voir dire*. The remaining two conferences were initiated by the trial judge during transitional stages of the proceedings and neither conferences resulted in any ruling by the court. Based on the record facts and defendant's failure to specifically allege how he was prejudiced by the lack of complete recordation, we hold that the trial court's failure to require complete recordation was harmless beyond a reasonable doubt.

[2] Defendant next contends that the trial court erred by conducting unrecorded jury charge conferences. N.C.G.S. § 15A-1231 provides that charge conferences must be recorded but that, "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant." N.C.G.S. § 15A-1231(b) (1988).

In this case, the record reflects that the trial court conducted two unrecorded charge conferences at which all counsel for defendant and for the State were present. Defense counsel did not object to the trial court's failure to require recordation of these conferences. At the conclusion of these conferences, the judge explained on the record that the chambers conferences had been conducted and that it would instruct the jury according to the applicable North Carolina Pattern Jury Instructions. The judge stated to trial counsel that "if you have any comment to make about these as we go along, I would suggest that you make it as we proceed." The court then read the number and title of each instruction it intended to give. The record reflects that defense counsel made numerous requests that additional or different in-

structions be given. As described in defense counsel's own words, these recorded requests were made "for the protection of the record[.]"

The record shows that the trial court invited defense counsel to state its objections to the court's proposed instructions and that defense counsel took full advantage of its opportunity to do so. Thus, defendant has failed to demonstrate how he was materially prejudiced by the two earlier unrecorded charge conferences. N.C.G.S. § 15A-1231(b) (1988); *see also State v. Bacon*, 326 N.C. 404, 390 S.E.2d 327 (1990).

[3] Defendant next contends that his federal and state constitutional rights to be present at every stage of his trial were violated when the trial court conducted bench and chambers conferences outside of his presence. Defendant takes the position that he had an unwaivable right to be present at every stage of his non-capital trial because he was charged with first degree murder, for which he could have been tried for his life. Defendant cites the Court's decision in *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *sentence vacated*, --- U.S. ---, 111 L. Ed. 2d 777 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991), in support of this contention.

It is well settled that the North Carolina Constitution grants criminal defendants the right to be confronted by witnesses against them and to be present at every stage of their trials. *Id.* at 29, 381 S.E.2d at 651. When a defendant is tried for a capital felony, his right to be present at every stage of his trial is unwaivable. *Id.* In this case, the State did not try defendant for his life. Thus, defendant's case lost its capital nature and defendant's right to be present at every stage of his trial was a personal right which could be waived, either expressly, or by his failure to assert it. *State v. Braswell*, 312 N.C. 553, 559, 324 S.E.2d 241, 246 (1985). Having failed to request to be present at either of the conferences or to object to his absence therefrom, defendant waived his right to be present and cannot, on appeal, assign as error the trial court's denial of that right. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred by denying his motion for sequestration of the State's witnesses. Defendant says he was prejudiced by the court's ruling because, unsequestered, the State's witnesses were allowed to tailor their testimony to that of earlier State's witnesses. Defendant argues that his mental status at the time of the crime was of critical importance to his

defense and that because his motion was denied, the State's witnesses tailored their testimony to the testimony of earlier witnesses to the effect that defendant appeared "normal" or "rational" at the relevant times.

While it is true that one of the purposes for requiring sequestration is to prevent witnesses from tailoring their testimony from that of earlier witnesses, in order to show error a defendant must show that the trial court abused its discretion. N.C.G.S. § 15A-1225 (1988); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Harrell*, 67 N.C. App. 57, 312 S.E.2d 230 (1984). In this case, the trial court heard arguments of counsel prior to denying defendant's motion. Having reviewed those arguments, we cannot hold that the trial court abused its discretion by denying defendant's motion. When asked by the court, defendant gave no reason for suspecting that the State's witnesses would use previous witnesses' testimony as their own. We hold that defendant has failed to show that the trial court abused its discretion and thus overrule this assignment of error.

[5] Defendant next contends that the State failed to present substantial evidence of each essential element of the offenses charged and that therefore the trial court erred by denying his motions to dismiss, to set aside the verdict, and for a new trial. Specifically, defendant says that considering the evidence of defendant's mental illness, there was insufficient evidence of premeditation or deliberation. We disagree.

When the State presents substantial evidence of each of the elements of the crime charged, the question of the defendant's guilt of that charge should be submitted to the jury. *State v. Horton*, 299 N.C. 690, 263 S.E.2d 745 (1980); *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as sufficient to support a conclusion." *Corn*, 303 N.C. at 296, 278 S.E.2d at 223. When determining whether the State has presented substantial evidence, the trial court should evaluate the evidence in the light most favorable to the State. *State v. Simpson*, 303 N.C. 439, 279 S.E.2d 542 (1981).

Premeditation means thought beforehand for some length of time, however short. No particular length of time is required and it is sufficient if the premeditation occurred at any time prior to the killing. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980).

Deliberation means the defendant carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

Premeditation and deliberation ordinarily are not susceptible to proof by direct evidence and must usually be proved circumstantially. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Among the circumstances that are to be considered in determining whether a killing was with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct and statements of the defendant before and after the killing; (3) threats and declarations of the defendant before and during the occurrence giving rise to the victim's death; (4) ill-will or previous difficulty between the parties; (5) evidence that the killing was done in a brutal manner; and (6) the nature and number of the victim's wounds. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

At trial numerous witnesses testified that, in their opinion, immediately after the killings, defendant's mental and physical faculties were not impaired, that he knew what he was saying and doing. Connie Williams' sister, Mildred Gray, testified that approximately two weeks prior to 5 May 1989, she was talking with the victim in Gray's yard. Defendant ran into the yard, carrying a knife behind him and preparing to stab the victim. When Gray told defendant that she did not believe that he would stab the victim, he turned and left. Betty Boyd, a Halifax County magistrate, testified that two or three days prior to the killings defendant had visited her at her office and told her that Spencer Powell had stolen food and clothing from defendant's home. Boyd told defendant that he needed more evidence and that the Sheriff's Department needed to investigate the allegations. Deputy Sheriff Joe Williams testified that approximately two weeks prior to 5 May, defendant told him that Powell had been stealing defendant's food and "messing with" defendant's girlfriend when defendant was not around. When Williams told defendant that he should let the Sheriff's Department handle the problem, defendant said that he would "deal with it [himself]."

In addition to the evidence above, the State introduced into evidence defendant's signed confession in which he stated in part:

> Tonight Spencer Powell came to my house. I don't know exactly what time it was. He didn't bring anything to drink, but we had some beer there. Spencer wanted something to drink, but I wouldn't give him any beer because he done broke into my house one time and stole some food out of my refrigerator. He ain't nothing but a thief and a rogue. Spencer sat out on the porch because I wouldn't let him in the house. . . . I went out on the porch tonight and told Spencer I didn't want him to come to my house anymore. I don't know what he said back to me, but it was something because it made me mighty angry. I went back into my house and got my axe handle. I went back outside and I hit Spencer across the head. Spencer was standing up when I hit him. I hit him just once and he fell to the porch. I went back inside. Connie was passed out on the floor and I took and hit her. I don't know exactly where I hit her at, but I know she caught a lick from me. I only hit her once. . . .

Additional evidence tended to show that defendant killed the victims by striking their heads with an ax. Williams suffered multiple wounds to her head and face. One wound was caused by a severe blow to her head that broke the skull bone, forced it inward and then tore the underlying brain tissue. Powell suffered a depressed skull fracture to the front left of his skull as well as a wound to the crown of his head which literally laid his skull open.

This evidence, taken in the light most favorable to the State, tended to show that neither of the victims provoked defendant. Connie Williams was helpless when she was attacked by defendant. Previous difficulties existed between defendant and each of the victims and there was some evidence that he had threatened each of them on previous occasions. These killings were committed in a brutal manner during which defendant inflicted numerous wounds on the victims. We hold that there was substantial evidence of each element of the crimes charged and that the trial court properly denied defendant's motions.

[6] Defendant next assigns as error the trial court's failure to suppress two statements that were allegedly made by defendant following the killings. Defendant contends that the trial court should have suppressed these statements as a sanction against the State for failing to provide a copy of one of defendant's statements, providing an inaccurate copy of another statement, and for failing

to provide a list of the witnesses interviewed by law enforcement officers at the crime scene. This assignment of error is meritless.

Whether to impose sanctions for failure to comply with a discovery order is a matter addressed to the sound discretion of the trial judge. *State v. Thomas*, 291 N.C. 687, 231 S.E.2d 585 (1977); *State v. Jones*, 295 N.C. 345, 245 S.E.2d 711 (1978). The first statement that defendant contends should have been suppressed was testified to by Gwen Wright. Wright testified that defendant said, "[i]f you come up here, it already two dead bodies, and if you come up here there'll be two more dead bodies." Defendant contends that this statement was never provided to defendant and that it therefore should have been suppressed. However, defendant never informed the trial court that this statement had not been provided to defendant, nor did he request that the statement be suppressed. Likewise, it does not appear that defendant informed the court that he thought he was entitled to the list of witnesses or that he had not been provided a copy of the same. When a party fails to bring a matter to the court's attention in order for the judge to exercise his discretion and rule thereon, there can be no abuse of discretion.

The second statement defendant contends should have been suppressed occurred in the testimony of Trooper Carmon. Carmon testified, as transcribed by the court reporter, that while he was transporting defendant to jail, defendant said, "I went to the Sheriff's Department and told 'em I was gone [sic] kill 'em. . . ." Defendant says that Carmon's testimony was that defendant said, "I was gone [sic] kill *them*." [Emphasis added.] Prior to trial, the State provided defendant with a copy of a statement in which he allegedly said, "I told the Sheriff's Department that I was going to kill *him*." [Emphasis added.] Defendant does not contend that the State intentionally provided inaccurate discovery. However, he does argue that he was prejudiced by the admission of Carmon's testimony because it was the only evidence tending to show that defendant acted with premeditation and deliberation in the killing of Williams.

We hold that defendant has failed to show that the trial court abused its discretion by refusing to suppress this statement. However, taking as true defendant's contention that Carmon's testimony differed from the statement provided to defendant, any error in the admission of the statement was harmless. As we held

above, the State presented substantial evidence of premeditation and deliberation, even in the absence of the statement at issue.

[7] By his next assignment of error, defendant contends that the trial court committed prejudicial error by allowing a defense witness to read into evidence the prior testimony of State's witness Carmon. Defendant called the witness in order to rebut Trooper Carmon's testimony that defendant had used the word "them" as opposed to the word "him." On recross-examination the prosecutor asked the witness to read into evidence Carmon's prior suppression hearing testimony in which he stated that defendant had used the word "them."

In *State v. Sparks*, 297 N.C. 314, 255 S.E.2d 373 (1979), the Court held that no error was committed when the trial court allowed the court reporter to read into evidence the prior testimony of witnesses who testified during the defendant's second trial. Specifically, the Court held that, "[t]estimony at a former trial is admissible for corroborative purposes." *Id.* at 334, 255 S.E.2d at 385-386. Therefore, we hold that the trial court did not err by allowing the witness to read into evidence the suppression hearing testimony of Trooper Carmon in order to corroborate Carmon's trial testimony to the effect that defendant said that, "he was going to kill *them*." [Emphasis added.] This assignment of error is overruled.

[8] Next, defendant contends that the trial court erred by refusing defendant's request to include an instruction on diminished mental capacity in its final mandate. The court's charge included instructions on diminished mental capacity and the defense of insanity. Defendant does not contend that these instructions were erroneous. Rather he contends that by refusing to include a diminished capacity instruction in its final mandate, the trial court's instructions confused the jury "as to where defendant's 'mental capacity' fit in with the elements the State has the burden of proving[.]" Having thoroughly reviewed the court's charge, we disagree. The court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill. This charge is in accord with the Court's decision in *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). That the court did not include a similar charge in its final mandate could not have created confusion in the minds of the

jurors as to the State's burden of proof. This assignment of error is overruled.

[9] Defendant next contends that the trial court erred by failing to suppress defendant's signed confession. Defendant says that, based on the totality of the circumstances, defendant's confession was involuntary and that the trial court erred by concluding as a matter of law that defendant knowingly, intelligently and voluntarily waived his *Miranda* rights. He further says that because the trial court would not allow defendant's counsel to present his legal arguments in favor of his position, defendant was denied his right to the effective assistance of counsel.

Defendant contends that this case is similar to *State v. Ross*, 297 N.C. 137, 254 S.E.2d 10 (1979), in which the Court, after weighing and considering all of the evidence, held that "the inescapable conclusion is that 'the confession most probably was not the product of any meaningful volition.' " *Id.* at 143, 254 S.E.2d at 14, *quoting Blackburn v. Alabama*, 361 U.S. 199, 211, 4 L. Ed. 2d 242, 250 (1960). In *Ross*, the evidence showed that the defendant had a history of mental illness dating back twelve or thirteen years and that he had been involuntarily committed to a psychiatric hospital as recently as one week prior to the crime he allegedly committed. *Id.* at 141, 254 S.E.2d at 12. Three days prior to the crime and the defendant's confession, he had been to a mental health clinic. The therapist who saw him testified that his "mood and affect were 'inappropriate,' he had 'poor judgment,' and 'there was a very high likelihood that he was suffering from psychotic conditions,' specifically schizophrenia." *Id.* at 141, 142, 254 S.E.2d at 13. Other evidence tended to show that the defendant had been unable to work, incapable of caring for himself, and exhibiting bizarre behavior. *Id.* at 142, 254 S.E.2d at 13. The victim of the crime testified that the defendant looked strange and psychiatric examination following the defendant's confession revealed that he was suffering from "chronic, undifferentiated schizophrenia." *Id.* In addition, the defendant's confession was itself illogical and nonsensical. *Id.* at 143, 254 S.E.2d at 13.

The evidence in the case *sub judice* concerning defendant's mental status is distinguishable from the evidence presented in *Ross*. Furthermore, the evidence supports the trial court's findings of fact, which findings are thus binding on appeal despite the existence of conflicts in the evidence. *State v. Simpson*, 314 N.C.

359, 334 S.E.2d 53 (1985). Although there was substantial evidence that defendant had a history of suffering from schizophrenia and that he had sought and obtained medication for this condition approximately three days prior to the crimes at issue, this evidence, standing alone, fails to establish that defendant lacked the capacity to knowingly, intelligently and voluntarily waive his rights.

Defendant's psychiatric expert, Dr. Lara, testified that he was unable to offer a professional opinion as to whether defendant could have properly waived his rights. Dr. Lara testified that although he was unable to determine the exact level of defendant's understanding, the fact that defendant responded coherently to questions indicated that he had some level of understanding.

Unlike *Ross*, here there was no evidence that defendant exhibited bizarre behavior. Nor was there any evidence that he was unable to care for himself. Additionally, there was evidence which tended to show that defendant made periodic visits to the Halifax County Mental Health Center to obtain medicine to control his mental illness and that he had done so three days prior to the killings. Contrary to defendant's contention, his confession was not illogical and nonsensical. Rather, his confession is a chronological account of the events leading up to the killings. In his confession, defendant stated his belief that Powell had stolen defendant's food and that the victims were engaged in some type of intimate relationship. This statement was consistent with statements he had made on prior occasions to two State's witnesses. Defendant's statement was also consistent with the physical evidence at the scene. He accurately described the position of the victims' bodies, the location of their wounds, and the location where he had placed the murder weapon. Although defendant described the ax used to kill the victims as a stick or an ax handle, we cannot say that this inaccuracy is necessarily indicative of mental incompetence.

Several of the State's witnesses were acquainted with defendant and were aware of his history of mental illness. These witnesses testified that on the night of the killings, defendant was rational and aware of what he had done. None of these witnesses observed anything abnormal about defendant, his behavior, or his speech on the night in question. He was cooperative and generally followed instructions. He made no bizarre statements and acted appropriately in light of the circumstances. We hold that the trial court's findings of fact are supported by competent evidence and that

these findings in turn support the court's conclusion that defendant freely, knowingly, intelligently, and voluntarily waived his *Miranda* rights. This assignment of error is overruled.

[10] Defendant's contention that he was denied his right to the effective assistance of counsel is without merit. Defendant argues that this right was denied by the trial court's refusal to hear his counsel's arguments in favor of his motion to suppress. However, after reviewing the portions of the record referenced by defendant, it does not appear that defense counsel ever made any effort to argue in support of defendant's position. It does appear that defense counsel stated to the court that he possessed three cases discussing the State's burden of showing a knowing and voluntary waiver of rights, and that the judge stated that it would not be necessary for him to review those cases. We find nothing in these proceedings which indicates that the trial court denied defendant his right to the effective assistance of counsel. This assignment of error is overruled.

[11] Defendant next contends that the prosecutor's final argument was improper and that he was thus denied his right to a fair trial. At the outset we note that defendant lodged only one objection to the prosecutor's argument. Where a defendant fails to object to the State's closing argument he must show that the argument was so grossly improper that the trial judge should have corrected the argument *ex mero motu*. *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). Defendant contends that the prosecutor's argument violated N.C.G.S. § 15A-1230(a), which prohibits abusive arguments, arguments in which counsel asserts his personal belief as to the truth or falsity of the evidence or the guilt or innocence of the defendant, and arguments based on matters outside the record. We disagree.

The prosecutor argued that the jury had the opportunity to "do something about it, this case, and what this man did. . . ." He argued that the jury had a duty to perform and that the judge would instruct the jury as to its duty. He argued that the jury was the "they" that is often referred to by members of the public when the public says, "[T]hey ought to do something about [the economy, politics, war, Hussein]." The prosecutor's statements regarding his personal thoughts or beliefs did not concern the evidence or defendant's guilt or innocence. The prosecutor further argued that the jury would render a verdict and that it could find defendant

not guilty or not guilty by reason of insanity, but that if it did, "then you just as well take a wreath, a big wreath and hang it on the courthouse door because justice in Halifax County will be dead." Defendant objected to this latter argument.

While it is true that it is improper to argue to a jury that it should convict a defendant based upon anything other than the evidence presented at trial, we find no such argument in the present case. We cannot say that the prosecutor's argument that if defendant was found not guilty, "justice in Halifax County will be dead[,]" was an improper argument. This argument was a hyperbolic expression of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice. Nor can we say that there was anything in the remainder of the prosecutor's argument that was so grossly improper that the trial court should have intervened *ex mero motu*. This assignment of error is overruled.

Defendant brings forth six additional assignments of error. However, defendant candidly concedes that this Court has previously decided, adversely to defendant's position, the issues raised by the first three of these assignments of error and he has expressly abandoned the three remaining assignments of error. For the reasons stated herein, we find no error in the trial.

No error.

STATE OF NORTH CAROLINA v. JOHN BROWN

No. 459PA91

(Filed 4 September 1992)

1. Rape and Allied Offenses § 5 (NCI3d)— second degree sexual offense—sufficient evidence of force

There was sufficient evidence to support a reasonable finding that defendant used the force required to sustain his conviction under N.C.G.S. § 14-27.5(a)(1) for second degree sexual offense where the State's evidence tended to show that defendant and his victim were absolute strangers to each other; defendant entered unbidden into the victim's darkened hospital

room in the middle of the night; there he found the female victim suffering from cystic fibrosis and attached to tubing through which she was being administered antibiotics intravenously; the victim's eyes were closed, and defendant had no reason to believe she was conscious; defendant pulled back the bedclothes on the victim's bed, pulled up her gown, pulled down her panties, and put his fingers into her pubic hair; the victim opened her eyes, and defendant immediately pushed his finger into her vagina; and when the victim moved slightly, defendant went immediately to the door, which he had closed after entering the room, and made his escape. The jury could reasonably find that defendant's actions in pulling back the bedclothing, pulling up the victim's gown, and pulling her panties aside amounted to actual physical "force" as that term is to be applied in sexual offense cases.

Am Jur 2d, Rape §§ 4, 5, 7, 8, 63, 90.

2. Rape and Allied Offenses § 6 (NCI3d)— second degree sexual offense—threat of force—instructions

The trial court's instructions on the element of force required for a second degree sexual offense did not permit the jury to convict if it found merely that the victim suffered from fear, fright or coercion but did not find that such fear, fright or coercion was induced by defendant's actions where the trial court expressly instructed that the jury could convict defendant on the theory of a threat of force sufficient to overcome the victim's will if the threat he made under all of the circumstances then existing would reasonably induce a fear of serious bodily harm in the mind of a person of ordinary firmness "and did in fact create such a fear in the mind of the victim."

Am Jur 2d, Rape § 11.

3. Rape and Allied Offenses § 6 (NCI3d)— second degree sexual offense—threatened use of force—sufficient evidence of victim's fear

The trial court's instruction permitting the jury to convict defendant of second degree sexual offense upon the theory of a threatened use of force was supported by evidence that defendant's actions in fact created a fear in the mind of the victim prior to his commission of the sexual offense where

the jury reasonably could find from the victim's testimony that the victim, as a result of defendant's presence in her hospital room and his actions toward her, was afraid that defendant would hurt her and "didn't know what to do," and that her fear caused her to do nothing and enabled defendant to push his finger into her vagina.

Am Jur 2d, Rape § 11.

4. **Criminal Law § 694 (NCI4th)— identification of defendant—refusal to give pattern instruction—harmless error**

Assuming *arguendo* that the trial court erred by refusing defendant's request to give the pattern jury instruction concerning identification of defendant as the perpetrator of the crime charged, defendant failed to show that this error was prejudicial where the victim's identification of defendant was absolutely unequivocal at all times, and the court's instructions made it clear to the jury that it must be satisfied beyond a reasonable doubt that *this defendant* committed the crime charged in order to return a verdict of guilty.

Am Jur 2d, Appeal and Error §§ 776 et seq.; Trial § 1257.

5. **Rape and Allied Offenses § 6.1 (NCI3d)— sexual offense—instruction on attempt not required**

The trial court in a prosecution for second degree sexual offense did not err by failing to instruct on the lesser included offense of attempted second degree sexual offense where all of the evidence tended to show that, if defendant committed any crime at all, he committed the crime for which he was tried.

Am Jur 2d, Rape § 110; Trial §§ 1427 et seq.

Propriety of lesser-included-offense charge to jury in federal sex-crime prosecution. 100 ALR Fed 535.

Justice FRYE concurring.

ON discretionary review of an unpublished decision of the Court of Appeals, 104 N.C. App. 309, 409 S.E.2d 332 (1991), reversing a judgment entered on 2 May 1990 by *Watts, J.*, in Superior Court, PITT County. Heard in the Supreme Court on 13 April 1992.

The defendant was tried at the 30 April 1990 Criminal Session of Superior Court, Pitt County, upon a proper bill of indictment

for second-degree sexual offense. The jury having returned a verdict finding the defendant guilty of second-degree sexual offense, the trial court entered judgment sentencing him to imprisonment for a term of thirty-five years. The defendant appealed to the Court of Appeals.

In an unpublished opinion, the Court of Appeals concluded that the State had not presented substantial evidence at trial to establish the element of force necessary to sustain a conviction under N.C.G.S. § 14-27.5(a)(1) for second-degree sexual offense. As a result, the Court of Appeals reversed the judgment of the trial court. On 21 October 1991, the Supreme Court allowed the State's motion for a temporary stay of the decision of the Court of Appeals. By Order dated 6 December 1991, the Supreme Court allowed supersedeas, granted the State's petition for discretionary review of the decision of the Court of Appeals, and granted the defendant's motion to bring additional issues forward for discretionary review.

Lacy H. Thornburg, Attorney General, by Timothy D. Nifong, Assistant Attorney General, for the State-appellant.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh, Assistant Appellate Defender, for the defendant-appellee Brown.

MITCHELL, Justice.

On discretionary review before this Court, the State first argues that it met its burden of proof at trial as to all essential elements of the crime of second-degree sexual offense. The Court of Appeals concluded that no substantial evidence was introduced at trial to support a reasonable finding that the defendant in the present case used force in the commission of the offense charged. For that reason, the Court of Appeals concluded that the defendant was entitled to his liberty and reversed the trial court's judgment without reaching the defendant's remaining assignments of error. For reasons which follow, we conclude that the Court of Appeals erred in its conclusion and holding. Therefore, the decision of the Court of Appeals must be reversed, and the judgment of the trial court must be reinstated.

The evidence introduced at trial tended to show that the victim, an adult female, was employed as a registered nurse at Pitt County Memorial Hospital. She had long suffered from cystic fibrosis,

an hereditary pulmonary disease. She became seriously ill and was hospitalized as a patient at Pitt County Memorial Hospital on 20 December 1989. A course of treatment was commenced, including the intravenous administration of antibiotics. During 21 December 1989, the victim was coughing up blood and was nauseated. By the evening of 22 December 1989, she was feeling better and was able to watch television. About 11:30 p.m., she turned the television off and went to sleep. A nightlight was on in her room. The bathroom door was cracked open, and the light in the bathroom was left on.

At approximately 1:10 a.m., on 23 December 1989, the victim aroused from her sleep sufficiently to become aware that someone was feeling her identification bracelet and feeling the tubing being used to administer antibiotics to her intravenously. The victim assumed it was her nurse and did not open her eyes. The person then pulled down the bedclothing and began feeling the victim's abdomen. The victim assumed her nurse was assessing her condition by conducting abdominal palpitation, which is a routine procedure for assessing the condition of patients who have experienced nausea. The person then pulled up the victim's nightgown and pulled her panties aside. Immediately thereafter, the victim opened her eyes for the first time when the person placed his fingers in her pubic hair. The victim saw the defendant standing over her. The defendant then pushed his finger into the victim's vagina. When she moved, he began to walk away from the bed and toward the door. At that point the victim could tell that he was not dressed as a nurse. She sat up and said, "Sir, may I help you?" The defendant turned as he left the room and said, "No, ma'm, everything's okay, just go back to sleep."

When the man left her room, the victim turned off the solution of antibiotics which was being administered to her intravenously, picked up the pole on which the antibiotics were hanging, and went into the hall outside her room. She saw the defendant walking down the hall, and she called for someone to stop him. The victim told her nurse, Mrs. Horsely, what had happened and described her assailant. Nurse Horsely recognized that the description the victim gave of her assailant fit the man Horsely had seen in the hallway a few moments before. Nurse Horsely, with the assistance of a police officer, located the defendant in the front lobby of the hospital. Nurse Horsely recognized him as the man she had seen coming from the direction of the victim's room at about the

time the victim had been assaulted. Shortly thereafter, the victim identified the defendant as the man who had assaulted her in her hospital room.

Under N.C.G.S. § 14-27.5(a):

> A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person:
>
> (1) By force and against the will of the other person; or
>
> (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know that the other person is mentally defective, mentally incapacitated, or physically helpless.

N.C.G.S. § 14-27.5(a) (1986). We neither consider nor decide whether the evidence in this case would support a reasonable finding that the victim was "physically helpless" as that term is used in the statute, N.C.G.S. § 14-27.5(a)(2), since the charge against the defendant was not submitted to the jury on that theory. Instead, the charge against the defendant was submitted to the jury on the theory that the defendant engaged in a sexual act with the victim by force and against her will in violation of N.C.G.S. § 14-27.5(a)(1), and the jury returned its guilty verdict based on that theory. Our inquiry concerning this issue on appeal, then, is limited to the question of whether there was substantial evidence to support a reasonable finding that the defendant used the force required to sustain his conviction under N.C.G.S. § 14-27.5(a)(1).

The phrase "[b]y force and against the will of the other person" as used in N.C.G.S. § 14-27.5(a)(1) has the same meaning as it did at common law when it was used to describe an element of rape. *State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981). That element is present if the defendant uses force sufficient to overcome any resistance the victim might make. *See, e.g., State v. Etheridge*, 319 N.C. 34, 46, 352 S.E.2d 673, 681 (1987) (quoting *State v. Alston*, 310 N.C. 399, 409, 312 S.E.2d 470, 476 (1984)); *State v. Jones*, 304 N.C. 323, 330, 283 S.E.2d 483, 487 (1981); *State v. Bailey*, 36 N.C. App. 728, 732, 245 S.E.2d 97, 100 (1978). "The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion." *Etheridge*, 319 N.C. at 45, 352 S.E.2d at 680. Constructive force may be shown by evidence of threats or other actions of the defend-

ant which compel the victim's submission. *Id.* Such threats "need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat." *Id.* The defendant argues that no evidence of either actual physical force or constructive force was introduced at trial in the present case. In support of this argument, he relies strongly *inter alia* upon reasoning applied in *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984). The defendant's reliance is misplaced.

Alston arose upon evidence so peculiar that the decision in that case may well be *sui generis*. The alleged victim in *Alston* had engaged in a consensual sexual relationship with the defendant for six months prior to the rape alleged in that case. Uncontroverted and uncontested testimony by the alleged victim herself showed that when they had sexual intercourse during that relationship, she would remain entirely motionless while the defendant undressed her and had intercourse with her. On the day of the alleged rape, the defendant waited outside the school which the woman attended. He grabbed her arm and told her she was going with him. As they walked away, he threatened to "fix" her face. The two then walked around the neighborhood and discussed their relationship. Eventually, the alleged victim followed the defendant to the home of a friend. There, as she testified was customary and usual conduct between them, the defendant began to undress her and told her to lie on the bed. Then, in accord with what she also described as usual and ordinary conduct between them, the defendant pushed her legs apart and had intercourse with her while she offered no resistance and remained motionless. She then left and went home. She waited some time but, after telling her mother what had happened, contacted law enforcement authorities who charged the defendant Alston with rape. Uncontested and uncontroverted testimony by the alleged victim in *Alston* also indicated that after the defendant had been charged with rape, he came by her apartment to see her.

> Brown said she sat and looked at him, and he began kissing her. She pulled away and he picked her up and carried her to the bedroom. He performed oral sex on her and she testified that she did not try to fight him off because she found she enjoyed it. The two stayed together until morning and had sexual intercourse several times that night. Brown did not

disclose the incident to the police immediately because she said she was embarrassed.

Alston, 310 N.C. at 403, 312 S.E.2d at 473.

Based upon the unique uncontroverted facts of *Alston*, we concluded that the victim's testimony that she had acquiesced due to some "general fear" of the defendant due to his past tendencies for violence was not evidence that the defendant had used force or threats *to overcome the will of the victim to resist the particular sexual intercourse alleged to have been rape*; we also concluded that absent such evidence, the defendant's conviction could not stand. *Id.* at 409, 312 S.E.2d at 476. In more recent cases, we have clearly stated that the "general fear" reasoning of *Alston* should be applied only to situations like the peculiar factual situation presented in that case. *Etheridge*, 319 N.C. at 47, 352 S.E.2d at 681; *State v. Strickland*, 318 N.C. 653, 656, 351 S.E.2d 281, 283 (1987). This clearly is not such a case.

Based on substantial evidence introduced at trial, the jury could reasonably find that the defendant in the present case used actual physical force sufficient to overcome any resistance the particular victim he had chosen might have offered. In reaching our conclusion in this regard, we neither consider nor decide whether the actual physical force which will establish the force element of a sexual offense may be shown simply through evidence of the force inherent in the sexual act at issue. *But see State v. Raines*, 72 N.C. App. 300, 324 S.E.2d 279 (1985) (declining to adopt such a definition of "force" under N.C.G.S. § 14-27.5(a)(1)). We expressly defer any decision on that question until we are presented with a case which requires its resolution. Here, the evidence tended to show the defendant used actual physical force surpassing that inherent in the sexual act he committed upon the victim.

When reviewing the sufficiency of the evidence to support a defendant's conviction, as when reviewing a defendant's motion to dismiss for a lack of evidence, all evidence admitted, whether competent or incompetent, must be considered in the light most favorable to the State. *See generally State v. Scott*, 323 N.C. 350, 372 S.E.2d 572 (1988). The State is entitled to every reasonable inference. Evidence favorable to the State must be deemed to be true, and any inconsistencies or contradictions therein must be disregarded. *Id.* The question for the Court is whether there is substantial evidence of each essential element of the crime charged

and whether the defendant was the perpetrator of the crime. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

[1] The issue in dispute in this case is whether there was sufficient evidence of the element of force to support the defendant's conviction for second-degree sexual offense under N.C.G.S. § 14-27.5(a)(1). Taken in the light most favorable to the State, the evidence tended to show that the defendant and his victim were absolute strangers to each other. Nevertheless, the defendant entered the hospital in which the victim was a patient. With no lawful basis to do so, the defendant pushed open the door of the victim's hospital room in the middle of the night and entered unbidden into her darkened room. There he found the female victim suffering from cystic fibrosis and attached to the tubing through which she was being administered antibiotics intravenously. Her eyes were closed, and the defendant had no reason to believe she was conscious. Finding his victim in this condition, the defendant pulled back the bedclothes on the victim's bed, pulled up her gown, pulled down her panties, and put his fingers into her pubic hair. She opened her eyes, and he immediately pushed his finger into her vagina, thereby committing the sexual act necessary to establish a sexual offense. When his victim moved slightly, the defendant went immediately to the door of the darkened hospital room, which he had closed after entering the room, and made his escape. Such conduct by a defendant *might* not amount to force sufficient to overcome any resistance of the victim or the will of the victim to resist if, as in *Alston*, the defendant's actions were directed toward a woman who, over a long period of time before and after the alleged criminal act, voluntarily permitted the defendant to regularly engage in identical conduct. *But see generally* Susan Estrich, *Rape*, 95 Yale L.J. 1087 (1986) (a thoughtful article, described by the author as "a study of rape law as an illustration of sexism in the criminal law," which makes strong arguments to the effect that the law *should* treat such conduct as "force" even on those facts or *should* abandon the element of force). Here, however, where the evidence was that the defendant entered a hospital in the middle of the night and went into the room of a patient whom he had never seen before, a jury could reasonably find that his actions in pulling back the bedclothing, pulling up the victim's gown, and pulling her panties aside amounted to actual physical "force" as that term is to be applied in sexual offense cases.

Pursuant to our order allowing the defendant's motion to bring forward additional issues, the defendant has briefed and argued other issues before this Court. We turn now to an examination of those issues.

[2] The defendant argues that the trial court erroneously instructed the jury on the element of force required for second-degree sexual offense under N.C.G.S. § 14-27.5(a)(1). Specifically, the defendant complains that the trial court erred in instructing the jury as follows:

> Secondly, the State must prove that the defendant used or threatened to use force sufficient to overcome any resistance the victim might make. Force or threat of force may be either actual or constructive. Thus, the force necessary to satisfy this element need not be actual physical force; it can be constructive force. Fear, fright or coercion may take the place of actual force. A threat which under all of the circumstances then existing would reasonably induce a fear of serious bodily harm in the mind of a person of ordinary firmness and did in fact create such a fear in the mind of the victim would constitute the requisite constructive force required by law.

The defendant objected to this part of the trial court's instructions. He argues such instructions could have led the jury to convict if the jury merely found that the victim suffered from fear, fright or coercion, but did not find that such fear, fright or coercion was induced by the defendant's actions. The trial court expressly instructed, however, that the jury could convict the defendant on the theory of a threat of force sufficient to overcome the victim's will, if the threat he made "under all of the circumstances then existing would reasonably induce a fear of serious bodily harm in the mind of a person of ordinary firmness *and did in fact create such a fear in the mind of the victim*." (Emphasis added.) This argument is without merit.

[3] The defendant also argues that an instruction permitting the jury to convict the defendant upon the theory of a threatened use of force was error in the present case because it was unsupported by any evidence that the defendant's actions in fact created a fear in the mind of the victim prior to the defendant committing the sexual offense. Again, we do not agree.

Substantial evidence in the present case tended to show that the victim opened her eyes and saw the defendant after he had

placed his hand on her pubic hair, but before he had actually penetrated her vagina with his finger. In this regard, the victim testified as follows:

> Q. Now, from the time you opened your eyes *until this ultimate act occurred*, how many—how long would you say that took?
>
> A. A matter of seconds. It seemed like hours.
>
> Q. What were you thinking as you were lying there?
>
> A. I was in shock. I didn't know what to do. *I was afraid* that he was going to hurt me or continue what he had started. *I didn't know what to do.*
>
> Q. What happened then?
>
> A. I moved my leg. I was still lying down. He walked away from the bed, started towards the door.
>
> Q. What was your emotional state at that time?
>
> A. I was in shock.
>
> Q. Were you frightened?
>
> [A.] Very much so.
>
> Q. What were you frightened about?
>
> A. I didn't know who it was, why they were there or what they were going to do next. I didn't know if he would try to kill me.

(Emphasis added.) From this testimony, the jury reasonably could have found that the victim, as a result of the defendant's presence in her room and his actions toward her, was afraid that the defendant would hurt her, and "didn't know what to do." Her fear caused her to do nothing and enabled the defendant to push his finger into her vagina. Further, a jury reasonably could have concluded that, under the circumstances, the defendant's presence and actions amounted to a threat of force sufficient to overcome any resistance of the victim.

[4] The defendant next argues that the trial court erred by declining the defendant's request to give the pattern jury instruction concerning identification of the defendant as the perpetrator of

the crime charged. As any error here is not alleged to have arisen under the Constitution of the United States, the burden is on the defendant to show that, had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Assuming *arguendo* that the trial court erred in failing to give the instruction requested, we conclude that the defendant has failed to show that the error was prejudicial.

In the present case, the victim's identification of the defendant as the perpetrator of the crime charged was absolutely unequivocal at all times from the point of his apprehension moments after the crime was committed through the trial of this case. Nurse Horsely's identification of him as the man in the hall at about the time of the crime (approximately 1:10 a.m.) was also unequivocal.

Further, the instructions given by the trial court made it clear to the jury that before the jury could convict, the jury must be satisfied beyond a reasonable doubt that *this defendant* committed the crime charged. As the trial court defined each element of the crime, it expressly stated that the jury must find that "the defendant" had engaged in conduct sufficient to establish that element. The trial court then further instructed the jury:

> So I charge you that if you find from the evidence and beyond a reasonable doubt that on or about . . . December 22, 1989, *the defendant John Brown* engaged in a sexual act with the victim . . . , and that *he* did so [by means that established the elements of the crime charged] . . . , it will be your duty to return a verdict of guilty of second-degree sexual offense as charged.

(Emphasis added.) In light of the victim's unequivocal identification of the defendant and the instructions given by the trial court in the present case, we are convinced that the jury had a clear understanding that it must be satisfied beyond a reasonable doubt that *this defendant* committed the crime charged in order to return a verdict of guilty. *See State v. Shaw*, 322 N.C. 797, 804-05, 370 S.E.2d 546, 550-51 (1988). Therefore, the defendant has failed to carry his burden of showing prejudice.

[5] Finally, the defendant argues that the trial court erred by failing to instruct the jury on the lesser included offense of attempted second-degree sexual offense and by failing to have the jury consider returning a verdict finding him guilty of that lesser in-

cluded offense. Having reviewed the evidence introduced at trial, we are convinced that all of the evidence tended to show that, if the defendant committed any crime at all, he committed the crime of second-degree sexual offense for which he was tried. In such situations, the trial court must refuse to charge on lesser included offenses. *E.g., State v. Bagley*, 321 N.C. 201, 210, 362 S.E.2d 244, 249-50 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

For the foregoing reasons, we conclude that the State introduced substantial evidence of the defendant's use of force—both actual and constructive—and that the defendant's trial was otherwise free of prejudicial error. Accordingly, we reverse the unpublished decision of the Court of Appeals and remand this case to the Court of Appeals for its further remand to the Superior Court, Pitt County, for reinstatement of the judgment of the trial court.

Reversed and remanded.

Justice FRYE concurring.

I concur in the opinion of the majority, but write separately because this case presents an excellent opportunity for this Court to say explicitly what I believe is already implicit in our law: the elements of force and lack of consent in rape and sexual offense cases may be satisfied when the victim demonstrates, as in this case, that the attack was carried out by surprise.[1]

The phrase, "by force and against the will of another person," found in our state's rape and sexual offense statutes "means the same as it did at common law when it was used to describe some of the elements of rape." *State v. Locklear*, 304 N.C. 534, 539, 284 S.E.2d 500, 503 (1981); *see* N.C.G.S. §§ 14-27.2 to -27.5 (1988). At common law, the elements of force and lack of consent for the crime of rape were implied in law "upon the mere showing of sexual intercourse with a person who is asleep, unconscious, or otherwise incapacitated and therefore could not resist or give

1. I realize that this defendant's conviction cannot be upheld on a "surprise" theory because this theory was not submitted to the jury. However, given the importance of this issue and the fact that this theory was briefed and argued by both parties, I believe it to be a proper subject for our consideration.

consent. . . . In such a case sexual intercourse with the victim is *ipso facto* rape because the force and lack of consent are implied in law." *State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 505-06 (1987); *see State v. Dillard*, 90 N.C. App. 318, 322, 368 S.E.2d 442, 445 (1988) (force and lack of consent implied in law when sexual offense perpetrated upon a victim who is sleeping or similarly incapacitated).

The teaching of the common law rule is clear: force and lack of consent may be implied when the circumstances surrounding the attack are such that the victim cannot resist or give consent. A surprise attack, as in this case, certainly fits within this commonsense rule. The circumstances surrounding the attack in this case, for example, were such that the victim could not resist or give consent. By the time she realized what was happening, the sexual offense was complete. Allowing an attacker to escape justice where the attack is carried out by surprise, although without actual force, not only would be morally indefensible, but would also fly in the face of the well-settled common law rule of implied force.

The "surprise theory" of implied force is certainly not new. More than six decades ago, the Supreme Court of Missouri held that the force element of that state's rape statute was satisfied by a surprise attack of a physician against a female patient. *State v. Atkins*, 292 S.W. 422 (Mo. 1926). In *Atkins*, the victim visited the physician to replace the bifocal lenses in her eyeglasses. *Id.* at 423. During an examination to determine the cause of her eye trouble, the defendant put the victim's heels in the stirrups of a chair, drew her legs apart, pressed against her stomach and sides, and removed her bloomers. *Id.* Embarrassed, the victim closed her eyes and covered them with her arms; the defendant then "began to press against her sides, and then the prosecutrix felt something press against her private parts." *Id.* The defendant argued that he could not be convicted of rape because the "alleged act of ravishing was not forcible." *Id.* at 425. The court disagreed.

> If it is rape under our statutes for a man to have illicit sexual connection with a woman while she is asleep, and incapable of consenting, when no more force is used than is necessary to effect penetration with the consent of the woman, we are unable to see why it is not also rape for a man to have improper sexual connection with a woman by accomplishing penetration through surprise, when she is awake, but utterly

> unaware of his intention in that regard. In such case the woman is incapable of consenting, because she has no opportunity to give consent any more than has a sleeping woman.

Id. at 426; *see also People v. Borak*, 13 Ill. App. 3rd 815, 821, 301 N.E.2d 1, 5 (1973) (force implied when "rape or deviate sexual acts proscribed by statute are accomplished under the pretext of medical treatment when the victim is surprised, and unaware of the intention involved"); 75 C.J.S. *Rape* § 16 (1952) ("[B]oth at common law and under statutory provisions, if [the victim] is deceived by fraud or surprise as to the act perpetrated on her, it is rape, although she makes no resistance.").

In sum, I believe it is already implicit in our law that the force and lack of consent elements of rape and sexual offense can be satisfied when the attack, as here, is carried out by surprise. I believe it is time to say so explicitly.

R. GENE EDMUNDSON, EXECUTOR, OF THE ESTATE OF C. JULIAN WILSON (DECEASED) v. MARGUERITE W. MORTON, JOE B. MORTON, EDWIN B. WILSON, W. W. MASON, L. L. MASON, LOUISE TOLLEY, CAROLYN W. JONES, W. H. STOVALL, JAMES A. HOWARD, ROBERT W. HOWARD, GEORGIA HOWARD POMETTO, JOHN HOWARD, GLADYS SYKES WALLACE, ELIZABETH D. SYKES AND NANCY B. McKEE

No. 333PA91

(Filed 4 September 1992)

1. Wills § 58.1 (NCI3d)— bequest of stock—general bequest—stock splits and dividend reinvestments—right to accessions

A bequest of corporate stocks was intended to be a general bequest, and the beneficiaries were thus entitled to receive accessions to the stocks from routine stock splits and dividend reinvestments, where testator bequeathed "all of the stocks . . . which I may own as inherited by me from my wife" to the wife's nieces and nephews, share and share alike, and thereafter listed "for identification purposes" the number of shares of each stock that he inherited from his wife; the entirety of the will reveals that testator grouped or categorized his beneficiaries into two classes according to their relationship to him and the origin of the property which each class was

to receive; and testator devised and bequeathed his family property to members of his own family and property that had belonged to his wife to members of the wife's family.

Am Jur 2d, Wills § 1535.

2. **Wills § 58.1 (NCI3d)— bequest of stock—right to stock splits, stock dividends, and dividend reinvestments**

Absent any expression of intent in the will or compelling circumstances to the contrary, accessions to publicly held stocks by way of stock splits, stock dividends or dividend reinvestments occurring in the normal course of business between the date of execution of the will and the date of testator's death should pass to the beneficiary of the stock named in the will.

Am Jur 2d, Wills § 1535.

ON writ of certiorari to review the decision of the Court of Appeals, 103 N.C. App. 253, 404 S.E.2d 890 (1991), modifying and remanding the judgment for defendant-appellants entered by *Johnson (E. Lynn), J.*, on 6 February 1990 in Superior Court, GRANVILLE County. Heard in the Supreme Court on 12 March 1992.

Cheshire, Parker and Butler, by D. Michael Parker, for defendant-appellants James A. Howard, Robert W. Howard, Georgia Howard Pometto, John Howard, Gladys Sykes Wallace, Elizabeth D. Sykes and Nancy B. McKee.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn and Charles M. White, III, for defendant-appellees Marguerite W. Morton and Joe B. Morton, Executors of the Estate of Marguerite W. Morton, Joe B. Morton, Edwin B. Wilson, W.W. Mason, L.L. Mason, Louise W. Tolley and Carolyn W. Jones.

LAKE, Justice.

This case presents essentially a question of interpretation of a will, involving accessions (accretions) to certain bequeathed property and whether the testator intended the bequest directly in question to be general or specific in nature.

The bequest directly in question was of certain stocks and bonds inherited by testator from his wife and bequeathed by him as a collective unit. The essence of the question is the determination of the proper legatees of normal accessions to the shares of these

corporate stocks, which accessions occurred by way of routine stock splits and dividend reinvestments between the times of testator's acquisition thereof, his execution of the will and his death. As such, this is a case of first impression in North Carolina.

The plaintiff, executor of the estate of C. Julian Wilson, brought this action for declaratory judgment in Superior Court, Granville County seeking an interpretation of the testator's will and a declaration of the rights of the beneficiaries under the will with respect to the bequests set forth in Items Five and Nine of the will. The case was submitted to the trial court upon stipulated facts.

The testator, C. Julian Wilson, died 11 September 1983. His last will, dated 22 March 1979, was duly submitted for probate. In Item Five, testator bequeathed "all of the stocks and bonds which I may own as inherited by me from my wife, . . ." share and share alike, to his wife's family. Item Five provides as follows:

> ITEM FIVE: I give and bequeath to my nephews-in-law and my nieces-in-law who may be living at the time of my death, and Elizabeth Sykes, widow of my nephew-in-law, Arthur Sykes, share and share alike, all of the stocks and bonds which I may own as inherited by me from my wife, Rachel H. Wilson, and for identification purposes such stocks and bonds which I inherited from my wife are as follows:
>
> 228 Shares American Telephone and Telegraph Company, common
>
> 120 Shares American Tobacco Company, common
>
> 5 shares Carolina Power & Light Company, preferred
>
> 494.590 Shares Investors, Mutual, Inc., common
>
> 131.189 Shares Investors Variable Payment Fund, Inc., common
>
> U.S. SAVINGS BONDS, SERIES E

NUMBER	DATE	MATURITY VALUE
L4004877933E	Dec. 1943	$ 50.00
Q4008735615E	May 1943	25.00
C4003195302E	Sept. 1943	100.00
C4003195303E	Jan. 1943	100.00
C4003195304E	Jan. 1943	100.00

C4003195305E	Jan. 1943	100.00
C4003195306E	Jan. 1943	100.00
C4003195307E	Jan. 1942	100.00
C4003026589E	Feb. 1942	100.00
C4003195308E	March 1942	100.00
C114698955E	Dec. 1945	100.00
C114698956E	Dec. 1945	100.00
C114698957E	Dec. 1945	100.00
C114698958E	Dec. 1945	100.00
C146275941E	April 1949	100.00
C146275942E	April 1949	100.00
C146275943E	April 1949	100.00
C146275944E	April 1949	100.00
C146275945E	April 1949	100.00
C146275964E	April 1949	100.00
C146275966E	April 1949	100.00
C146275967E	April 1949	100.00
C9340623E	Juen [sic] 1944	500.00

The shares of stock specified in Item Five represented the total shares of stock testator inherited from his wife, Rachel H. Wilson. The 228 shares of American Telephone and Telegraph Company were held by testator at the date of execution of his will and the same number continued to be held at the date of his death. The 120 shares of American Tobacco Company were held at the date of execution of the will, and 240 shares of this stock were held at the date of death as a result of a stock split. The 5 shares of Carolina Power & Light Company preferred stock were held at the date of execution of the will, and 20.877 shares of this stock were held at the date of death as a result of dividend reinvestments. The 494.590 shares of Investors Mutual, Inc. had increased to 850.59 shares at the date of execution of the will as a result of dividend reinvestment, and 850.59 shares of this stock continued to be held at the date of death. The 131.189 shares of Investors Variable Payment Fund, Inc. had increased to 202.231 shares at the date of execution of the will, and 277.791 shares of this stock were held at the date of death, all of which increases resulted from dividend reinvestments.

Item Nine of the will is a residuary bequest wherein testator bequeathed all the rest and residue of his property to his own brother and sister and to his nieces and nephews. Item Nine provides as follows:

ITEM NINE: I bequeath and devise the rest and residue of the property which I may own at the time of my death, real and personal, tangible and intangible of every nature and wherever situated, including all property which I may acquire or become entitled to after the execution of this will to my brother and sister and nieces and nephews, in the following proportions:

(a) To my nephew, W.W. Mason, an undivided one-eighth share;

(b) To my nephew, L.L. Mason, Jr., an undivided one-eighth share;

(c) To my brother, William R. Wilson, an undivided one-fourth share;

(d) To my sister, Marguerite W. Morton, an undivided one-fourth share;

(e) To my nephew, Edwin B. Wilson, an undivided one-eighth share;

(f) To my nephew, Joe B. Morton, an undivided one-eighth share.

According to the Stipulation of Facts entered into by the parties and submitted to the trial court, after testator's execution of the will and before his death, certain of the U.S. Savings Bonds, Series E, listed in Item Five (having a maturity value of $1,775) were "exchanged," along with other Series E Bonds, for certain Series HH bonds (having a maturity value of $16,000) by L.L. Mason, "attorney in fact for C. Julian Wilson, said L.L. Mason being a beneficiary pursuant to Item 9 of the referenced Will." On 24 October 1991, after this case was docketed in this Court, the defendant-appellees filed motion to supplement the record with the affidavit of L.L. Mason attesting that he had no recollection of having a power of attorney for any purpose by C. Julian Wilson, that he did write checks for Wilson from time to time, that Wilson decided to sell certain of the "E" bonds, that be observed Wilson sign these bonds for purposes of sale, and that when the proceeds of the sale of these bonds went into Wilson's checking account upon request by Wilson he and a bank officer advised Wilson to purchase "HH" bonds. The Court determines this motion should be allowed and the affidavit considered with the case. For the reasons hereinafter

set forth, this affidavit, while considered, does not affect our decision in this case.

The trial court, upon the stipulated facts, ruled that Item Five of the will "is a general bequest, and that the beneficiaries thereof shall receive the entirety of the bequest, including any accessions resulting from stock splits and stock dividends, as well as the Series E Bonds." The defendant beneficiaries under Item Nine of the will (the residuary clause) appealed to the Court of Appeals contending the bequests under Item Five were specific bequests and that all accretions from the date of the will to the death of the testator passed to them under Item Nine.

The Court of Appeals interpreted the language of Item Five of the will to "indicate" a specific bequest and held that the Item Five beneficiaries take only the specified number of each of the stocks therein listed, with all accessions thereto occurring by way of stock split or stock dividends between the execution of the will and testator's death passing to the Item Nine beneficiaries. The Court of Appeals, also relying upon the stipulated facts, further held that the transfer of the Series E bonds by the testator's attorney-in-fact did not work an ademption, and thus the Item Five beneficiaries "are entitled to the entirety of the original bequest of Series E bonds." *Edmundson v. Morton*, 103 N.C. App. at 258, 404 S.E.2d at 893. The defendant beneficiaries under Item Five (the family of testator's wife) petitioned this Court for discretionary review, contending the Item Five bequests were general bequests which passed all such accessions to the designated stocks, before and after the testator's death, to them.

[1] We agree with the holding of the Court of Appeals that the Item Five beneficiaries take the specified number of each of the stocks therein listed, together with all accessions to those stocks occurring *since* testator's death. However, for the reasons herein set forth, we reverse that portion of the Court of Appeals' decision holding that the accessions to the corporate stocks occurring between the time of execution of the will and testator's death do not pass along with the bequest.

When engaging in the troublesome area of interpretation of a will it is, of course, axiomatic, and this Court has stated, that "[i]t is an elementary rule in this jurisdiction 'that the intention of the testator is the polar star which is to guide in the interpretation of all wills . . . .'" *Pittman v. Thomas*, 307 N.C. 485, 492,

299 S.E.2d 207, 211 (1983) (*quoting Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960)). These two decisions are helpful in the difficult and disquieting task which we now face in the instant case—of determining what a person now deceased meant by particular words he used in life for the disposition of his property to take effect at his death. *Morris v. Morris*, 246 N.C. 314, 98 S.E.2d 298 (1957). The decisions in *Pittman* and *Clark* are relevant in setting forth certain rules of interpretation or construction which are particularly applicable to the circumstances of the case at hand.

In *Pittman* this Court stated:

> In a sentence which has been frequently quoted, this Court has said: "The will must be construed, 'taking it by its four corners' and according to the intent of the testator as we conceive it to be upon the face thereof and according to the circumstances attendant." *Patterson v. McCormick*, 181 N.C. 311, 313, 107 S.E. 12 (1921). In referring to the "circumstances attendant" we mean "the *relationships* between the testator and the beneficiaries named in the will, and the condition, nature and extent of [the testator's] property." *Wachovia Bank and Trust Co. v. Wolfe*, 243 N.C. at 473, 91 S.E.2d at 250.

Pittman, 307 N.C. at 492-93, 299 S.E.2d at 211 (emphasis added).

In the instant case we find the "relationships" between the testator and his named beneficiaries to be significant, particularly with respect to the way in which the beneficiaries were grouped or classed according to the "nature and extent" of the property each group was designated to receive. The entirety of the will reveals that, other than taking care of perfunctory, administrative matters in Items One, Two, Ten and Eleven, and one specific bequest of his tractor and cultivator in Item Eight, the testator has grouped or categorized his beneficiaries into two classes, each according to their *relationship* to him as a class and according to the *origin* of the property which each class, as a collective unit or group, was designated to receive. The two classes are: (1) members of his own family (a brother, a sister and four nephews) to whom he gives his family property in Items Three and Four, and (2) members of his wife's family (his nephews-in-law and nieces-in-law) to whom he gives the property that belonged to his wife in Items Five and Six of the will.

In *Clark* this Court stated:

> In ascertaining this intention [of the testator] the language used, and the sense in which it is used by the testator, is the primary source of information, as it is the expressed intention of the testator which is sought.
>
> Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain *the general plan and purpose* of the testator, if there be one. . . . If, when so considered, the intention of the testator can be discerned, that is the end of the investigation.

Clark, 253 N.C. at 520-21, 117 S.E.2d at 468 (emphasis added) (citations omitted).

In considering the will of C. Julian Wilson as a whole, under these fundamental rules of testamentary interpretation or construction, we do indeed perceive a "general plan and purpose" on the part of the testator. This general plan and purpose was to keep the original properties of the two families, which had come into his ownership and care during his lifetime, whole, separate and, if not sacrosanct, secure for the sole benefit and inheritance of those members of each family from which the properties came who were living at his death, without regard to the monetary value or any appreciation or depreciation of those properties at the time of his death.

While we also consider the determination of whether a bequest in question is a general bequest or a specific bequest frequently helpful in ascertaining the testator's intention, we agree with the Court of Appeals that such determination in this or any given case of interpretation is not *per se* dispositive or to be given any more weight than other factors and circumstances to be considered. In this case, however, we consider that the bequest directly in question (Item Five), in light of its wording and the factors above set forth, is in fact a general bequest as held by the trial court.

The general rules for determining whether a bequest is general or specific in nature are relatively clear, but their proper application to the innumerable variations in wording and circumstances presented by testators to the courts is much less certain. A specific legacy is defined as a gift of a particular fund or object—"a par-

ticular thing or money specified and distinguished from all of the same kind, as of a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." *Shepard v. Bryan*, 195 N.C. 822, 828, 143 S.E. 835, 838 (1928); Wiggins, *Wills and Administration of Estates in North Carolina* § 140 (2d ed. 1983) [hereinafter *Wills and Administration*]. *See also Trust Co. v. Dodson*, 260 N.C. 22, 131 S.E.2d 875 (1963). In order to avoid having to apply the principle of ademption, courts usually presume that the testator intended to create a general legacy when he fails to make his intention clear. *Wills and Administration*, § 140. "The tendency of the courts is to hold that a bequest is not specific unless the intent clearly appears in the will." *Moore v. Langston*, 251 N.C. 439, 444, 111 S.E.2d 627, 631 (1959).

A general bequest is defined as "a gift of property which does not specify the exact unit of property which the legatee is to receive." *Wills and Administration*, § 140. Generally, use of the word "my" with the designation of a particular object of testator's property strongly indicates a specific bequest, but when the words "my property" are preceded by the word "all," e.g., "all my property," the presumption is that the testator intended to make a general bequest. *Wills and Administration*, § 140.

In the instant case the key or most significant language of the bequest directly in question (Item Five), where the testator provides for his wife's family on a share and share alike basis, is: "I give and bequeath . . . *all* of the stocks and bonds which I *may* own as inherited by me from my wife, Rachel H. Wilson, ..." (Emphasis added.) Clearly, if the testator had stopped the bequest here there would be no doubt that he intended his wife's family who survived him to receive "all" of the stocks she owned and left to him which he might own at his death. His use of the words "which I may own" clearly demonstrates his intent to give such stocks, share and share alike, to this class of beneficiaries, without regard to *any number* of shares of such stocks (more or less) which he might ultimately own at his death. Any doubt or question of this intent arises only from the immediately succeeding language: "and for *identification purposes* such stocks and bonds which I inherited from my wife are as follows: . . . ." (Emphasis added.) We consider this succeeding language and the following listing of certain numbers of shares of certain stocks to be precisely as labeled—a mere identifier of what the testator inherited from

his wife, and as such designed to serve only as an advisory supplement to, rather than a modifier of, the preceding key words of bequest. We thus find this language in Item Five of the will to be consistent with a general bequest and the "general plan and purpose" of the testator to be gleaned from the will as a whole.

A careful examination of the will "from its four corners" quite clearly reveals that "family" and heritage were of utmost importance to C. Julian Wilson. As noted above, in general gifts he takes care of his family in Items Three and Four, and in like manner he takes care of his wife's family in Items Five and Six. In Item Three he devises "all of my real estate" to the identical beneficiaries named in the Item Nine residuary clause and in the same proportions, and he then states: "Since this farm has been in the Wilson family since the Civil War, it is my desire that it will remain in the Wilson family." In Item Four he devises in trust "the Wilson Family Cemetery lot . . . to be used as a family cemetery lot for the Wilson Family . . . ." After giving the stocks and bonds inherited from his wife to her nephews and nieces in Item Five, he bequeathes to his wife's nephews and nieces in Item Six "all of my household and kitchen furniture which formerly belonged to my wife, Rachel H. Wilson . . . ." These four provisions constitute the heart of this will and together they are clearly a plan carefully designed to provide for each "family" according to its heritage. To interpret Item Five of this will in such manner as would separate from the specified stocks inherited from Rachel the natural investment growth and proceeds derived solely from Rachel's stocks, and give these proceeds to the other family, would indeed work an unnatural result and frustrate the testator's overall purpose.

The defendant-appellees argue the ruling of this Court in *Bank v. Carpenter*, 280 N.C. 705, 187 S.E.2d 5 (1972) should be controlling in this case. We disagree. In *Bank v. Carpenter* the testator in two identical provisions bequeathed specifically "ten (10) shares of my stock" in his company to two of his employees on condition each was still employed with the company at the time of testator's death. After execution of the will and prior to testator's death the company was restructured and recapitalized. As a result of this, all of testator's 900 shares in the company were retired and 250,000 shares of new stock were issued to testator. There was no infusion of new capital. It was held under these circumstances that the testator intended that each beneficiary should receive only the 10 shares bequeathed and not any increase in number

of shares resulting from the restructure. This case presents a substantially different scenario from the "circumstances attendant" in the instant case, both in terms of the discernible "intention" of the testators and in the nature or manner of occurrence of the gain or increase in the stock involved.

In *Bank v. Carpenter*, the stock involved was not in a publicly held company, but rather was in a closely held and controlled company. The testator owned one-half of the company, and with his co-owner decided to restructure the company. This restructure presumably had nothing to do with normal financial operation, involving either gain or loss, retained earnings or distribution of profits to the owners or shareholders of the company, either through cash or stock dividends or dividend reinvestments. Likewise, it had nothing to do with the usual basis for a stock split in a publicly owned company traded on a stock exchange, i.e. a reduction in the market price with concomitant, proportionate increase in number of shares to enhance trading in the stock. With respect to the testator's intent and overall control, the Court notes that the restructure was completed over a year after the will was executed and that the testator lived one year, nine months and eleven days thereafter, "[w]ith full knowledge of the increase in the number of his shares [and] permitted the bequest to remain at ten shares for each legatee." *Bank v. Carpenter*, 280 N.C. at 708, 187 S.E.2d at 7.

Further, in *Bank v. Carpenter*, unlike the instant case, the primary issue was whether pursuant to N.C.G.S. § 31-41, with respect to testamentary intent, "the will should speak as of the date of its execution rather than the date of the testator's death." *Bank v. Carpenter*, 280 N.C. at 707, 187 S.E.2d at 7. On this issue the Court maintained our consistent rule that "a will becomes effective at the testator's death unless a contrary intent appears from the language of the will." *Id.* In so doing, the Court noted as to the testator's intention that the bequests were each conditioned on the legatees' employment by the company at testator's death, thus clearly showing the gift was to be determined at date of death.

The question of whether accessions to stock, occurring after execution of the will and prior to death of the testator, pass to the legatee, when such accessions occur routinely in the normal course of business by way of stock splits, stock dividends or dividend reinvestments, is one which has presented considerable difficulty to the courts of other jurisdictions. This conflict and relevant

commentary thereon is expressed as follows in *Wills and Administration*, § 145:

> Since the courts are not in agreement on the question of dividends declared on specific bequests prior to the death of the testator, the draftsman should move in this area with the utmost caution. The intent of the testator in regard to stock splits and stock dividends should be stated explicitly in the instrument with as little as possible left to conjecture.
>
> In case of a division or a splitting of stock, the change is really one of form and not of substance with the interest of the testator being merely represented by more shares. Thus, if the testator bequeaths "my five hundred shares in a named corporation" and after the execution of the will the stock is split two-for-one with 500 shares being given to the testator, the legatee should be entitled to 1,000 shares, since the split results in a mere formal change.
>
> In the absence of any expression of intent in the will to the contrary, the fact the legatee was designated by the testator to receive the particular stock should be sufficient reason for the legatee to receive stock dividends, whether declared prior to, or subsequent to, the death of the testator.

[2] We find this reasoning persuasive, not only with respect to the case at hand—where for the reasons above stated upon the "circumstances attendant" we hold the testator intended precisely in accord with the above commentary—but also with respect to cases generally where the accessions to publicly held stocks occur routinely in the normal course of the company business. Thus, where the above admonition has not been followed and the intent of the testator is not stated explicitly, we conclude that, absent any expression of intent in the will or compelling circumstance to the contrary, accessions to publicly held stocks by way of stock splits, stock dividends or dividend reinvestments occurring in the normal course of business between date of execution of the will and date of testator's death, should pass to the beneficiary of the stock named in the will.

This case was accepted by the Court upon defendant-appellants' petition for discretionary review (treated as a writ of certiorari due to late filing of petition) on the single issue of whether the Court of Appeals incorrectly ruled as to the accessions to the stocks

bequeathed under Item Five of the will. The defendant-appellees later moved to amend the record with respect to the bequest of the bonds under Item Five and added this issue in their brief filed with this Court. We conclude this issue is not properly before this Court, but notwithstanding this posture, the issue has been, in effect, resolved by our holding that the trial court was correct in designating Item Five as a general bequest.

Upon the foregoing, the decision of the Court of Appeals is

Affirmed in part and reversed in part.

TRAVCO HOTELS, INC. v. PIEDMONT NATURAL GAS COMPANY, INC. *and* K & W RESTAURANT, INC. v. PIEDMONT NATURAL GAS COMPANY, INC. v. TRAVCO HOTELS, INC.

No. 281A91

(Filed 4 September 1992)

1. Appeal and Error § 134 (NCI4th)— denial of motion to disqualify opposing counsel—interlocutory—dismissal of appeal—affirmed

The Court of Appeals correctly dismissed as interlocutory defendant's appeal of an order *denying* its motion to disqualify opposing counsel on the ground that opposing counsel had obtained confidential information during representation of defendant in a previous matter. Although the use against defendant of confidential information gained in representing defendant would deprive defendant of a substantial right not to have its attorney-client confidences breached, defendant can adequately protect its right not to have its confidences used against it to its detriment by appealing any adverse final judgment. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, should no longer be considered authoritative on this point. However, the *granting* of a motion to disqualify counsel, as in *Goldston v. American Motors Corp.*, 326 N.C. 723, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney and neither deprivation can be adequately addressed by a later appeal.

Am Jur 2d, Appeal and Error § 171.5.

Appealability of state court's order granting or denying motion to disqualify attorney. 5 ALR4th 1251.

2. Attorneys at Law § 36 (NCI4th)— representation against former client—motion to disqualify denied—no abuse of discretion

The trial judge did not abuse his discretion in denying a motion to disqualify opposing counsel based on representation of the movant in prior litigation where the trial judge examined counsel's file on its former representation *in camera* and issued an order covering 67 pages in the record and containing 120 findings of fact, many of which related to the nature of the prior litigation and the information acquired by counsel during the course of its representation; concluded among other things that counsel had not used or disclosed any confidential information or secrets, that the material facts and issues in the two cases were not substantially related, that there had been no appearance of impropriety, and that there was no evidence that the firm's attorneys in this action had ever had access to or used information gained from the prior action; and expressly stated that it chose to believe that the attorneys would not risk sanctions or ignore their professional obligations even without sanctions.

Am Jur 2d, Attorneys at Law § 189.

Propriety and effect of attorney representing interest adverse to that of former client. 52 ALR2d 1243.

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

APPEAL of right by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 659, 403 S.E.2d 593 (1991), dismissing defendant's appeal of the denial of its motion to disqualify plaintiff's counsel by *Freeman (William H.), J.*, on 11 January 1990 in Superior Court, FORSYTH County. Heard in the Supreme Court on 11 December 1991.

Womble Carlyle Sandridge & Rice, by Grady Barnhill, Jr., and William C. Raper; Bailey & Thomas, by David W. Bailey, Jr.; Wyatt, Early, Harris, Wheeler & Hauser, by Kim R. Bauman, for plaintiff-appellee, Travco Hotels, Inc.

Hedrick, Eatman, Gardner & Kincheloe, by John A. Gardner, III, Scott M. Stevenson and Brian D. Lake, for defendant-appellant, Piedmont Natural Gas, Inc.

EXUM, Chief Justice.

[1] The issue before us is whether the Court of Appeals erred in dismissing, as interlocutory, defendant's appeal of an order denying its motion to disqualify opposing counsel.

This action is one of a multitude of lawsuits arising out of an 18 January 1988 natural gas explosion in Winston-Salem. The explosion destroyed a hotel and restaurant building owned by TRAVCO Hotels, Inc. ("Travco") and leased by K & W Cafeterias, Inc. The complaint alleges that the explosion was caused by the negligence of defendant Piedmont Natural Gas Company, Inc. ("Piedmont"). Numerous lawsuits have been filed, and are currently pending, against Piedmont. On 12 May 1989 the cases stemming from the explosion were declared exceptional pursuant to Rule 2.1[1] of the General Rules of Practice for the Superior and District Courts. With the consent of all parties, the two cases comprising this action were consolidated and treated as "flagship" cases to be tried first. Judge William H. Freeman, Resident Superior Court Judge in Forsyth County, was designated to preside over the cases arising from the explosion.

On 11 September 1989, attorneys for Piedmont moved to disqualify the law firm of Womble Carlyle Sandridge & Rice ("Womble"), one of several firms representing plaintiff Travco. The motion alleged that Womble had obtained confidential information during representation of Piedmont in a previous matter, in which Piedmont had sought damages when one of its gas lines was broken during construction work. A lawsuit, *Piedmont Natural Gas Co. v. Blue*

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1. Rule 2.1. Designation of Exceptional Civil Cases.

(a) The Chief Justice may designate any case or group of cases as "exceptional." A senior resident superior court judge, chief district court judge, or presiding superior court judge may *ex mero motu*, or on motion of any party, recommend to the Chief Justice that a case or cases be designated as exceptional.

. . . .

(d) Factors which may be considered in determining whether to make such designation include: the number and diverse interests of the parties; . . . the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.

(e) The Chief Justice may enter such orders as are appropriate for the pretrial, trial, and other disposition of such designated case or cases.

Ridge Concrete ("*Blue Ridge*"), was filed by Womble on Piedmont's behalf on 28 August 1985 in Forsyth County (No. 85-CVS-4041). Womble's involvement in that matter concluded in August 1987, shortly after the trial of the case. The incident that precipitated the *Blue Ridge* litigation is unrelated to the 18 January 1988 natural gas explosion.

On 11 January 1990 Judge Freeman in an order supported by thorough and detailed findings, denied Piedmont's motion to disqualify Womble. Piedmont filed notice of appeal with the Court of Appeals. Travco moved to dismiss Piedmont's appeal on the ground that the order appealed from was interlocutory. A divided panel of the Court of Appeals agreed and dismissed the appeal. *Travco Hotels v. Piedmont Natural Gas Co.*, 102 N.C. App. 659, 403 S.E.2d 593 (1991) (Phillips, J., dissenting).

I.

The first question to be addressed is whether the Court of Appeals correctly concluded that Judge Freeman's order denying Piedmont's motion to disqualify Womble was not appealable. We think the Court of Appeals was correct. We affirm its decision and remand the matter for further proceedings.

Generally, there is no right of immediate appeal from interlocutory orders and judgments. *Goldston v. American Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, N.C.G.S. §§ 1-277 and 7A-27 set forth certain exceptions to the general rule. *Id.* at 725, 392 S.E.2d at 736; *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978). N.C.G.S. § 1-277(a) (1983) provides that:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . .

N.C.G.S. § 7A-27(d) (1989) provides that:

> From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which affects a substantial right . . . appeal lies of right directly to the Court of Appeals.

This Court has consistently found "that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Waters*, 294 N.C. at 207, 240 S.E.2d at 343 (quoting *Consumers Power v. Duke Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974)). "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. at 726, 392 S.E.2d at 736; *see also Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977). However, as we have previously noted, the "substantial right" test is more easily stated than applied. *Waters*, 294 N.C. at 208, 240 S.E.2d at 343. In determining which interlocutory orders are appealable and which are not, we must consider the particular facts of each case and the procedural history of the order from which an appeal is sought. *Id.* at 208, 240 S.E.2d at 343; *Patterson v. DAC Corp.*, 66 N.C. App. 110, 112, 310 S.E.2d 783, 785 (1984).

Piedmont contends that because Womble previously represented it in a matter involving the rupture of one of its gas lines, Womble may not represent Travco in the present action against Piedmont. Piedmont contends that during the course of the *Blue Ridge* litigation Womble became privy to confidential information which it may use to Piedmont's detriment and to give Travco an unfair advantage in this litigation. Piedmont argues it has a right to prevent Womble from using any confidential information against it which may have been gleaned from the prior representation; this right is substantial; and the only way it can be vindicated is by removal of Womble as counsel for Travco. Failure, therefore, to review the order denying Piedmont's motion before final judgment at trial would mean that Piedmont's substantial right would be forever lost if, indeed, the denial of its motion was error.

We agree with Piedmont that the use against it by Womble's client in this trial of confidential information gained by Womble when it represented Piedmont would deprive Piedmont of a substantial right not to have its attorney-client confidences breached to its detriment. We disagree, however, with the argument that the order denying Piedmont's motion to disqualify Womble cannot be effectively reviewed and Piedmont's rights protected after final

judgment at trial. The order denying the motion to disqualify counsel fails the second prong of the two-part "substantial right" test.

Piedmont can adequately protect its right not to have its confidences used against it to its detriment by appealing any adverse final judgment. In this appeal Piedmont may assign error to the denial of its motion to disqualify Womble and the improper use, should there be any, of its confidences by Womble in the representation of Piedmont's adversary. If reversible error was committed in the denial of the motion or in the improper use of confidences, or both, then Piedmont will be given a new trial at which these errors would not occur.

We recognize that in *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735, we held that an interlocutory order granting a motion to disqualify counsel was immediately appealable. The granting of a motion to disqualify counsel, unlike a denial of the motion, has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client.

Other courts have persuasively concluded that the denial of a motion to disqualify counsel is not immediately appealable but must be addressed on an appeal from a final judgment at trial. The United States Supreme Court resolved the issue as it applies to federal civil litigation when it held "that a district court's order denying a motion to disqualify counsel is not appealable under § 1291 prior to final judgment in the underlying litigation." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 66 L. Ed. 2d 571, 581 (1981). The Court in *Firestone* stated the three-pronged federal test for immediate appealability of "final 'collateral orders' " as follows: "[T]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Id.* at 375, 66 L. Ed. 2d at 579. Conceding that an order denying a motion to disqualify counsel met the first prong of the test and assuming that it also met the second, the Court concluded that it did not meet the third prong, saying, "petitioner is unable to demonstrate that an order denying disqualifica-

tion is 'effectively unreviewable on appeal from a final judgment' within the meaning of our cases." *Id.* at 376, 66 L. Ed. 2d at 579.

The Supreme Court of Ohio has recognized the distinction for purposes of immediate appealability between orders allowing and orders denying motions to disqualify counsel. In *Bernbaum v. Silverstein*, 62 Ohio St. 2d 445, 406 N.E.2d 532 (1980), the Court held that an order denying a motion to disqualify counsel was not immediately appealable because the order could be effectively reviewed for error on an appeal from a final judgment adverse to the movant. Later in *Russell v. Mercy Hospital*, 15 Ohio St. 3d 37, 472 N.E.2d 695 (1984), the Ohio Court concluded that the granting of a motion to disqualify counsel was immediately appealable. The Court reasoned, *id.* at 42, 472 N.E.2d at 699:

> The finality of the two orders is as dissimilar as their results. An order granting disqualification seriously disrupts the progress of litigation while new counsel is obtained, but one refusing such relief merely allows the action to proceed and has no permanent effect of any kind. A mere refusal to act is necessarily less conclusive than the affirmative grant of the requested relief.

The argument that irreparable damage could be done to a party by the disclosure of the party's attorney-client confidences has been addressed by one scholar as follows:

> Prejudice to the litigation . . . can be corrected by a new trial . . . . This remedy may be less than ideal from the movant's point of view, both because damage from an attorney's improper disclosure of confidences might never be fully corrected, and because retrial is costly and inconvenient. The disclosure problem, however, is no more curable by an immediate appeal; the challenged attorney will generally have had ample opportunity to disclose all that he knows before he is disqualified upon appeal.

Michael W. McConnell, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. Chic. L. Rev. 450, 457 (1978).

Because of our decision on this issue, *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 275, 300 S.E.2d 230 (1983), which reached a contrary conclusion, should no longer be considered authoritative on this point.

II.

[2] Although not required to do so, we elect to consider the merits of the underlying appeal pursuant to our supervisory powers under Article IV, § 12(1) of the North Carolina Constitution. Section 12(1) gives this Court jurisdiction "to review upon appeal any decision of the courts below, upon any matter of law or legal inference" and gives it "general supervision and control over the proceedings of the other courts." *Crist v. Moffatt*, 326 N.C. 326, 330, 389 S.E.2d 41, 44 (1990). Pursuant to this constitutional grant of jurisdiction, we elect to treat Piedmont's appeal from the order as a petition for our writ of certiorari which we now allow.

At issue on the merits is whether Judge Freeman erred when he denied Piedmont's motion to disqualify Womble from representing Travco.

Decisions regarding whether to disqualify counsel are within the discretion of the trial judge and, absent an abuse of discretion, a trial judge's ruling on a motion to disqualify will not be disturbed on appeal. *In re Lee*, 85 N.C. App. 302, 310, 354 S.E.2d 759, 764-65, *disc. rev. denied*, 320 N.C. 513, 358 S.E.2d 520 (1987).

Piedmont contends Judge Freeman abused his discretion in denying its motion to disqualify Womble. It contends that Womble's continued representation of Travco in this litigation is a violation of Canon IV, Rule 4, and Canon V, Rule 5.1 of the Rules of Professional Conduct, which govern the conduct of lawyers in North Carolina. Canon IV, Rule 4, essentially admonishes lawyers not to reveal knowingly the confidences of a client obtained during the course of the professional relationship. Rule 4 states: "For the purposes of the rule, 'client' refers to present and former clients." Canon V, Rule 5.1(A) admonishes lawyers to avoid conflicts of interests in the representation of clients. Rule 5.1(C) requires that a lawyer "withdraw from representation of any party he cannot adequately represent or represent without using the confidential information or secrets of another client or former client except as Rule 4 would permit . . . ." Rule 5.1(D) prohibits a lawyer who has formerly represented a client from representing "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after full disclosure."

Judge Freeman conducted a full and thorough hearing on Piedmont's disqualification motion. He examined *in camera* Womble's 2900-page file on its former representation of Piedmont in the *Blue Ridge* case. Judge Freeman's order denying Piedmont's motion covers 67 pages in the record and is supported by 120 findings of fact. Many of the findings relate to the nature of the *Blue Ridge* litigation and the information about Piedmont acquired by Womble during the course of Womble's representation of Piedmont. These findings include the following:

> 24. The scope of the *Blue Ridge* case was quite limited. The issues were simple; the basic facts were not in dispute. The court's *in camera* review of the file shows that the documents in the file are focused specifically to the *Blue Ridge* facts.
>
> . . . .
>
> 33. The little information obtained by the Womble Carlyle attorneys in *Blue Ridge*, other than that directly related to *Blue Ridge*, concerning Piedmont's procedures, practices, operations and personnel was of a most general nature and much too general to be of assistance in this action (as will be analyzed later) and was most favorable to Piedmont. Messrs. Norris and Raker testified at their depositions that they knew of nothing that they or Piedmont had done wrong in connection with *Blue Ridge*. They knew of no procedures or guidelines which had been violated. Consequently, they had communicated nothing detrimental about the company to the Womble Carlyle attorneys. Counsel for Piedmont produced no documents or records from Womble Carlyle's files indicating any wrong-doing by Piedmont which came to Womble Carlyle's attention.
>
> 34. At no time in connection with representing Piedmont in the *Blue Ridge* case did the Womble Carlyle attorneys become privy to any information, procedures, guidelines, or practices which appear to the court to be unique, unexpected, unusual or novel, rather they appear commonplace and routine for corporations generally. It is to be anticipated that any corporation of any size will have a "chain of command." Piedmont's procedures and practices involved in *Blue Ridge* were what the court would have anticipated them to be. It is common knowledge that natural gas companies have gas mains and lines; that the gas companies will seek to repair the lines if they are

ruptured and that they will have the men and equipment needed. No true secrets or real confidences appear to have been involved in *Blue Ridge*. Nothing learned by Womble Carlyle attorneys in *Blue Ridge* would have been embarrassing to Piedmont nor likely to be detrimental to Piedmont. The specifics of any conversation between the Womble Carlyle attorneys and Messrs. Norris and Baker would have been subject to the attorney-client privilege, but it nowhere appears that Womble Carlyle was told anything in the conversations, the underlying facts of which could not have been obtained through discovery.

35. A detailed analysis of the pleadings, discovery and trial of *Blue Ridge*, including portions of the Womble Carlyle file shows that the discovery, interviews, depositions and trial were focused on the specific facts involved in *Blue Ridge*, the subject matter of which and the facts of which and the actually litigated issues of which were markedly and pronouncedly different from those in the present action. The similarities are superficial and, particularly in the context of the complexity of *Travco*, are not significant. The major difference, among many differences, in the two cases is that *Travco* involves an explosion, *Blue Ridge* did not. A key issue in *Travco* is what caused the gas line to rupture, whether corrosion or the collapse of a wall. There was no question in *Blue Ridge* as to how the rupture occurred. Cathodic protection and maintenance of the lines are key issues in *Travco*; neither issue was involved in *Blue Ridge*. The duty of meter readers to see and observe conditions at or near the meters is another important issue in *Travco*; meter reading was in no way involved in *Blue Ridge*. Leak detection is a key issue in *Travco*; it was not involved in *Blue Ridge*. A key issue in *Blue Ridge* was whether the pipe was laid in accordance with Department of Transportation directions and was where it was shown to be on a Department of Transportation map. Neither are at issue in *Travco*. The accidents occurred five miles apart and in areas served by different mains. In *Travco*, the explosion was at a hotel/restaurant; in *Blue Ridge*, the leak was beneath a creekbed. The relationship between Piedmont and the Utilities Commission is at issue in Piedmont; it was not in *Blue Ridge*. A six-inch gas main was involved in *Blue Ridge*; a two-inch service line is involved in *Travco*.

36. An examination of the areas pointed to by Piedmont to show a substantial relationship between the *Travco* and *Blue Ridge* cases follows. The court determines that the similarities are superficial; that the few similarities are not significant, particularly in view of the complexity of *Travco*; that none of the issues or facts are similar in any meaningful way; that the subject matters are different; that many of the areas pointed to by Piedmont are more matters of general education or common sense than the "stuff" of confidential communications or secrets and that no confidences, secrets or information were imparted or would logically have been imparted to the Womble Carlyle attorneys which would assist them in this action in any other than a most superficial and meaningless way.

These findings are fully supported by the evidence.

Judge Freeman's findings support his conclusions which, among others, were:

2. Womble Carlyle has not used or disclosed any confidential information or secrets of Piedmont in violation of the Rules of Ethics.

. . . .

4. The material facts and real issues in the matters or cases, including *Blue Ridge*, Womble Carlyle has handled on behalf of Piedmont were not substantially related to the facts and issues in the present one within the meaning of Canon V, Rule 5.

. . . .

6. Womble Carlyle did not violate Canon V, Rule 5.1(A), (C) or (D) in undertaking the representation of Travco in this litigation.

. . . .

8. No appearance of impropriety has occurred.

9. . . . .

. . . .

(e) Piedmont agrees that it has no evidence that the Womble Carlyle attorneys prosecuting this action have ever had ac-

cess to or used any information gained in *Blue Ridge*. This court chooses to believe, until shown to the contrary, that the Womble Carlyle attorneys will not risk the heavy sanctions attendant to such use, or that they would ignore their professional responsibilities, even without such sanctions.

We conclude that Judge Freeman acted well within his discretionary authority in denying Piedmont's motion to disqualify Womble.

The result is that the Court of Appeals' decision dismissing Piedmont's appeal of the denial of its motion to disqualify counsel is affirmed and, in the exercise of our supervisory powers, we find no abuse of discretion in Judge Freeman's order. The matter is remanded to the Superior Court, Forsyth County, for further proceedings.

Affirmed and remanded.

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

SANDRA L. HART AND ROGER J. HART, PLAINTIFFS v. HOWARD L. IVEY, JR. AND JOHN ROSENBLATT AND DAVID KING AND DAVID HOWELL AND MIKE'S DISCOUNT BEVERAGE, INC., DEFENDANTS, AND JOHN DENNIS LITTLE, JR. AND JOHN DENNIS LITTLE, SR., DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. HOWARD L. IVEY, JR., THIRD-PARTY DEFENDANT

No. 265A91

(Filed 4 September 1992)

1. Intoxicating Liquor § 64 (NCI4th)— giving alcoholic beverage to minor—statutory violation—no negligence per se

The statute prohibiting the giving of alcoholic beverages to anyone less than twenty-one years old, N.C.G.S. § 18B-302(a), is not a public safety statute, and a violation of the statute by a social host is thus not negligence *per se*.

Am Jur 2d, Intoxicating Liquors § 555.

Damage from sale or gift of liquor or drug. 97 ALR3d 528.

2. Intoxicating Liquor § 64 (NCI4th)— serving beer to intoxicated guest—common law negligence—liability of social host

Plaintiffs stated a claim under common law principles of negligence against social hosts for serving beer to an intoxicated guest where they alleged that defendants served beer to a minor guest who they knew or should have known was under the influence of alcohol, that defendants knew this guest would drive an automobile on the streets or highways shortly after consuming the beer, and that as a result of defendants' negligent acts the intoxicated guest drove his automobile into the vehicle driven by the female plaintiff, causing her serious injury.

Am Jur 2d, Intoxicating Liquors § 553.

Damage from sale or gift of liquor or drug. 97 ALR3d 528.

Justice MITCHELL concurring in the result.

Justice LAKE joins in this concurring opinion.

APPEAL as 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 a decision of the Court of Appeals, 102 N.C. App. 583, 403 S.E.2d 914 (1991), reversing a judgment entered by *Snepp, J.*, in the Superior Court, MECKLENBURG County, on 1 August 1989 and remanding for trial. Heard in the Supreme Court 10 February 1992.

The plaintiffs brought this action, alleging that the defendants Ivey, Rosenblatt, King and Howell were negligent in giving a party at which beer was served to John Dennis Little, Jr. who was eighteen years of age. These plaintiffs alleged that these defendants knew or should have known that Mr. Little was intoxicated at the time they served him the beer. They also alleged that these defendants knew or should have known that the defendant Little would drive a motor vehicle from the party and was likely to injure some person. They alleged further that the defendants knew Mr. Little was a minor and it was a violation of N.C.G.S. § 18B-302 to serve beer to him. The plaintiffs alleged further that as a result of these negligent acts by the four defendants Mr. Little's vehicle collided with a motor vehicle driven by Sandra L. Hart, causing her serious injury. Roger J. Hart asked for damages for loss of consortium.

John Dennis Little, Jr. and his father, who owned the Little vehicle involved in the collision, made Howard L. Ivey, Jr. a third party defendant. They alleged that if the Littles are held liable to the plaintiffs, that Ivey's negligence and his violation of N.C.G.S. § 18B-302 make him liable to them for contribution.

The defendants Ivey, Rosenblatt, King and Howell moved for judgments in their favor on the ground the complaint did not state a claim against them. The third party defendant Ivey made the same motion. The superior court granted these motions.

The Court of Appeals reversed the superior court. The Court of Appeals held that the plaintiffs had stated a claim because of a violation by the defendants of N.C.G.S. § 18B-302 which was negligence *per se*. Judge Lewis dissented. The Court of Appeals unanimously held that the plaintiffs had not stated a claim under common law principles of negligence.

The defendants appealed as of right from the holding of the Court of Appeals that their alleged action was negligence *per se*. We granted the plaintiffs' petition for discretionary review of the holding that the plaintiffs had not stated a claim under common law principles of negligence.

Olive-Monett, P.A. & Associates, by Terry D. Brown and R. Gary Keith, for plaintiffs appellants-appellees.

Horack, Talley, Pharr & Lowndes, by Neil C. Williams, for defendant/third-party appellant-appellee John Dennis Little, Sr.

Goodman, Carr, Nixon & Laughrun, by Michael P. Carr, for defendant/third-party plaintiff appellant-appellee John Dennis Little, Jr.

Kennedy, Covington, Lobdell & Hickman, by F. Fincher Jarrell, for defendants/third-party plaintiffs appellants-appellees John Dennis Little, Sr. and John Dennis Little, Jr.

Golding, Meekins, Holden, Cosper & Stiles, by John G. Golding and Terry D. Horne, for defendant appellant-appellee Howard L. Ivey, Jr.

Hedrick, Eatman, Gardner & Kincheloe, by Scott M. Stevenson, for defendant appellant-appellee John Rosenblatt.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant appellant-appellee David King.

Underwood, Kinsey & Warren, P.A., by C. Ralph Kinsey, Jr. and Richard L. Farley, for defendant appellant-appellee David Howell.

WEBB, Justice.

At the outset, we note that although the plaintiffs have alleged that the guests at the party were charged $2.00 per person to drink beer, none of the parties to this case contend that the hosts at the party were selling beer. All agree that the defendants should be treated as social hosts.

The plaintiffs have brought this action based on the negligence of the defendants. The plaintiffs contend they have stated a claim for negligence on two separate grounds. They say first that the defendants were negligent *per se* for serving an alcoholic beverage to a minor in violation of N.C.G.S. § 18B-302. The plaintiffs next contend that they have stated a claim under common law principles of negligence by alleging that the defendants served alcoholic beverages to a person when they knew or should have known that person was under the influence of alcohol and would drive an automobile on the streets or highway shortly after consuming the alcoholic beverage.

The Court of Appeals held that the plaintiffs had stated a claim for negligence by alleging a violation of N.C.G.S. § 18B-302 which would be negligence *per se*. The Court of Appeals held that the plaintiffs had not stated a claim under common law principles of negligence. We disagree with the Court of Appeals as to both conclusions. We hold that the plaintiffs have not stated a claim for the violation of N.C.G.S. § 18B-302 but they have stated a claim under common law principles.

[1] The plaintiffs contend and the Court of Appeals held that N.C.G.S. § 18B-302 is a public safety statute for the protection of persons driving on the highways of this state and its violation is negligence *per se*. N.C.G.S. § 18B-302 provides in part:

(a) Sale.—It shall be unlawful for any person to:

(1) Sell or give malt beverages or unfortified wine to anyone less than 21 years old; or

(2) Sell or give fortified wine, spirituous liquor, or mixed beverages to anyone less than 21 years old.

(b) Purchase or Possession.—It shall be unlawful for:

(1) A person less than 21 years old to purchase, to attempt to purchase, or to possess malt beverages or unfortified wine; or

(2) A person less than 21 years old to purchase, to attempt to purchase, or to possess fortified wine, spirituous liquor, or mixed beverages.

(c) Aider and Abettor.

(1) By Underage Person.—Any person who is under the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section shall be guilty of a misdemeanor punishable by a fine up to five hundred dollars ($500.00) or imprisonment for not more than six months, or both, in the discretion of the court.

(2) By Person over Lawful Age.—Any person who is over the lawful age to purchase and who aids or abets another in violation of subsection (a) or (b) of this section shall be guilty of a misdemeanor punishable by a fine of up to two thousand dollars ($2,000) or imprisonment for not more than two years, or both, in the discretion of the court.

When a statute imposes a duty on a person for the protection of others we have held that it is a public safety statute and a violation of such a statute is negligence *per se* unless the statute says otherwise. *Funeral Service v. Coach Lines*, 248 N.C. 146, 102 S.E.2d 816 (1958); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E.2d 333 (1955). A member of a class protected by a public safety statute has a claim against anyone who violates such a statute when the violation is a proximate cause of injury to the claimant. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E.2d 331 (1954).

We do not believe N.C.G.S. § 18B-302 is a public safety statute which was intended to protect the plaintiffs. We believe its purpose was to stop persons under the statutory age from drinking alcoholic beverages. If it was to protect the public, it should not be limited

to persons under twenty-one years of age. An adult driver under the influence of alcohol can be as dangerous on the highway as a person under twenty-one years of age. We also believe if it were a public safety statute, it would be related more to being under the influence of alcohol. The section does not restrict sales or the giving of alcoholic beverages to those who might be under the influence of alcohol, but forbids any sales or gifts at all of alcohol to those under twenty-one years of age. In this state, we do not proscribe all driving by those who have drunk some alcoholic beverage, but only those who are under the influence of alcoholic beverage. This demonstrates to us that the purpose of the section is to restrict the consumption of alcohol by those under twenty-one years of age and it was not adopted for the protection of the driving public.

If we were to hold, without any qualification, that a violation of N.C.G.S. § 18B-302 is negligence *per se*, it would require a trial court to charge that giving a person under twenty-one years of age a small amount of some alcoholic beverage, which does not affect his or her ability to drive, is negligence *per se*. We do not believe the General Assembly intended this result.

N.C.G.S. § 18B-302 is a part of Chapter 18B of the General Statutes whose title is "Regulation of Alcoholic Beverages." The purpose of Chapter 18B is "to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina." N.C.G.S. § 18B-100 (1989). There is no express purpose of protecting the public from intoxicated persons in the statute except in that portion of the chapter known as the Dram Shop Act, N.C.G.S. § 18B-120 *et seq*. The Dram Shop Act has no application to this case. Where a statute specifies the acts to which it applies, an intention not to include others within its operation may be inferred. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). We hold that a violation of N.C.G.S. § 18B-302 is not negligence *per se*.

[2] As to the cause of action for liability under common law principles of negligence we hold that the plaintiffs have stated a cognizable claim. We have not been able to find a case in this state dealing with the liability of a social host who serves an alcoholic beverage to a person who then injures someone while operating an automobile while under the influence of an intoxicating beverage. We believe, however, that the principles of negligence established

by our decisions require that we hold that the plaintiffs in this case have stated a claim.

Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 365 S.E.2d 898 (1988); *Lentz v. Gardin*, 294 N.C. 425, 241 S.E.2d 508 (1978); *Williams v. Trust Co.*, 292 N.C. 416, 233 S.E.2d 589 (1977); *Clarke v. Holman*, 274 N.C. 425, 163 S.E.2d 783 (1968).

The plaintiffs in this case have alleged that the defendants served an alcoholic beverage to a person they knew or should have known was under the influence of alcohol and that the defendants knew that the person who was under the influence of alcohol would shortly thereafter drive an automobile. If proof of these allegations were offered into evidence, the jury could find from such evidence that the defendants had done something a reasonable man would not do and were negligent. The jury could also find that a man of ordinary prudence would have known that such or some similar injurious result was reasonably foreseeable from this negligent conduct. The jury could find from this that the negligent conduct was the proximate cause of the injury to plaintiffs. *Mills v. Waters*, 235 N.C. 424, 70 S.E.2d 11 (1952).

There remains the question of whether the defendants were under a duty to the plaintiffs not to serve the alcoholic beverage as they did. We said in *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951), "[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence." *Id.* at 474, 64 S.E.2d at 553. The defendants were under a duty to the people who travel on the public highways not to serve alcohol to an intoxicated individual who was known to be driving.

The defendants, relying on cases from other jurisdictions, say that there is not a common law negligence claim against a social host for serving alcoholic beverages. They argue that there are many implications from establishing such a claim and we should not do so. Our answer to this is that we are not recognizing a

new claim. We are applying established negligence principles and under those principles the plaintiffs have stated claims.

We note that N.C.G.S. § 18B-128, which is a part of the Dram Shop Act, does not abrogate any claims for relief under the common law.

We agree, but for different reasons, with the Court of Appeals that it was error to dismiss the plaintiffs' claims.

Affirmed.

Justice MITCHELL concurring in the result.

In their complaint, the plaintiffs have alleged that the defendants Howard L. Ivey, Jr., John Rosenblatt, David King and David Howell knowingly served beer to a minor, John Little, Jr., which caused him to become intoxicated and drive a motor vehicle into the vehicle driven by the female plaintiff, proximately causing the plaintiffs' alleged injuries. Under N.C.G.S. § 18B-302(a), it is a general misdemeanor for any person to give or sell alcoholic beverages to anyone less than twenty-one years old. N.C.G.S. § 18B-302(a)(1), (2) (1989). Obviously, the alleged acts of these defendants as "social hosts" knowingly giving beer to a minor were criminal acts under the statute. *Id.* Nevertheless, the majority concludes that these defendants' criminal actions in violating the statute, as alleged in the complaint, do not amount to negligence *per se* because the statute is not a "public safety" statute intended to protect the plaintiffs. I believe that the majority's conclusion in this regard is erroneous.

Ordinarily, violation of a statute enacted for the safety and protection of the public is negligence *per se*—negligence as a matter of law. *State Farm Mut. Auto. Ins. Co. v. Holland*, 324 N.C. 466, 475, 380 S.E.2d 100, 105 (1989); *Gore v. George J. Ball*, 279 N.C. 192, 198, 182 S.E.2d 389, 392 (1971). Accordingly, we have stated that "violation of a statute which imposes a duty upon the defendant in order to promote the safety of others, including the plaintiff, is negligence *per se*, unless the statute, itself, otherwise provides, and such negligence is actionable if it is the proximate cause of injury to the plaintiff." *Lamm v. Bissette Realty, Inc.*, 327 N.C. 412, 415, 395 S.E.2d 112, 114 (1990) (quoting *Ratliff v. Power Co.*, 268 N.C. 605, 610, 151 S.E.2d 641, 645 (1966)). Clearly,

N.C.G.S. § 18B-302 is such a public safety statute. *Freeman v. Finney*, 65 N.C. App. 526, 529, 309 S.E.2d 531, 534 (1983), *disc. rev. denied*, 310 N.C. 744, 315 S.E.2d 702 (1984). *See Hutchens v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584, *disc. rev. denied*, 309 N.C. 191, 305 S.E.2d 734 (1983).

Better reasoned cases always have taken the view that laws governing the sale of alcoholic beverages are intended to and do enhance the well-being of the community by protecting all members of the public from the dangers arising from the indiscriminate sale of such alcoholic beverages. *E.g., Marusa v. District of Columbia*, 484 F.2d 828, 834 (D.C. Cir. 1973). I had thought it known to all humankind that when one provides alcoholic beverages to a minor, "the unreasonable risk of harm not only to the minor . . . but also to members of the traveling public may readily be recognized and foreseen." *Rappaport v. Nichols*, 31 N.J. 188, 202, 156 A.2d 1, 8 (1959). In its opinion in the present case, our Court of Appeals was quite correct in saying "[w]e need not recite at any length the record of carnage on our public highways caused by drivers (*particularly those under age*) who have consumed intoxicating beverages." *Hart v. Ivey*, 102 N.C. App. 583, 590, 403 S.E.2d 914, 919 (1991) (emphasis added). But highway safety is only one of many public safety interests served by our statute prohibiting the serving of alcoholic beverages to minors. Foremost among those interests is the physical and mental health of the children involved. Our legislature on behalf of our society has reasonably determined that children do not have sufficient maturity and discretion to decide whether to risk their health and safety by consuming alcoholic beverages. As a result, our legislature has made it a criminal act for any person to give alcoholic beverages to children. The legislature did so for the safety of our children and the general public and intended that such criminal violations be treated as negligence *per se*.

The majority of this Court, however, seems to take the view that N.C.G.S. § 18B-302 was intended to prevent minors from drinking alcoholic beverages for some unknowable reason unrelated to public safety. The majority here says that highway safety could not have been one of the reasons for the adoption of the statute because an adult driving under the influence of alcohol *can* be as dangerous as a minor. No doubt adult drivers under the influence of alcoholic beverages *can* be as dangerous to themselves and the public as drinking minors who drive on the public highways. However, reason and common sense could only have led our General Assembly,

like all ordinary citizens, to know that minors who drink alcoholic beverages and drive on the public highways *ordinarily will be* more dangerous to themselves and to the general public than more experienced adults who drive under the influence of alcohol. Further, it should be obvious to anyone that children who drink are more likely to fall under the influence of alcohol and to be *generally* more dangerous in every respect imaginable than similarly situated adults. Clearly, the statute in question here was intended to protect inexperienced youths and the general public from that danger and other dangers which arise when minors are served alcoholic beverages. This Court should take judicial notice of such obvious facts, including the fact that this statute was intended by the General Assembly as a public health and safety measure. We have previously said that there are many facts of which courts "may take judicial notice, and they should take notice of whatever is, or ought to be, generally known within the limits of their jurisdiction, for justice does not require that courts profess to be more ignorant than the rest of mankind." *State v. Vick*, 213 N.C. 235, 238, 195 S.E. 779, 781 (1938), *quoted in State v. Davis*, 245 N.C. 146, 149-50, 95 S.E.2d 564, 566-67 (1956). The fact that minors drinking alcoholic beverages generally are more dangerous to themselves and others than adults and the fact that laws against serving alcohol to minors protect public safety are facts known to everyone and should be judicially recognized by this Court. One court has stated when construing a statute nearly identical to the one before us: "[I]t would be absurd indeed to maintain that one of the purposes of the statute in question was not to protect the public from the risk of injury caused by intoxicated minors. Thus, defendants' alleged violation of the statute would, *if proven*, constitute negligence per se. . . ." *Thaut v. Finley*, 50 Mich. App. 611, 613, 213 N.W.2d 820, 822 (1974) (social hosts' violation of statute prohibiting giving alcoholic beverage to minor social guests). I would follow the well-reasoned decisions of other courts which have concluded that statutes which prohibit giving alcoholic beverages to minors are public safety statutes and that violations of those statutes by social hosts amount to negligence *per se*. *E.g.*, *Davis v. Shiappacossee*, 155 So. 2d 365 (Fla. 1963); *Koback v. Crook*, 123 Wis. 2d 259, 366 N.W.2d 857 (1985). *See generally* Edward L. Raymond, Jr., Annotation, *Social Host's Liabilities for Injuries Incurred by Third Parties as a Result of Intoxicated Guests' Negligence*, 62 A.L.R. 4th 16 (1988); 45 Am. Jur. 2d *Intoxicating Liquors* § 555 (1969). As a result, I would hold that if the plaintiffs can prove that these

defendants violated N.C.G.S. § 18B-302, they will also have established negligence *per se* on the part of these defendants.

For the foregoing reasons, I concur in the result reached by the majority in affirming the holding of the Court of Appeals, which reversed the trial court's dismissal of the plaintiffs' claims against each of these defendants for failure to state a claim upon which relief could be granted. I agree with the majority's reasoning and conclusion to the effect that the plaintiffs have stated a cognizable claim against these defendants "for liability under common law principles of negligence." Since I reject the majority's unfortunate conclusion that these defendants' alleged violations of N.C.G.S. § 18B-302 do not amount to negligence *per se*, however, I must concur only in the result reached here by the majority.

Justice LAKE joins in the concurring opinion.

HARRY EUGENE LANNING, EXECUTOR FOR THE ESTATE OF DEBORAH JEAN LANNING; LAWRENCE C. STOKER, ADMINISTRATOR FOR THE ESTATE OF CHERYL ANN MELTON; LINDA DIANE CHRISTOPHER, NATURAL MOTHER AND GUARDIAN AD LITEM OF KELLY PAULA CHRISTOPHER, MINOR CHILD v. ALLSTATE INSURANCE COMPANY

No. 288PA91

(Filed 4 September 1992)

1. **Insurance § 514 (NCI4th)— uninsured motorist coverage— intrapolicy stacking not required by statute**

N.C.G.S. § 20-279.21(b)(3), prior to its 1991 amendment, did not require an automobile insurer to aggregate or stack its intrapolicy UM coverage provided with respect to each of the vehicles named in the policy.

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverage provided in fleet policy. 25 ALR4th 896.

2. **Insurance § 514 (NCI4th)— uninsured motorist coverage— intrapolicy stacking not allowed by policy**

The language of an automobile policy prohibited intrapolicy stacking of its UM coverages where it provided that "the

limit of bodily injury liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury . . . regardless of the number of: . . . Insureds; . . . [and] Vehicles or premiums shown in the Declarations."

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverage provided in fleet policy. 25 ALR4th 896.

Justice MEYER concurs in the result.

Justices FRYE and LAKE did not participate in the consideration or decision of this case.

ON petition for discretionary review prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31, of a summary judgment for defendant on 19 April 1991 by *C. Walter Allen, J.*, in Superior Court, BUNCOMBE County. Heard in the Supreme Court on 16 October 1991 with *Requeno v. Integon General Ins. Corp.*, 332 N.C. 339, 421 S.E.2d 784 (1992), and *Wheeler v. Welch*, 332 N.C. 342, 420 S.E.2d 186 (1992).

Hyler & Lopez, P.A., by George B. Hyler, Jr. and Robert J. Lopez, for plaintiff-appellants Lanning and Stoker.

Lindsay & True, by Ronald C. True, for plaintiff-appellant Christopher.

McClure & Contrivo, P.A., by Frank J. Contrivo, for defendant-appellee.

EXUM, Chief Justice.

This is a declaratory judgment action brought to determine plaintiffs' rights under an automobile insurance policy issued by defendant Allstate Insurance Company (Allstate). At issue is whether N.C.G.S. § 20-279.21 (1989) requires that the UM coverage limits on each of three vehicles insured in the policy be aggregated, or "stacked." If it does not, the next question is whether the nature of the policy itself and the language it employs requires such stacking. We conclude, for the reasons given below, that the answers to both questions are no.

I.

The parties have stipulated the facts to be as follows:

Allstate issued an automobile insurance policy to Harry and Deborah Lanning, the named insureds. The policy insured against the Lannings' liability to third parties and provided collision, comprehensive and UM coverage. The declarations page listed three vehicles, two Pontiac Firebirds and a Subaru, for coverage and showed that the liability and UM coverages applied to all three vehicles. The collision and comprehensive coverages applied only to the Pontiacs. As to each of the three vehicles the bodily injury liability and UM coverages were limited to $25,000 per person and $50,000 per accident. Separate premiums were charged with respect to each vehicle for each coverage provided. For the UM coverage the premium was $4 per vehicle.

On 20 January 1989 one of the Pontiacs listed in the Allstate policy, being driven by Ms. Lanning and occupied by her daughter, Cheryl Ann, and a foster child, Kelly, was struck by an uninsured automobile. Ms. Lanning was killed instantly; Cheryl Ann later died from injuries suffered in the collision; and Kelly was seriously injured.

Plaintiffs Harry Lanning, executor of his wife Deborah's estate, Lawrence C. Stoker, administrator of the estate of Cheryl Ann Melton, and Linda Diane Christopher, the natural mother and guardian ad litem of Kelly Christopher, have filed actions in Buncombe County for wrongful death and personal injury damages against the estate of the tortfeasor, who subsequently died due to conditions unrelated to this litigation. Defendant Allstate has offered the sum of $50,000 to be divided between plaintiffs as settlement of plaintiffs' claims against it pursuant to its UM coverage. Allstate contends that $50,000 constitutes the applicable limit of liability per accident under the UM coverage it afforded to the Lannings. On the other hand, plaintiffs have offered to settle for $150,000. Plaintiffs contend that $150,000 represents the applicable limit of liability per accident under Allstate's UM coverage.

In the case before us defendant moved for summary judgment. At the hearing on the motion the parties offered their stipulation of the facts and Allstate's policy of insurance. On 19 April 1991 Judge Allen granted defendant's motion, in effect holding that Allstate was not required to aggregate, or stack, the intrapolicy

UM limits under the policy in question. Pursuant to this ruling Allstate's limit of liability for this accident under its UM coverage was $50,000. We allowed plaintiffs' petition for discretionary review of Judge Allen's ruling prior to determination by the Court of Appeals.

II.

[1] Plaintiffs first contend that N.C.G.S. § 20-279.21 of the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended effective 1 October 1985 (the Act), and as interpreted by our decision in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), requires that Allstate aggregate its intrapolicy UM coverage provided with respect to each of the three vehicles named in the policy. We find no such requirement in the Act.

Language in a policy of insurance is the determining factor in resolving coverage questions unless that language is in conflict with applicable statutory provisions governing such coverage. *Sutton*, 325 N.C. 259, 382 S.E.2d 759; *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

> [W]hen a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written into it, and if the terms of the policy conflict with the statute, the provisions of the statute will prevail.

Sutton, 325 N.C. at 263, 382 S.E.2d at 762; *accord Chantos*, 293 N.C. at 441, 238 S.E.2d at 604.

UM insurance is largely governed by subdivision (b)(3) of the Act; whereas UIM insurance is largely governed by subdivision (b)(4). *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991). This distinction is crucial to our holding. Subdivision (b)(3) of the Act provides:

> No policy of bodily injury liability insurance . . . shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles and hit-and-run motor vehicles

> because of bodily injury, sickness or disease, including death, resulting therefrom; provided, an insured is entitled to secure additional coverage up to the limits of bodily injury liability in the owner's policy of liability insurance that he carries for the protection of third parties. . . . The coverage required under this subdivision shall not be applicable where any insured named in the policy shall reject the coverage. If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage.

Beyond the above-cited provisions, subdivision (b)(3) is largely procedural in nature.[1]

On the other hand, subdivision (b)(4) of the Act provides in pertinent part:

> [T]he limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; *it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance* . . . .

(Emphasis added.) Although this Court has acknowledged that UIM coverage is "an outgrowth from and development of uninsured motorist insurance," *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762 (citing J. Snyder, Jr., *N.C. Automobile Insurance Law*, § 30-1 (1988)),[2] we must also recognize that there are differences in the

1. It should be noted that the Act was amended in July 1991. The 1991 amendments deal specifically with both interpolicy and intrapolicy stacking of UM and UIM coverages. These amendments are inapplicable to claims arising or policies written prior to their enactment. 1991 N.C. Sess. Laws, ch. 646, § 4. Therefore, we are concerned only with the provisions of the Act as amended in 1985 and quoted above.

2. In dicta in *Sutton*, we also stated that "[g]iven the close relationship between *uninsured* and *underinsured* coverages the principles applicable to *uninsured* motorist

coverages, as evinced by the General Assembly's use of separate statutory provisions and separate language. *See also Smith*, 328 N.C. at 142, 400 S.E.2d at 47. "The cardinal principle of statutory construction is that the intent *of the Legislature* is controlling." *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763 (quoting *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978)) (emphasis added).

In *Sutton*, we held that the language quoted above in subdivision (b)(4) explicitly mandates intrapolicy and interpolicy stacking of UIM coverages for the benefit of an injured policy owner. The General Assembly, however, has never included in subdivision (b)(3) language similar to that in subdivision (b)(4). Subdivision (b)(3) is in fact silent on the issue of stacking coverages. Our decision in *Sutton*, consequently, is not controlling on the issue presented here.

Plaintiffs also argue that, because subdivision (b)(4) explicitly incorporates the provisions of subdivision (b)(3), subdivision (b)(3) in turn incorporates the provisions and, therefore, the requirements of (b)(4). Because (b)(4) requires both interpolicy and intrapolicy stacking, plaintiffs argue (b)(3) does, too. Plaintiffs are relying on the following language of subdivision (b)(4): "The provisions of subdivision (b)(3) . . . shall apply to the coverage required by this subdivision." This language apparently incorporates the provisions of (b)(3) into those of (b)(4). There is, however, no similar language in the Act incorporating the provisions of (b)(4) into those of (b)(3). A fair reading of the Act compels us to conclude that the legislature intended the provisions of (b)(3) to be incorporated into (b)(4) but did not intend the provisions of (b)(4) to be incorporated into those of (b)(3). Plaintiffs' argument to the contrary must fail.

Plaintiffs further contend that our decision in *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 155 S.E.2d 128 (1967), interpreted the Act to require interpolicy stacking of UM coverages. From this contention plaintiffs argue that if the Act requires interpolicy stacking of UM coverages, it follows logically that it requires intrapolicy stacking. We do not agree that *Moore* interpreted the Act to require interpolicy stacking of UM coverages.

In *Moore* plaintiff's intestate was killed and two others were injured when their vehicle was struck by a vehicle being negligently

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intrapolicy stacking should be equally applicable to factual situations giving rise to *underinsured* intrapolicy stacking questions. *Id.* at 264, 382 S.E.2d at 762 (emphasis in original).

operated by an uninsured motorist. The vehicle in which they were traveling was owned by the intestate's husband's employer and was being operated by the husband. The employer's auto liability policy purchased from the Insurance Company of North America (INA), provided minimum limits UM coverage. INA paid out the limits of its UM coverage to the plaintiff administrator and the two injured persons. Plaintiff's intestate was also afforded minimum limits UM coverage under an automobile liability policy written by Hartford on an automobile owned by the husband. Hartford attempted to avoid liability under its UM coverage pursuant to an "Other Insurance" clause contained in its policy. The clause read:

> 6. Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured under this endorsement, the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.

The *Moore* Court concluded that, notwithstanding this language, subdivision (b)(3) of the Act entitled plaintiff's intestate to Hartford's minimum limits UM coverage.

The decision in *Moore*, however, did not rest on the notion that *the Act* required the UM coverages in the two different policies to be aggregated or stacked. It rested, instead, on the proposition that the Act required UM coverage to be written at certain minimum limits, a requirement which the insurer could not abrogate by policy language. The minimum limits provision of subdivision (b)(3) in the Act when *Moore* was decided required that "[n]o policy of bodily injury liability insurance . . . shall be . . . issued for delivery in this State . . . unless coverage is provided therein . . . in limits for bodily injury or death set forth in subsection (c) of § 20-279.5 . . . ." At the time, subsection (c) of § 20-279.5 required that each policy provide a limit of liability for UM insurance of $5,000 per person. The *Moore* Court held that Hartford could not abrogate the per policy minimum limits requirement by the use of the "Other Insurance" clause. Former Chief Justice Parker in his opinion for the Court stated:

> [Subdivision (b)(3)] provides for a limited type of compulsory automobile liability coverage against uninsured motorists. It

> requires coverage for bodily injury or death caused by an uninsured motorist to the extent of $5,000 for one person. It does not permit "other insurance" clauses in the policy which are contrary to the statutory limited amount of coverage. . . . It seems clear that our statute does not limit an insured only to one $5,000 recovery under said coverage where his loss . . . is greater than $5,000, and he is the beneficiary of more than one policy . . . .

Id. at 543, 155 S.E.2d at 136. The Court thus concluded that the Act required that the Hartford policy provide minimum limits UM coverage. Finding that the Act did not prohibit the beneficiary of more than one policy from recovering under all such policies, the Court concluded the UM coverages under both policies at issue were available to plaintiff's intestate.

The Allstate policy at issue here contained UM coverage written in an amount equal to the current minimum limits as required by the Act ($25,000 per person and $50,000 per accident). There is no "Other Insurance" clause in this policy purporting to abrogate the minimum limits requirements of the Act, as there was in *Moore*. Even without stacking, the UM coverage provided to the insureds under the Allstate policy plainly satisfies the minimum limits requirements of (b)(3) and our decision in *Moore*. *Moore*, therefore, is inapplicable to the issue before us.

III.

[2] The next issue is whether the language in Allstate's policy entitles the plaintiffs to stack the UM coverages provided for each of the three vehicles. We conclude that it does not.

While, as we have held above, the Act does not require intrapolicy stacking of UM coverages, neither does it prohibit such stacking.[3] When policies written before the 1991 amendments to the Act[4] contain language that may be interpreted to allow stacking of UM coverages on more than one vehicle in a single policy, insureds are contractually entitled to stack. *See Smith v. Nation-*

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3. As previously noted in footnote 1, *supra*, our concern in the present case is only with the provisions of the Act prior to the 1991 amendments. We are not called upon, nor do we, hazard an interpretation of the effect of the Act's revised provisions enacted in 1991.

4. See n.3, *supra*.

wide Mutual Ins. Co., 328 N.C. 139, 400 S.E.2d 44; (UIM coverages); *see also Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978) (medical pay coverages).

In *Woods*, we stated that:

> The various terms of [an insurance] policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. *Whereas, if the meaning of the policy 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.

Woods, 295 N.C. at 506, 246 S.E.2d at 777 (emphasis added).

We believe that the language in Allstate's policy is clear, and capable of but one reasonable interpretation: that being that the policy prohibits intrapolicy stacking of its UM coverages. In pertinent part, under a section of Allstate's policy entitled "Limits of Liability," the policy states:

> The limit of bodily injury liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages for **bodily injury**, including damages for care, loss of service or death, sustained by any one person in any one auto accident. Subject to the limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident. . . . This is the most we will pay for **bodily injury** . . . regardless of the number of:
>
> 1. **Insureds**;
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident.

(Emphasis in original.)

Although the *Woods* Court unanimously found that intrapolicy stacking of medical payments coverage under an automobile liability policy was allowed where various terms of the policy were ambiguous with respect to stacking, that case is easily distinguishable from the case before us. In *Woods*, we found a "per accident" limitation in the policy to be ambiguous because it contrasted with other policy language that stated the coverages shown would "apply separately" to each of the vehicles listed. The Court said, "Absent express language in the policy that the 'per accident' limitation applies without regard to the number of vehicles covered by the policy, the ambiguity must be resolved against the insurer . . . ." *Id.* at 509, 246 S.E.2d at 779. Unlike the Allstate policy here, the *Woods* policy failed to state explicitly that the "per accident" limitation contained in the policy applied regardless of the number of vehicles listed in the policy.

The Allstate policy, however, contains language very similar to that contemplated in *Woods*. The policy, as we have shown, states that the "limit of bodily injury liability shown in the Declarations for each person for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury . . . *regardless of the number of: . . . Insureds*; . . . [and] *Vehicles or premiums shown in the Declarations*. . . ." (Emphasis added.) This language plainly distinguishes *Woods*. The language used in the Allstate policy is not ambiguous.

We agree with two decisions of our Court of Appeals, both of which found that similar "Limits of Liability" language contained in automobile liability policies precluded intrapolicy stacking of medical payments coverage, *Tyler v. Nationwide Mutual Insurance Co.*, 101 N.C. App. 713, 401 S.E.2d 80 (1991), and UM coverage, *Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 335 S.E.2d 228 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986). As here, intrapolicy stacking of the coverages at issue in those cases was precluded in those cases by clear and unambiguous policy language limiting the insurer's liability.

Because the Allstate policy before us plainly and unambiguously precludes the aggregation of UM coverages under its policy, plaintiffs' per accident UM coverage under that policy is limited to $50,000.

The Order of the trial court is therefore

Affirmed.

Justice MEYER concurs in the result.

Justices FRYE and LAKE did not participate in the consideration or decision of this case.

JOHN ALFRED BLACKWELDER v. CITY OF WINSTON-SALEM AND MICHAEL LARRY THOMAS

No. 518PA91

(Filed 4 September 1992)

Municipal Corporations § 12.3 (NCI3d) — governmental immunity — Risk Acceptance Management Corporation — no waiver of immunity

Defendant City did not waive governmental immunity by organizing the Risk Acceptance Management Corporation, RAMCO, for the payment of tort claims of $1,000,000 or less against the City. It is clear that the City has not participated in a local governmental risk pool because the City has not joined with any other local government in the operation of RAMCO; the City has not entered into an insurance contract with RAMCO because RAMCO has not agreed to pay any money or do any act as an indemnity to the City for loss or injury to the City and, in fact, the City has agreed to indemnify RAMCO for payments it makes for tort claims against the City; the collection of leaves from the street did not make the street itself unsafe, so that the exception to governmental immunity for the negligent failure to maintain streets in a reasonably safe condition does not apply; the Court declined to abolish the doctrine of governmental immunity; action by the City under N.C.G.S. § 160A-167 does not waive immunity; the City is not equitably estopped from raising the defense of governmental immunity in that it paid the property damage portion of plaintiff's claim and engaged in settlement negotiations with the plaintiff prior to filing this action because the plaintiff did not change his position to his detriment based on any action by the City and there was no misrepresentation by the City as to liability insurance coverage; the only third

party benefit plaintiff is entitled to receive is the City's contract with RAMCO to pay certain claims against the City and RAMCO's negotiation of such a claim with plaintiff; and, finally, the Supreme Court declined to pass on the constitutional contention that the City violated the Equal Protection Amendment by picking and choosing through RAMCO the claims it would pay.

Am Jur 2d, Municipal Tort Liability §§ 5, 14, 19, 37-38.

Comment Note—Municipal immunity from liability for torts. 60 ALR2d 1198.

ON discretionary review pursuant to N.C.G.S. § 7A-31, prior to determination by the Court of Appeals of an order granting partial summary judgment in favor of the plaintiff, entered by *Seay, J.*, in Superior Court, FORSYTH County on 27 August 1991. Heard in the Supreme Court 16 April 1992.

The plaintiff brought this action to recover for what he alleged were severe personal injuries proximately caused by the negligence of Michael Larry Thomas, while Mr. Thomas was operating a truck in his employment for the City of Winston-Salem. The truck was being used to collect leaves from the city streets. The City filed an answer in which it pled governmental immunity as a partial bar to the plaintiff's claim.

The City made a motion for partial summary judgment based on the doctrine of governmental immunity. The City alleged that it had no liability insurance to cover claims of $1,000,000 or less. It requested the court to enter a judgment declaring the City was not liable for claims of $1,000,000 or less. The plaintiff made a motion for partial summary judgment, asking the court to strike this defense of the City.

The materials submitted in support and opposition to the two motions for summary judgment showed that the City had liability insurance coverage with General Star National Insurance Company for claims in excess of $1,000,000. The City has organized a corporation named Risk Acceptance Management Corporation (RAMCO), to handle claims against the City of $1,000,000 or less. All officers and directors of RAMCO are employees of the City. RAMCO obtained part of its funds for operations by issuing tax exempt certificates with payment of the certificates guaranteed by the City.

The City agreed to pay to RAMCO $600,000 annually and to reimburse RAMCO for operating expenses, borrowed funds and all other costs.

The Court denied the City's motion for partial summary judgment and allowed the plaintiff's motion for partial summary judgment, striking the City's defense of governmental immunity. The City gave notice of appeal to the Court of Appeals. We allowed the plaintiff's petition for discretionary review prior to determination by the Court of Appeals.

Petree, Stockton & Robinson, by J. Robert Elster, Stephen R. Berlin and Henry C. Roemer, III, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Roddey M. Ligon, Jr., Charles F. Vance, Jr. and Gusti W. Frankel, for defendant appellant City of Winston-Salem.

Bell, Davis & Pitt, P.A., by Richard V. Bennett, for defendant appellant Michael Larry Thomas.

WEBB, Justice.

We note at the outset that the orders allowing and denying the motions for summary judgment did not determine the case and are interlocutory. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E.2d 338 (1978). We elect to consider the merits of the appeal pursuant to our supervisory powers under Article IV, § 12(1) of the North Carolina Constitution. *See Travco Hotels, Inc. v. Piedmont Natural Gas Company, Inc.*, 332 N.C. 288, 420 S.E.2d 426 (1992). Pursuant to this provision of our Constitution, we elect to treat the City's appeal as a petition for certiorari which we now allow.

The principal question in this appeal is whether the City of Winston-Salem, by organizing RAMCO for the payment of tort claims of $1,000,000 or less against the City, has waived its governmental immunity for those claims. N.C.G.S. § 160A-485(a) provides:

> Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool pursuant to Article 39 of General Statute Chapter 58 shall be deemed to be the purchase of insurance for the purposes of this section. Immunity shall be waived only to the extent that the City

> is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity, and no city shall be deemed to have waived its tort immunity by any action other than the purchase of liability insurance.

It is clear that the City has not participated in a local governmental risk pool which would be deemed the purchase of liability insurance under the statute. We note that the legislation authorizing local government risk pools was adopted as part of Chapter 1027 of the Session Laws of 1986. The act which authorized these risk pools provided that it was adding Article 39 to Chapter 58 of the General Statutes. The statute was codified, however, as Article 23 of Chapter 58 of the General Statutes. We believe the reference to Article 39 of General Statute Chapter 58 in N.C.G.S. § 160A-485 should be read as a reference to Article 23 of General Statute Chapter 58.

Article 23 of Chapter 58 of the General Statutes provides that two or more local governments may form a risk pool. The City of Winston-Salem has not joined with any other local government unit in the operation of RAMCO. It is not participating in a risk pool.

The next question posed is whether by forming and operating RAMCO the City has purchased liability insurance, which is the only way, other than by joining a risk pool, that it can waive governmental immunity. We hold that the City has not purchased liability insurance.

An insurance contract is defined by N.C.G.S. § 58-1-10 as:

> A contract of insurance is an agreement by which the insurer is bound to pay money or its equivalent or to do some act of value to the insured upon, and as an indemnity or reimbursement for the destruction, loss, or injury of something in which the other party has an interest.

Under this definition, the City has not entered into an insurance contract with RAMCO. RAMCO has not agreed to pay any money or do any act as an indemnity to the City for loss or injury to the City. Indeed, the City has agreed to indemnify RAMCO for payments it makes for tort claims against the City. N.C.G.S. § 160A-485(a) provides that immunity is waived by the City only to the extent it is indemnified by the insurance contract from

tort liability. *Black's Law Dictionary* 769 (6th ed. 1990) defines indemnify as "[t]o restore the victim of a loss, in whole or in part, by payment, repair, or replacement." RAMCO does not do any of these things and under N.C.G.S. § 160A-485(a), the City has not waived its liability by its contract with RAMCO. This case is similar to *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E.2d 669 (1963), in which we held that a contract under which a first party was required to reimburse a second party for claims paid by the second party for losses incurred by the first party was not an insurance contract.

One characteristic of an insurance contract is the shifting of a risk from the insured to the insurer. If no risk is shifted there is not an insurance contract. *Helvering v. LeGierse, et al.*, 312 U.S. 531, 85 L. Ed. 996 (1941); *Clougherty Packing Co. v. Commissioner*, 811 F.2d 1297 (1987); *Beech Aircraft Corp. v. U.S.*, 797 F.2d 920 (1986). In this case, there is not a shifting of any risk from the City to RAMCO. The City is bound to reimburse RAMCO for any claims RAMCO pays for the City.

N.C.G.S. § 58-28-5 requires that before a company can transact business as an insurance company in this state, it must procure a certificate of authority from the Commissioner of Insurance. A certificate has not been procured by RAMCO.

For the above reasons, we hold that the City has not waived its governmental immunity by the purchase of insurance.

The plaintiff, relying on *Hamilton v. Rocky Mount*, 199 N.C. 504, 154 S.E. 844 (1930), contends that the City is not protected by governmental immunity in this case. In *Hamilton*, we held that there is an exception to the doctrine of governmental immunity for the negligent failure of a city to maintain its streets in a reasonably safe condition. *See also Hunt v. High Point*, 226 N.C. 74, 36 S.E.2d 694 (1946). We believe this case is governed by *Stephenson v. Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950) and *Broome v. Charlotte*, 208 N.C. 729, 182 S.E.2d 325 (1935). In *Stephenson*, we held that the collecting and removing of prunings from shrubbery and trees from the residences of citizens is a governmental function and a city is not liable for the negligent operation of a truck used for this purpose. In *Broome*, we held that the collection of garbage is a governmental function which protects a city from liability for the negligent operation of a garbage truck. In *Hamilton*, the allegations of the complaint were that the city was laying

a cable in such a manner that it was an obstruction to those walking on the sidewalk. There is no allegation in this case that the street was obstructed. The collection of leaves from the street may have been done in a negligent manner, but it did not make the street itself unsafe.

The plaintiff asks us either to abolish governmental immunity or to change the way it is applied. Although it is true that the doctrine of governmental immunity was first adopted by this Court, it has been recognized by the General Assembly in N.C.G.S. § 160A-485. We feel that any change in this doctrine should come from the General Assembly. *See Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971). We decline to disturb the doctrine of governmental immunity.

The plaintiff next says that the City has waived governmental immunity by instituting a plan pursuant to N.C.G.S. § 160A-167, under which the City may pay all or part of some claims against employees of the City. N.C.G.S. § 160A-485 provides that the only way a city may waive its governmental immunity is by the purchase of liability insurance. Action by the City under N.C.G.S. § 160A-167 does not waive immunity.

The plaintiff next argues that the City is equitably estopped from raising the defense of governmental immunity because it paid the property damage portion of the plaintiff's claim and engaged in settlement negotiations with the plaintiff prior to the filing of the action. He says that he relied on this action by the City to believe that the City would reimburse him for all his damages. He does not say he changed his position in reliance on this action by the City. We said in *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971), "[i]t is generally recognized in North Carolina that the doctrine of estoppel will not be applied against a municipality in its governmental, public, or sovereign capacity." *Id.* at 120, 179 S.E.2d at 448. In *Helms v. Charlotte*, 255 N.C. 647, 122 S.E.2d 817 (1961), we said, "[a] municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting the violation." *Id.* at 652, 122 S.E.2d at 821.

Assuming that the City is subject to a plea of equitable estoppel, such an estoppel would not apply in this case. In order to estop a party from asserting a defense, the party who desires to take advantage of the estoppel must show that in reliance on

the other party's action, he changed his position to his detriment. *Highway Commission v. Thornton*, 271 N.C. 227, 156 S.E.2d 248 (1967). There is no such showing in this case. The plaintiff has made his claim against the City and continued to press the claim before and after the City pled the doctrine of sovereign immunity. The plaintiff has not changed his position to his detriment based on any action by the City. *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982), upon which the plaintiff relies, is not helpful to him. That case was specifically limited to estoppels involving workers' compensation claims in CETA programs.

The plaintiff also contends that the City is estopped to plead governmental immunity because it has misrepresented its position by alleging it does not have insurance, when in fact it has a contract with RAMCO to provide it with liability insurance. He says this is an unfair and deceptive trade practice in violation of Chapters 58 and 75 of the General Statutes. The pleadings show that at no time did the City represent that it had liability insurance coverage. It has contended and we have held that its contract with RAMCO does not provide liability insurance coverage. There has not been a misrepresentation by the City as to liability insurance coverage.

The plaintiff next contends that he is a third party beneficiary of the contract between the City and RAMCO. We have our doubts that the plaintiff is a third party beneficiary to this contract but if he is, it is not helpful to him in this case. The City has contracted with RAMCO to pay certain claims against the City and RAMCO has negotiated such a claim with the plaintiff. That is the benefit plaintiff, as third party beneficiary, is to receive under the contract. He cannot receive more. *See Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E.2d 273 (1970).

Finally, the plaintiff contends that the City has violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina. He says this is so because the City, through RAMCO, can pick and choose what claims it will pay, thus depriving the plaintiff of the equal protection of the law. We decline to pass on this constitutional question because of its posture in this case. If we were to hold the City has acted unconstitutionally in the way it administers RAMCO, it would not mean the City had waived its governmental immunity. The most we could do is strike down RAMCO. A decision involving this con-

stitutional question would not resolve this case and we do not consider it.

For the reasons stated in this opinion, we reverse the judgment of the superior court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

KIMBERLY B. GOODWIN v. INVESTORS LIFE INSURANCE COMPANY OF NORTH AMERICA AND CHARLES TOOMEY D/B/A CHARLES TOOMEY AGENCY

No. 474PA91

(Filed 4 September 1992)

1. **Rules of Civil Procedure § 50.3 (NCI3d)— directed verdict— prima facie case by nonmoving party—documentary evidence by moving party manifestly credible—no inherent bar to directed verdict**

There was no inherent bar to granting a motion for a directed verdict by defendant Investors Life Insurance where the credibility of Investor's documentary evidence was manifest. The Court of Appeals erred in its unpublished opinion by holding that the non-moving party's establishment of a prima facie case necessarily prevents the granting of a directed verdict in the moving party's favor.

Am Jur 2d, Trial §§ 907 et seq.

2. **Insurance § 250 (NCI4th)— life insurance—application—misrepresentations—material**

Defendant Investors Life Insurance should have been granted a directed verdict in an action arising from defendant's rescission of a life insurance policy following the death of the insured where plaintiff and her husband were asked by the agent when purchasing the policy whether plaintiff's husband had had his driver's license suspended or had had two or more moving violations or accidents within the past two years and neither plaintiff nor her husband informed the agent that her husband's license had been suspended, that he had had

two moving violations, and that he had had two accidents within the past two years. It is clear that the representation regarding the driving record was false and that the company would have increased the premium if the question had been answered truthfully. Thus, Investors showed that the insured made representations which were material and false and, by so doing, fully overcame plaintiff's prima facie case.

Am Jur 2d, Insurance §§ 1003, 1005-1007.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 104 N.C. App. 138, 408 S.E.2d 762 (1991), affirming the judgment entered by *Read, J.*, on 20 April 1990 in Superior Court, DURHAM County. Heard in the Supreme Court on 14 May 1992.

Newsom, Graham, Hedrick, Bryson & Kennon, by David S. Kennett, for plaintiff-appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr., for defendant-appellant Investors Life Insurance Company of North America.

Jordan, Price, Wall, Gray & Jones, by John R. Jordan, Jr., Robert R. Price, and R. Frank Gray, for Amici Curiae Jefferson-Pilot Life Insurance Company, Association of North Carolina Life Insurance Companies, and American Council of Life Insurance.

LAKE, Justice.

The issue presented by this appeal is the propriety of the trial court's failure to grant a directed verdict for defendant Investors Life Insurance Company of North America (Investors). For the reasons set forth in this opinion, we have determined that this was error, and the decision of the Court of Appeals must be reversed.

The plaintiff and her husband, Walter B. Goodwin, met with defendant Charles Toomey on 14 November 1985 for the purpose of applying for and purchasing a life insurance policy on the life of Walter B. Goodwin. At the time, defendant Toomey was acting as agent for defendant Investors. He asked plaintiff and her husband certain questions appearing on the application form provided by Investors, filled out the form himself, and had the Goodwins sign the application. The following question appeared on the insurance application: "Within the past 2 years have you had your

driver's license suspended or had 2 or more moving violations or accidents?" Toomey checked the box representing that Walter Goodwin had not. Although plaintiff was aware of the fact that Goodwin's driver's license had been suspended on 19 August 1985 and that he had two moving violations and two accidents as well within the two years prior to applying for the insurance, neither she nor her husband informed Toomey. Plaintiff testified the subject never came up during the conversation. Toomey presented the form to the Goodwins and both signed it, although the application contained a clause above the signature lines which stated: "Having read the above statements and answers, I (we) represent that they are full, complete and true to the best of my (our) knowledge and belief . . . ." There is no evidence that either the agent or the insurance company, Investors, was aware of Goodwin's driving record.

Defendant Investors issued an insurance policy for the life of Walter Goodwin on 22 November 1985. Goodwin died on 11 July 1986 as a result of massive head trauma suffered in an accident during a prearranged race in which he was driving seventy miles per hour in a thirty-five mile per hour zone.

Upon notice of Goodwin's death, Investors initiated its standard investigation of the circumstances surrounding the death of the insured since the death occurred within two years of issuance of the policy. During the investigation, Investors conducted a motor vehicles record check and discovered the violations. On 22 September 1986 Investors notified plaintiff it was rescinding the policy due to the false information supplied on the application regarding her husband's driving record.

The plaintiff filed suit to enforce the policy, naming as defendants Toomey and Investors. Each defendant moved at the close of plaintiff's evidence for a directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure. Defendant Toomey's motion was granted and plaintiff appealed to the Court of Appeals which affirmed the trial court's judgment as to Toomey. Plaintiff has not petitioned this Court for review of the decision of the Court of Appeals regarding Toomey.

The trial court denied defendant Investors' motions for directed verdict, for judgment notwithstanding the verdict and for a new trial after the jury returned a verdict against Investors. Investors

appealed to the Court of Appeals which affirmed the judgment of the trial court.

[1] Defendant Investors contends the Court of Appeals committed error by affirming the trial court's denial of its motion for a directed verdict. It is fundamental law that a motion by a defendant for a directed verdict under N.C.G.S. § 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. A defendant is not entitled to a directed verdict or a judgment notwithstanding the verdict unless the evidence, viewed in the light most favorable to the plaintiff, establishes its defense as a matter of law. *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 401 S.E.2d 837 (1991); *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E.2d 452 (1979); *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E.2d 507 (1978). Where a defendant establishes an affirmative defense as a matter of law, there are no issues to submit to a jury and a plaintiff has no right to recover. Directing a verdict for the defendant in such instance is appropriate.

In determining whether a directed verdict should have been granted, the Court of Appeals misapprehended the standard for directed verdict. In affirming the trial court's judgment, the Court of Appeals stated: "In the light most favorable to Mrs. Goodwin, [these] facts establish more than the scintilla of evidence necessary to establish a prima facie case and thus, Investors was not entitled to a directed verdict or judgment notwithstanding the verdict." *Goodwin v. Insurance Co.*, 104 N.C. App. 138, 408 S.E.2d 762, slip op. at 11 (1991) (unpublished). By holding that the non-moving party's establishment of a prima facie case necessarily prevents the granting of a directed verdict in the moving party's favor, the Court of Appeals erred. This Court stated in *Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979):

> It should be stressed that there are neither constitutional nor procedural impediments to directing a verdict for the party with the burden of proof where *the credibility of movant's evidence is manifest as a matter of law*. . . . Whether credibility is established as a matter of law depends on the evidence in each case.

297 N.C. at 537, 256 S.E.2d at 396.

In the instant case, defendant Investors entered into the record the guidelines for adjusting premiums with respect to driving violations, and Investors' expert witness testified without objection as to how Mr. Goodwin's driving record would have increased the premium. The written guidelines in the company's underwriting manual supplied the controlling evidence for Investors' defense. Plaintiff offered no evidence to contradict Investors on this point. Accordingly, "[w]here the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents," *id.* at 537, 256 S.E.2d at 396, the credibility of movant's evidence is manifest as a matter of law. Thus, the credibility of defendant Investors' documentary evidence was manifest and there was no inherent bar to granting the motion for a directed verdict.

[2] The question that remains is whether Investors' evidence that the misrepresentation was material entitled it to judgment as a matter of law. As stated by this Court in *Ward v. Durham Life Insurance Co.*, 325 N.C. 202, 381 S.E.2d 698 (1989), "[a] policy of life insurance may be avoided by showing that the insured made representations which were material and false." 325 N.C. at 210, 381 S.E.2d at 702.

Clearly false representations were made on the application. The information contained in the application clearly represented that plaintiff's husband, the decedent, did not have two moving violations and did not have his license suspended within the two years prior to his application. Defendant Investors' investigation after Goodwin's death revealed the Division of Motor Vehicles' report which showed these representations were untrue. Plaintiff asserts that she cannot be bound by the misrepresentations because she was unaware of the driving record question on the application and the agent's inaccurate response to it. However, this Court has held in a factually similar case:

> [T]he rule that the insured is not responsible for false answers in the application where they have been inserted by the agent through mistake, negligence, or fraud is not absolute, and applies only if the insured is *justifiably ignorant* of the untrue answers, *has no actual or implied knowledge* thereof, and has been guilty of no bad faith or fraud.

Jones v. Insurance Co., 254 N.C. 407, 413, 119 S.E.2d 215, 219-20 (1961) (emphasis added). *See also, Ward v. Durham Life Insurance Co.*, 325 N.C. 202, 381 S.E.2d 698. Plaintiff and her husband signed

the application thereby representing that they had read it and that the information contained therein was true. The law presumes that the plaintiff knew the contents of the application she signed; she has asserted nothing to justify her ignorance. As quoted in *Jones* from *Weddington v. Insurance Co.*, 141 N.C. 234, 54 S.E. 271 (1906): " 'It made no difference whether the plaintiff knew what was in the [agreement] or not. He signed it, and the law presumes he did know what was in it, and he will not be heard, in the absence of any proof of fraud or mistake, to say that he did not.' " *Jones*, 254 N.C. at 413, 119 S.E.2d at 219 (*quoting Weddington*, 141 N.C. at 243, 54 S.E. at 274). Thus, the representation made regarding decedent's driving record was false and, as there was no finding of fraud on the part of the agent or Investors, plaintiff will be held to the statement.

The determinative underlying issue in this case is whether the misrepresentation regarding the driving record was material. This Court has held that a representation in an application for an insurance policy is deemed material "if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, *or in fixing the rate of premium.*" *Tolbert v. Insurance Co.*, 236 N.C. 416, 418-19, 72 S.E.2d 915, 917 (1952) (emphasis added). The uncontroverted testimony of Investors' expert witness at trial clearly indicated that if Investors had known of the violations at the time of the application it would have charged a higher premium. The annual premium charged by Investors based on the misrepresentation was $444.00. By the evidence submitted at trial, Investors showed that had the company known the truth the Goodwins' premium would have been $150.00 a year higher, an increase of approximately thirty-three percent. Investors established this by applying the written guidelines used by the company in underwriting life insurance policies to Mr. Goodwin's driving record at the time he applied.

At trial, Investors' expert testified without challenge that automobile accidents are the leading cause of death of young people ages sixteen through twenty-four. This fact reflects a rationale for asking the question and also tends to show a "natural influence" on setting life insurance premiums. Goodwin was twenty-four years old at the time of his application and at the time of his death.

Plaintiff contends that an objective standard should be used in determining whether a misrepresentation is material. As authority for this position, plaintiff points to *Schas v. Insurance Co.*, 166 N.C. 55, 81 S.E. 1014 (1914), where, following a list of questions which the trial court recognized as proper on an insurance application, this Court said: "These and many other questions of like kind any prudent man engaged in the business of life insurance would be more than likely to ask . . . ." 166 N.C. at 60, 81 S.E. at 1016. The use of the word "prudent" does not make the standard an objective one. Earlier in the same opinion this Court said: "The determining factor, therefore, in such case is whether the answer would have influenced the company in deciding *for itself, and in its own interest*, the important question of accepting the risk, and what rate of premium should be charged." *Id.* at 59, 81 S.E. at 1015 (emphasis added). Undoubtedly, in some instances a question asked on an insurance application may be so immaterial under the circumstances that it would not allow an insurer to avoid a policy if answered falsely. In this case, however, there is a strong logical relationship between the question asked, assessing the risk, and the ultimate determination of an actuarially sound premium.

This Court recognizes that within various industries, including the insurance industry, some businesses are more risk averse than others and that an individual insurance company is well within its rights to establish what will trigger a higher premium. We therefore follow the subjective standard established in *Schas* and reject the notion that questions on an insurance application are material only if asked by all in the industry. Evidence was presented which indicated that not all insurance companies inquired into an applicant's driving record (though the evidence also showed that Investors was not alone in presenting this question on its application). As we have noted, the question of an applicant's driving record is related to determining an actuarially sound premium. Investors chose to ask the question and had guidelines for determining what rate would be charged according to how the question was answered and what information an investigation revealed. The insurance industry is highly competitive and that competition will determine what rates will be charged and what questions a company can afford to ask, or fail to ask, and remain in business.

Adopting the subjective standard of *Schas* and applying the *Tolbert* test for determining materiality, we conclude that defendant Investors should have been granted a directed verdict. It is

clear that the representation regarding Goodwin's driving record was false. It is also clear that if the question had been answered truthfully the company would have increased the premium charged for the coverage. Thus, Investors showed that the insured made representations which were material and false and, by so doing, Investors fully overcame plaintiff's prima facie case. Under the long-standing law in this state enunciated in *Ward*, defendant Investors was entitled to a directed verdict as a matter of law. The motion for directed verdict was improperly denied, and the case should not have been submitted to the jury.

Reversed.

UNITED SERVICES AUTOMOBILE ASSOCIATION v. UNIVERSAL UNDERWRITERS INSURANCE COMPANY AND WARDEN MOTORS, INC., D/B/A CLEMMONS TRADERS

No. 506PA91

(Filed 4 September 1992)

Insurance § 549 (NCI4th)— test drive of vehicle—driver's insurance—garage liability policy—applicable policy

A driver's own liability policy, not a dealer's garage liability policy, provides liability coverage for an accident that occurred while the driver was test driving a vehicle owned by the dealer where the other insurance provision of the driver's policy provides that, if there is other applicable liability insurance, the driver's insurer will pay only its share of the loss and that any insurance provided for a vehicle not owned by the insured shall be excess over other insurance; the garage liability policy provides that it is excess for any person who becomes a covered insured "as required by law" and that for an occurrence involving a person "required by law" to be insured, coverage is provided only for the amount needed to comply with the financial responsibility law; no amount is needed under the garage liability policy because the driver's own policy provides the coverage required by law; and the garage liability policy thus provides no liability coverage for the test driver's accident.

Am Jur 2d, Automobile Insurance §§ 432-434.

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

ON discretionary review pursuant to N.C.G.S. § 7A-31(a) of an opinion of the Court of Appeals, 104 N.C. App. 206, 408 S.E.2d 750 (1991), affirming the declaratory judgment entered in favor of plaintiff by *Beaty, J.*, in the Superior Court, FORSYTH County on 2 October 1990. Heard in the Supreme Court 13 March 1992.

This case involves a dispute as to which of two insurance companies has provided liability insurance to the driver of a truck involved in a collision. The driver of the truck had a liability insurance policy with the plaintiff. He was driving the truck with the permission of Warden Motors, Inc., which owned it, for the purpose of deciding whether he would purchase it. Warden had a garage owner's liability policy with the defendant Universal Underwriters Insurance Company.

The superior court held that the defendant Universal provided liability coverage and the Court of Appeals affirmed this holding. We allowed the defendant Universal's petition for discretionary review.

Nichols, Caffrey, Hill, Evans & Murrelle, by Karl N. Hill, Jr., for plaintiff-appellee.

Petree, Stockton & Robinson, by James H. Kelly, Jr., for defendant-appellant.

WEBB, Justice.

We faced a situation very similar to the one in this case in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967). We hold that pursuant to *Insurance Co.* we are bound to reverse the Court of Appeals.

In *Insurance Co.* we held that an insurer by the terms of its policy could exclude liability coverage under a garage owner's liability policy if the driver of a vehicle owned by the garage was covered under his own policy for the minimum amount of liability coverage required by the Motor Vehicle Financial Responsibility Act, N.C.G.S. § 20-279.1 *et seq.* Whether such an exclusion occurs depends on the terms of the policy. *Insurance Co.* holds that N.C.G.S.

§ 20-279.21(j) allows either of the two policies which provides for the required liability coverage to satisfy the financial responsibility required by the Act.

In *Insurance Co.* the garage owner's policy contained a provision that coverage for the driver was provided, "only if no other valid and collectible automobile liability insurance, either primary or excess, . . . is available to such person." The driver's policy provided that in the event there was other coverage, the driver's coverage would be excess coverage. This Court held that this excess coverage provision in the driver's policy was an event which excluded coverage for the driver in the garage owner's policy.

In this case, we must examine the two policies to determine if either of them excludes coverage. We note that there is not a contention that the driver of the truck is not covered by liability insurance. The question is which of the two policies provides coverage.

The policy issued by the plaintiff to the driver of the truck provided in its coverage section as follows:

> We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. We will settle or defend, as we consider appropriate, any claim or suit asking for these damages. In addition to our limit of liability, we will pay all defense costs we incur. Our duty to settle or defend ends when our limit of liability for this coverage has been exhausted.
>
> "**Covered person**" as used in this Part means:
>
> 1. You or any **family member** for the ownership, maintenance or use of any auto or **trailer.**

The policy issued by the plaintiff also contained the following "other insurance" provision:

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

The policy issued by the defendant Universal identified the following as insureds with respect to the auto hazard:

1. YOU;

2. Any of YOUR partners, paid employees, directors, stockholders, executive officers, a member of their household or a member of YOUR household, while using an AUTO covered by this Coverage Part, or when legally responsible for its use. The actual use of the AUTO must be by YOU or within the scope of YOUR permission;

3. Any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission.

The limits of the policy issued by Universal are as follows:

Regardless of the number of INSUREDS or AUTOS insured by this Coverage Part, persons or organizations who sustain INJURY, claims made or suits brought, the most WE will pay is:

1. With respect to GARAGE OPERATIONS and AUTO HAZARD, the limit shown in the declarations for any one OCCURRENCE.

The portion of the limit applicable to persons or organizations required by law to be an INSURED is only the amount (or amount in excess of any other insurance available to them) needed to comply with the minimum limits provision of such law in the jurisdiction where the OCCURRENCE takes place.

The "other insurance" provision of the policy issued by Universal provides as follows:

The insurance afforded by this Coverage Part is primary, except it is excess:

1. for PRODUCT RELATED DAMAGES and LEGAL DAMAGES;

2. for any person or organization who becomes an INSURED under this Coverage Part as required by law.

It is apparent that in defining the limits for which it would be liable for an occurrence involving a person required by law to be insured, Universal agreed to cover only what was needed to comply with the financial responsibility law. In this case, nothing is needed because the plaintiff provides the required coverage. We held in *Insurance Co.*, that a garage owner's policy complies

with the Motor Vehicle Safety and Financial Responsibility Act although it does not provide liability coverage for an occurrence if the operator of the vehicle involved in the occurrence is covered by another policy.

The plaintiff contends that this limitation by Universal is nothing more than making the liability limits the same as under the Financial Responsibility Act. The plaintiff concedes this language is an attempt to subtract from those limits any other coverage the driver might have. We believe that a better reading of this sentence, particularly because the clause in parentheses refers to an "amount in excess of any other insurance available to them," is that this limitation was intended to be affected by the existence of other coverage.

There is nothing in the policy issued by the plaintiff which says it will not provide coverage if there is another policy which provides coverage. The plaintiff does say in the other insurance provision of its policy that if there is other insurance, it will pay only its share of the loss and that if the insured is operating a vehicle he does not own, the plaintiff's liability shall be excess over other insurance. In this case, Universal has not contracted for any liability. The plaintiff's liability cannot be shared and it is not excess. Universal limited the amount it would pay so that it has no coverage.

The plaintiff contends that N.C.G.S. § 20-279.21(b)(2) requires that the liability policy issued to Warden cover anyone operating the truck with Warden's permission which makes it an insurer of the driver of the truck. We held in *Insurance Co.*, that this provision of N.C.G.S. § 20-279.21(b)(2) was satisfied if the policy of either the owner or the driver provided liability coverage. In this case, the driver's policy provides the coverage required by law.

The plaintiff also says that under the terms of the policy issued by Universal, the driver was covered by liability insurance. The policy identified as an insured a person required by law to be an insured if using the truck with the permission of Warden. The auto hazard section of the policy included an automobile owned by Warden and furnished by it for the use of any person. The insuring agreement was that Universal would pay all damages caused by an occurrence arising out of an auto hazard. The plaintiff says these parts of the policy indicate that the driver was covered by defendant Universal's policy. These terms in Universal's policy

are applicable for those persons for which Universal provides coverage. In this case, Universal does not provide coverage for the driver of the truck.

We do not agree with the Court of Appeals that the phrase "required by law" as used in Universal's policy and particularly in the part which limits coverage is ambiguous. Universal was required by law to insure persons who were operating the truck with Warden's permission. N.C.G.S. § 20-279.21(b)(2) (1989). The driver of the truck in this case falls within that class and makes the limitation in the policy applicable.

For the reasons stated in this opinion, we reverse the Court of Appeals and remand for remand to the superior court for entry of a judgment for the defendant Universal Underwriters Insurance Company.

Reversed and remanded.

CARLOS REQUENO v. INTEGON GENERAL INSURANCE CORPORATION

No. 603PA90

(Filed 4 September 1992)

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of a declaratory judgment for defendant entered by *Allsbrook, J.*, at the 5 November 1990 Session of Superior Court, HARNETT County. Heard in the Supreme Court 16 October 1991.

This is an action to determine whether the uninsured motorist coverages in an insurance policy issued by the defendant should be stacked. The superior court held that the coverages should not be stacked. The plaintiff appealed.

Kelly & West, by J. Thomas West and G. Michael Malone, for plaintiff appellant.

Walter L. Horton, Jr. for defendant appellee.

Paul D. Coates and ToNola D. Brown, for Nationwide Mutual Insurance Company as amicus curiae.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for the North Carolina Academy of Trial Lawyers as amicus curiae.

PER CURIAM.

We affirm the judgment of the superior court for the reasons stated in *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992), filed today.

Affirmed.

Justices FRYE and LAKE did not participate in the consideration or decision of this case.

KIMBERLY DAWN AMOS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 393PA91

(Filed 4 September 1992)

ON discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 103 N.C. App. 629, 406 S.E.2d 652 (1991), affirming an order entered 16 July 1990, *nunc pro tunc*, 2 July 1990, by *Downs, J.*, in the Superior Court, GRAHAM County. Heard in the Supreme Court 11 February 1992.

Zeyland G. McKinney, Jr., and Leonard W. Lloyd for plaintiff-appellee.

Willardson & Lipscomb, by William F. Lipscomb, for defendant-appellant.

FRYE, Justice.

For the reasons stated in this Court's decision in *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

I dissent for the reasons stated in my dissenting opinion in *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 195, 420 S.E.2d 124, 131 (1992).

Justice LAKE joins in this dissenting opinion.

JOHN HARRELL MANNING AND NANNIE MAE MANNING v. BILLY RAY TRIPP

No. 9A92

(Filed 4 September 1992)

ON appeal and discretionary review from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 601, 410 S.E.2d 401 (1991), affirming the judgment of *Hobgood, J.*, at the 29 October 1990 Civil Session of Superior Court, LENOIR County. Heard in the Supreme Court 13 April 1992.

Gillespie & Murphy, P.A., by J. Allen Murphy, for plaintiff-appellee Nannie Mae Manning.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., and M. Greg Crumpler, for appellant Nationwide Mutual Insurance Company.

FRYE, Justice.

For the reasons stated in this Court's decision in *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

I dissent for the reasons stated in my dissenting opinion in *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 195, 420 S.E.2d 124, 131 (1992).

Justice LAKE joins in this dissenting opinion.

TIMOTHY WHEELER, PLAINTIFF v. MICHAEL G. WELCH, NANCY WALDEN AND HUSBAND, RICHARD WALDEN, AND INTEGON INDEMNITY CORPORATION, UNINSURED MOTORIST CARRIER, UNNAMED DEFENDANT

No. 149PA91

(Filed 4 September 1992)

ON discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of a declaratory judgment for plaintiff entered by *Butterfield, J.*, on 31 December 1990 in Superior Court, HARNETT County. Heard in the Supreme Court 16 October 1991.

James M. Johnson and Rhonda H. Ennis for plaintiff appellee.

Walter L. Horton, Jr., for defendant appellant.

PER CURIAM.

For the reasons stated in *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 186 (1992) (filed simultaneously herewith), the judgment is reversed, and the cause is remanded to the Superior Court, Harnett County, for entry of a judgment for defendant appellant.

Reversed.

Justices FRYE and LAKE did not participate in the consideration or decision of this case.

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

CITY OF HIGH SHOALS v. VULCAN MATERIALS CO.

No. 140P92

Case below: 105 N.C.App. 424

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

CLIMATOLOGICAL CONSULTING CORP. v. TRATTNER

No. 152P92

Case below: 105 N.C.App. 669

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

DAVIS v. NATIONWIDE MUTUAL INS. CO.

No. 219P92

Case below: 106 N.C.App. 221

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

DUNLEAVY v. YATES CONSTRUCTION CO.

No. 213P92

Case below: 106 N.C.App. 146

Petition by defendant (Springfield Properties, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

GARY v. OLDE POINT DEVELOPMENT

No. 237P92

Case below: 106 N.C.App. 231

Petition by defendant (Olde Point Development, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

GERACI v. STATE RESIDENCE COMMITTEE OF U.N.C.

No. 288P92

Case below: 106 N.C.App. 493

Petition by plaintiff Kelly M. Geraci for writ of supersedeas of the judgment of the Court of Appeals denied 14 August 1992. Notice of appeal from the North Carolina Court of Appeals by Kelly M. Geraci pursuant to G.S. 7A-30 dismissed 14 August 1992. Petition by Kelly M. Geraci for discretionary review pursuant to G.S. 7A-31 denied 14 August 1992.

HAGGARD v. MITCHELL

No. 265P92

Case below: 106 N.C.App. 392

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

HANOVER INSURANCE CO. v. AMANA REFRIGERATION, INC.

No. 175P92

Case below: 106 N.C.App. 79

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

HENSELL v. WINSLOW

No. 232P92

Case below: 106 N.C.App. 285

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

HOOD v. HOOD

No. 230P92

Case below: 106 N.C.App. 392

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

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

HOOTS v. PRYOR

No. 280P92

Case below: 106 N.C.App. 397

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

JONES v. GENERAL ACCIDENT INSURANCE CO. OF AMERICA

No. 113PA92

Case below: 105 N.C.App. 612

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1992.

KINSEY CONTRACTING CO. v. CITY OF FAYETTEVILLE

No. 251P92

Case below: 106 N.C.App. 383

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

LACKEY v. R. L. STOWE MILLS

No. 305P92

Case below: 106 N.C.App. 658

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

LENZER v. FLAHERTY

No. 274P92

Case below: 106 N.C.App. 496

Petition by defendants for temporary stay allowed 4 August 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992. Petition by defendants for writ of supersedeas denied and stay dissolved 3 September 1992. Motion by plaintiff for sanctions denied 3 September 1992.

LOFTIS v. REYNOLDS

No. 155P92

Case below: 105 N.C.App. 697

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

LOWDER v. LOWDER

No. 324P92

Case below: 106 N.C.App. 145

Petition by Lois L. Hudson for writ of supersedeas denied 3 September 1992. Petition by Lois L. Hudson for writ of certiorari to the North Carolina Court of Appeals denied 3 September 1992. Petition by W. Horace Lowder for writ of certiorari to the North Carolina Court of Appeals denied 3 September 1992.

PARSONS v. JEFFERSON-PILOT CORP.

No. 240PA92

Case below: 106 N.C.App. 307

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1992.

PREVO v. LUMBERMENS MUT. CASUALTY CO.

No. 216P92

Case below: 106 N.C.App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

SEMONES v. SOUTHERN BELL
TELEPHONE & TELEGRAPH CO.

No. 253P92

Case below: 106 N.C.App. 334

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

SIMON v. TRIANGLE MATERIALS, INC.

No. 174P92

Case below: 106 N.C.App. 39

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

SQUIRES v. SQUIRES

No. 239P92

Case below: 106 N.C.App. 232

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. BAKER

No. 269PA92

Case below: 106 N.C.App. 687

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 September 1992.

STATE v. BILLINGS

No. 536A91

Case below: 104 N.C.App. 362

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992.

STATE v. BLAKE

No. 250P92

Case below: 106 N.C.App. 395

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. CAMPBELL

No. 236A92

Case below: 106 N.C.App. 392

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992.

STATE v. FAY

No. 190P92

Case below: 106 N.C.App. 229

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. HART

No. 143P92

Case below: 105 N.C.App. 542

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. HARVEY

No. 282P92

Case below: 106 N.C.App. 706

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. JOHNSON

No. 130P92

Case below: 105 N.C.App. 390

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. LANG

No. 284P92

Case below: 106 N.C.App. 695

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. LANGSTON

No. 270P92

Case below: 106 N.C.App. 494

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. MOORE

No. 256P92

Case below: 106 N.C.App. 494

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. MOSELY

No. 245P92

Case below: 106 N.C.App. 395

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 3 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. NOBLES

No. 204P92

Case below: 106 N.C.App. 393

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

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

STATE v. PRESSLEY

No. 272P92

Case below: 106 N.C.App. 494

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. REID

No. 276P92

Case below: 106 N.C.App. 494

Petition by defendant (Mark Pitt) for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. WEBB

No. 199P92

Case below: 106 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 September 1992.

STATE v. WELLS

No. 257P92

Case below: 106 N.C.App. 395

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 3 September 1992.

STATE OF NORTH CAROLINA v. RANDALL RAY JOLLY

No. 487A90

(Filed 4 September 1992)

1. **Evidence and Witnesses § 860 (NCI4th)— hearsay—declarant's conflicting statements—admissible—issue of credibility**

The trial court did not err in a noncapital homicide prosecution by admitting conflicting hearsay statements and allowing the jury to determine which was the most convincing where three witnesses testified that the victim had told them that defendant had shot at her during a highway chase, but the victim had testified at the probable cause hearing for that incident that she had not actually seen or heard shots during the chase. Prior testimony is itself hearsay evidence which is excepted from the hearsay rule by N.C.G.S. § 8C-1, Rule 804(b)(1). Where the hearsay statements of a declarant are conflicting, the conflict raises a question of credibility rather than reliability, and, when a declarant's conflicting hearsay statements have been determined to be excepted from the general prohibition against hearsay, the trial court need not subject the statements to any additional test for reliability before admitting them into evidence.

Am Jur 2d, Evidence § 1082; Witnesses §§ 929, 930, 933.

2. **Evidence and Witnesses § 927 (NCI4th)— hearsay—right to confrontation—no prejudicial error**

The trial court did not err by admitting two of three statements from a homicide victim concerning a previous incident with defendant where the two statements were made immediately after the incident and while the victim was still emotionally upset and fit squarely within the requirements of N.C.G.S. § 8C-1, Rule 803(2). The third statement was made the day following the event and did not fit within the excited utterance exception, but was harmless beyond a reasonable doubt because the same facts would have been properly before the jury in the absence of the testimony and there was ample evidence before the jury from which it could find defendant guilty of first degree murder.

Am Jur 2d, Evidence §§ 708, 716.

When hearsay statement as "excited utterance" admissible under Rule 803(2) of the Federal Rules of Evidence. 48 ALR Fed 451.

3. Appeal and Error § 147 (NCI4th)— homicide—hospital admission notes—cross-examination of different witness—no objection—assignment of error waived

A defendant in a homicide prosecution waived his right to assign error to the admission of testimony concerning notes taken upon his admission to a hospital prior to the crime where defendant's cross-examination testimony was substantially the same as the testimony to which he now assigns error.

Am Jur 2d, Evidence §§ 494, 1103.

4. Evidence and Witnesses § 720 (NCI4th)— character evidence—erroneously admitted—not prejudicial

There was no prejudicial error in a homicide prosecution from the admission of testimony regarding defendant's failure to spend time with his sons, testimony about statements by the victim, and testimony about the victim's marital situation because the evidence related facts that were not in dispute, was tangential and could not have affected the outcome of the trial in light of all the evidence that was properly introduced, did not implicate defendant, and could not have affected the outcome of the trial.

Am Jur 2d, Appeal and Error §§ 797, 798.

5. Evidence and Witnesses § 959 (NCI4th)— homicide—statements of victim—state of mind exception—admissible

There was no error in a homicide prosecution from the introduction of testimony by two witnesses that the victim had said that defendant would see her dead before he'd see her with anyone else and that she had said that there had been threats and that she felt they would be carried out. The testimony went directly to the victim's state of mind and tended to show that she was afraid of defendant, believed his threats, and would not have intended to reconcile with him or meet with him to engage in sexual activity.

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.

6. Homicide § 494 (NCI4th)— premeditation and deliberation—instructions—brutal and vicious circumstances of killing

The trial court did not err in a noncapital first degree murder prosecution by giving an instruction which permitted the jury to infer premeditation and deliberation from the vicious circumstances of the killing where the State's evidence showed that defendant subjected the victim to constant psychological abuse prior to and including the day of her killing.

Am Jur 2d, Homicide §§ 508, 509.

Homicide: presumption of deliberation or premeditation from circumstances attending the killing. 96 ALR2d 1435.

7. Evidence and Witnesses § 2228 (NCI4th)— murder—gunpowder residue test—reason test not performed—admissible

The trial court did not err in a noncapital murder prosecution by admitting testimony from an investigator that no gunpowder residue tests had been performed on the victim because the investigator had no doubt that the victim had not handled a gun. The testimony was elicited on re-direct after the defendant had elicited on cross-examination that a paraffin test had not been performed and the witness was a trained law enforcement officer employed as a criminal investigator.

Am Jur 2d, Expert and Opinion Evidence § 300.

8. Evidence and Witnesses § 263 (NCI4th)— cross-examination—defendant's desire for visit from young daughter in mental hospital—not de facto evidence of bad character

The trial court did not err in a noncapital murder prosecution by allowing the State to cross-examine defendant concerning his desire to have his four-year-old daughter visit him when he was confined in a psychiatric ward. Although the prosecutor's questions may have suggested to the jury that defendant should have had more concern about the effect that such a setting might have on his young child, defendant was given the opportunity to explain his adamant desire to see his daughter and it cannot be said that the prosecutor's questions twisted his testimony into de facto evidence of bad character. Moreover, defendant had earlier testified that he had left the hospital without permission because his wife had not brought his daughter to visit him and the State was entitled to challenge this explanation by suggesting that the

defendant's desire to have his daughter visit him was unreasonable.

Am Jur 2d, Evidence §§ 339, 340.

9. **Criminal Law § 461 (NCI4th)— murder—prosecutor's argument—State's witness threatened—not supported by evidence—no intervention ex mero motu**

The trial court did not abuse its discretion in a noncapital murder prosecution by not intervening *ex mero motu* when the prosecutor asserted in closing arguments that a State's witness had been threatened and went on to assert an incorrect statement of law because the entire matter was collateral to the issue of defendant's guilt.

Am Jur 2d, Trial § 640.

10. **Criminal Law § 435 (NCI4th)— closing arguments—prior convictions—contemptuousness for law—intervention ex mero motu not required**

The trial court did not abuse its discretion by not intervening *ex mero motu* in a noncapital murder prosecution where the prosecutor argued that defendant's prior convictions demonstrated a contemptuousness for the law. Although the evidence of defendant's prior convictions was admissible only to impeach defendant's credibility and should not have been argued as substantive evidence of the crime charged, defendant failed to object to the testimony at trial and the prosecutor's prior statement in the argument that the convictions did not make defendant guilty served to lessen the impropriety of the subsequent argument.

Am Jur 2d, Trial §§ 681, 682.

11. **Criminal Law § 445 (NCI4th)— murder—closing argument—prosecutor's opinion—no error**

There was no error in a noncapital murder prosecution where the prosecutor argued that he knew of no problem between the defendant and a State's witness, then modified his argument after an objection to the effect that the evidence did not show that there was any problem between defendant and the witness as of the date of the murder. Although initially phrased in terms of what he knew, the prosecutor's argument did not place before the jury any prejudicial matter that was

unsupported by the evidence and the modified version of the argument was a fair characterization of the shortcomings of defendant's evidence.

Am Jur 2d, Trial § 613.

12. Criminal Law § 959 (NCI4th)— murder—motion for appropriate relief on appeal—perjury of witness—no prejudice

A motion for appropriate relief in the Supreme Court was denied where it was discovered after defendant's murder trial that a State's witness who had testified concerning defendant's admission interview to an alcohol detoxification program had not graduated from an accredited medical school and may have obtained his medical license by the use of forged documents. Any question as to the credibility of the witness was rendered moot by defendant's corroboration of that testimony; moreover, the witness was not tendered as an expert and did not render any medical opinions based upon his observations of defendant, and there was substantial additional evidence which tended to show that defendant acted with premeditation and deliberation.

Am Jur 2d, Appeal and Error §§ 882-884; New Trial § 439.

What standard, regarding necessity for change of trial result, applies in granting new trial pursuant to Rule 33 of Federal Rules of Criminal Procedure for newly discovered evidence of false testimony by prosecution witness. 59 ALR Fed 657.

APPEAL as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Currin, J.*, at the 16 April 1990 Criminal Session of Superior Court, ORANGE County, upon a verdict of guilty of first degree murder. Heard in the Supreme Court 11 February 1992.

Defendant was tried, non-capitally, on a true bill of indictment charging him with the first degree murder of his wife, Dawn Starnes Jolly. On 3 May 1990, the jury returned a verdict of guilty as charged. The court entered a sentence of life imprisonment. On appeal defendant brings forth numerous assignments of error. On 6 April 1992, defendant filed in this Court a motion for appropriate relief on the ground that perjured testimony was admitted during the course of defendant's trial. We conclude that defendant's trial

was free from prejudicial error, affirm his conviction, and deny his motion for appropriate relief.

The State's evidence in this case tended to show that defendant and the victim met in 1983. They began dating in 1984 and were married later that year. Defendant and the victim had a daughter, Brandi. Defendant had been married previously and had two sons from that marriage, Jason and Kendall. The Jollys experienced marital difficulties that related primarily to defendant's abuse of alcohol.

In June 1988 the victim began working at Apparel Directives. At about this same time, defendant's son Kendall developed an illness that eventually caused his death in February 1989. Subsequent to Kendall's death defendant's drinking increased. As an apparent result of his increased drinking, the Jollys' marital difficulties escalated.

On 27 July 1989, the victim met two friends after work for dinner at a steakhouse. After having searched for his wife for two hours, defendant, accompanied by his son Jason, located her car at the restaurant. Defendant went inside and asked the victim for his paycheck. Defendant followed her outside the restaurant where she went to retrieve the check from her purse. Defendant, in a rage, snatched the purse away from her and began emptying its contents on the ground. He then got into his car and rammed it into his wife's car. After making threatening statements, defendant drove away. This incident was witnessed by several of the victim's friends.

On 31 July 1989, the damage caused to the victim's car during the 27 July incident was being repaired. Vickie Parker, the victim's friend and supervisor, lent her car to the victim so that she could pick up lunch for the staff of Apparel Directives. The victim and defendant encountered one another at an intersection. Defendant displayed a gun and threatened to kill her. Frightened, she fled in her car across some lawns towards a highway. Defendant followed her in his vehicle and chased her at speeds in excess of 100 miles per hour until she stopped at a Highway Patrol Station along the highway. Emotionally shaken, she reported the incident to an officer and stated that defendant had fired the gun at her during the chase. She also called Parker to report the reason for her delay in returning to work, and told her that defendant had shown her the gun and threatened to kill her.

As a result of the preceding incidents, on 1 August she employed the services of attorney Rebecca Mills. She informed Mills of the chase on the previous day and asked that she obtain a restraining order against defendant. After obtaining the restraining order, Mills drafted a consent agreement which was entered 10 August.

On 20 August defendant sought admission to University of North Carolina Hospitals for treatment of his alcohol abuse problem. During an admission interview defendant stated that he had purchased a .25 caliber semiautomatic handgun the week before, that he had had suicidal ideations the day before, and that once while drinking he had thought about harming his wife. The hospital employee who admitted defendant explained to him that in order to be admitted he would have to remain hospitalized for at least 72 hours after formally requesting discharge. Defendant agreed to this condition and was admitted. However, on 23 August defendant walked away from the hospital without proper authorization. Law enforcement authorities were informed of his disappearance but were unable to locate him.

On Saturday, 3 September, defendant went to Apparel Directives where he shot through the victim's office window and into her computer terminal. The business was unoccupied at that time. The following Monday, after returning from a weekend vacation, the victim discovered the damage that defendant had caused to her office.

The victim was to testify on 6 September at defendant's probable cause hearing on a charge of assault with a deadly weapon which stemmed from the 31 July highway chase. She was reluctant to appear in court after discovering the bullet that was fired into her office. Nevertheless, she did appear and testified that she did not hear any shots, see any smoke, nor discover any bullet holes in the car.

On 19 September, around 5:15 p.m., the victim drove a pickup truck, owned by her friend Jay Crawford, to Colonial Hills Day Care Center to pick up her daughter Brandi. Sarah Guill and teenagers Candace Sorrell and Suzanne Rhodes were attending to the youngsters at the center. Guill saw the victim drive into the parking lot. Defendant, following immediately behind her, parked his car so that her car was blocked at the rear. Guill was disturbed by their arrival because defendant and the victim never came to the center together. Guill had been instructed by the center's owner

that defendant could pick up or visit Brandi only on Wednesdays and only when he was accompanied by his parents.

Guill watched defendant exit his car and walk over to the driver's side of the victim's truck. Guill became alarmed by the victim's expression as defendant approached. She then called 911. After she had placed the call she heard one of the teenagers exclaim, "he's shooting her."

Sorrell heard the shots in quick succession. As the shots were fired the victim was leaning toward the passenger side of the truck, away from defendant, and defendant was leaning into the truck. Defendant then turned away, walked to his car and drove away. Dawn Jolly died upon arrival at the hospital.

When defendant was subsequently arrested, after having eluded police for several hours, the police searched defendant's person and found a .25 caliber semiautomatic pistol in defendant's back pants pocket. The weapon still had one bullet in the clip and one bullet in the chamber.

An autopsy revealed that the victim had suffered four gunshot wounds. Two of the wounds were not life threatening. One of the potentially fatal wounds was caused by a bullet that passed through her upper left arm, left breast, left lung, and the left lobe of her liver before lodging next to her spine. The other bullet entered through her right back and traveled through her rib, diaphragm and liver, grazing her heart.

Lacy H. Thornburg, Attorney General, by James J. Coman, Senior Deputy Attorney General, and Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant appellant.

WEBB, Justice.

[1] By his first assignment of error, defendant contends the trial court erred by allowing three witnesses to testify that the victim had told them that defendant shot at her during the 31 July highway chase. Defendant argues that because the victim testified at defendant's probable cause hearing arising from that incident that she had not actually seen or heard gunshots during the pursuit, the State should not have been allowed to contradict that sworn

testimony with the witnesses' hearsay testimony. Defendant contends that because the hearsay statements were contrary to the victim's prior testimony, the statements lost their presumptive reliability as excited utterances, and should have been subjected to the same close scrutiny as statements tendered under the residual hearsay exceptions. As such, the State would have been required to bear the burden of showing that the statements possessed "particularized guarantees of trustworthiness." *Idaho v. Wright*, --- U.S. ---, 111 L. Ed. 2d 638 (1990); *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Defendant also says that admission of this testimony violated his right to confront adverse witnesses as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 23 of the North Carolina Constitution.

We first note that prior testimony is itself hearsay evidence, N.C. R. Evid. 801, which is excepted from the hearsay rule by N.C. R. Evid. 804(b)(1). Although such statements are given under oath, they are nonetheless hearsay and presumably no more reliable than hearsay admitted under any of the other enumerated exceptions. We agree with the State that where, as here, the hearsay statements of a declarant are conflicting, the conflict creates a question of credibility and not, as defendant contends, one of reliability. Questions of credibility are to be determined by the jury. N.C. R. Evid. 104(e). When a declarant's conflicting hearsay statements have been determined to be excepted from the general prohibition against hearsay, the trial court need not subject the statements to any additional test for reliability before admitting them into evidence. Therefore the trial court did not err by admitting conflicting hearsay statements and allowing the jury to determine which of them was the most convincing.

[2] With regard to a defendant's rights of confrontation, in *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898-99 (1991), this Court stated:

> [S]tatements falling within an exception to the general prohibition against hearsay may be admitted into evidence without violating a defendant's right to confrontation, if the evidence is reliable. *E.g., Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L. Ed. 2d 597 (1980); *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981). Further, "a sufficient inference of reliability can be made 'without more' from the showing that the chal-

lenged evidence falls within 'a firmly rooted hearsay exception.' " *Porter*, 303 N.C. at 697 n. 1, 281 S.E.2d at 388 n. 1 (quoting *Ohio v. Roberts*, 448 U.S. at 66, 100 S.Ct. at 2539, 65 L. Ed. 2d at 608)[.]

N.C. R. Evid. 803(2) reads as follows:

Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

In this case, the record reveals that two of the statements attributed to the victim were made by her immediately after the chase and while still emotionally upset by the occurrence. Officer Jimmy Earp testified that when he arrived to receive the victim's complaint "[s]he was crying quite a bit, very upset. Hysterical." She told him that "she was going down the roadway, Randy was holding a gun out the window, shooting the gun at her. [S]he was running in excess of a hundred miles an hour and pulled into the Highway Patrol station." Vickie Parker testified substantially the same. She stated that when the victim called her from the station she was crying hysterically and that she told Parker that defendant had displayed a gun to her and threatened to kill her before chasing her down the highway. Rebecca Mills testified that when she met the victim at Mills' office the following day, she related to Mills the same series of events.

The record therefore makes clear that the testimony of Earp and Parker fit squarely within the requirements of N.C. R. Evid. 803(2) that the statement of the declarant be made about the startling event while still under the emotional stress caused by the event. However, Mills' testimony failed to meet the requirement that the statement be made by the declarant while under the stress of the event. The statement to Mills was made the day following the event described, after the declarant had an opportunity to reflect on what had occurred and was therefore inadmissible. *State v. Maness*, 321 N.C. 454, 364 S.E.2d 349 (1988). Because Mills' testimony did not fit within the excited utterance exception, its reliability was not sufficiently established so as to avoid violation of defendant's constitutional rights of confrontation.

In considering whether a violation of a defendant's constitutional right constituted prejudicial error, this Court must determine

whether the error was harmless beyond a reasonable doubt. *State v. Rankin*, 312 N.C. 592, 324 S.E.2d 224 (1985).

In this case, the facts testified to by Mills tended to show that the murder was premeditated and deliberated. However, in the absence of Mills' testimony, the same facts would have been properly before the jury. Earp and Parker had already testified in detail that the defendant had shown the victim the gun, threatened to kill her, and then chased her down the highway firing his pistol at her. Additionally, the credible and convincing evidence outlined above, including eyewitness testimony, was virtually uncontradicted and tended to prove each of the elements of the crime charged. There was ample evidence before the jury from which it could find defendant guilty of first degree murder. There was uncontradicted evidence of defendant's prior assaults on the victim as well as defendant's admissions that he planned to kill his wife. Mills' testimony could not have changed the outcome of defendant's trial. Therefore we hold the denial of defendant's rights of confrontation was harmless beyond a reasonable doubt.

[3] By his next assignment of error, defendant contends that the trial court erred by allowing Dr. Hagerty, an attending physician in the Department of Psychiatry at the University Hospital in Chapel Hill, to testify as to the contents of notes taken by a nurse upon defendant's admission to the hospital. These notes indicated that defendant stated that he had recently purchased a gun and that he had had thoughts about killing himself and harming his wife.

On cross-examination by the State concerning these notes, defendant was asked:

> Q: And do you recall at that time that you told her that you had bought a gun one day last week and had planned to kill himself and his wife? Do you recall having said that?
>
> A: If it's in the book, I said it, yes, sir.

"Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence." *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985); *State v. Corbett*, 307 N.C. 169, 297 S.E.2d 553 (1982). Here the defendant's answer on cross-examination that, "If it's in the book, I said it, yes, sir," was substantially the same as Dr. Hagerty's earlier testimony which defendant

now assigns as error. We overrule this assignment of error, the defendant being deemed to have waived his right to assign error to the admission of this testimony.

[4] Defendant next assigns as error the admission of various hearsay testimony from several witnesses. Defendant contends that the testimony was either irrelevant or inadmissible character evidence, and that to his prejudice he was denied his right to confront adverse witnesses. The State contends that the statements were evidence of the victim's state of mind, N.C. R. Evid. 803(3), and that they were offered to rebut the defendant's contention that he and the victim were trying to reconcile their differences and that they were planning a romantic interlude on the day she was murdered.

In *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876, we held that, "[e]vidence tending to show the victim's state of mind is admissible so long as the victim's state of mind is relevant to the case at hand." *Id.* at 314, 406 S.E.2d at 897; *State v. Meekins*, 326 N.C. 689, 695, 392 S.E.2d 346, 349 (1990). In *State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990), we held that evidence which tended to show the burglary victim's fear of the defendant was admissible because it was relevant to show that the victim would not have given the defendant consent to enter. In this case, evidence which would tend to show that the victim feared defendant and that she regarded their relationship as irreconcilable, would be relevant as it would tend to rebut the defendant's contention that the couple was trying to resolve their differences and was planning a romantic interlude on the day that the victim was killed.

We agree that certain portions of the following testimony were erroneously admitted. However, we do not agree that defendant was prejudiced thereby.

Rebecca Mills, Dawn's attorney, testified that Dawn said to her, "Randy . . . has no respect for the law. He's not scared of anybody. And none of this is going to help. It's not going to work. [N]obody can control him and he's scared of nothing." Mills further testified, "She said that he had two sons by a previous marriage, and he did not have regular visitation with these boys until she married him and at her assistance [sic], that more or less there was, he really gave the boys no time until she married him and pretty much encouraged that."

Mills' testimony regarding defendant's failure to spend time with his sons did not tend to show that the victim was afraid of defendant or that she had no intention of reconciling with him. Rather the evidence tended to show defendant's bad character and, as such, should not have been admitted. N.C. R. Evid. 404(a)(1). In light of all the evidence that was properly introduced, this tangential bit of evidence could not have affected the outcome of the trial. It was not prejudicial error. N.C.G.S. § 15A-1443(a) (1988). The remainder of the testimony did tend to show that the victim was afraid of defendant and was properly admitted.

Ted Moore, the victim's employer, testified that he had spoken to Dawn on the Friday following defendant's probable cause hearing and that, "[s]he said they don't care; and I said Dawn, who doesn't care. She said the authorities don't care." Moore further testified that during a later conversation, "[s]he said I thought about what I believe in. [S]he said I want to be remembered to my daughter that I was a good woman."

This testimony did not tend to show the victim's state of mind with regard to her relationship with defendant. Thus, the testimony was irrelevant and should not have been admitted. It hardly implicated the defendant, however, and we cannot hold that if it had not been introduced, there would have been a different result at the trial. It was not prejudicial error. *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

Vickie Parker was asked whether the victim frequently talked to her about her marital situation. She responded,

> Yes. She, they were not getting along. They were arguing a lot. She was very concerned with his drinking habits. She was also very concerned about her daughter Brandi. Brandi had begun wetting the bed and having some problems that Dawn associated with her overhearing and witnessing the arguments that she and Randy had.

This testimony, while only slightly probative of the victim's relevant state of mind, could not have been prejudicial to defendant. The witness simply related facts that were not in dispute, to wit: that the couple was having marital problems and that the victim was very concerned about defendant's alcohol abuse. The remainder of the testimony was innocuous.

[5] Janene Wadell was permitted to testify that, "she told me that he'd see her dead before he'd see her with anybody else." On cross-examination by defendant, Officer Jack Terry testified that, "she told me that there had indeed been threats and that she felt that they would be carried out."

The testimony of these two witnesses went directly to the victim's state of mind and tended to show that she was afraid of defendant, she believed his threats, and that she would not have intended to reconcile with him or to meet to engage in sexual activity. Thus, this testimony was relevant and properly admitted. This assignment of error is overruled.

[6] Defendant next assigns as error the trial court's instructions on premeditation and deliberation. The instruction permitted the jury to infer premeditation and deliberation from "the brutal or vicious circumstances of the killing." Defendant contends that this instruction allowed the jury to consider matters not supported by the evidence. We disagree.

Defendant relies on *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975), for the proposition that this killing was not "brutal or vicious." In *Buchanan*, the State's evidence tended to show that the defendant was the caretaker of a neighbor's property. The defendant saw the deceased and two other men drive past the defendant's home towards his neighbor's property and suspected they were going to steal firewood. Defendant drove to where the men had parked their vehicle and found them loading wood onto their truck. He blocked their truck with his own and approached them with his shotgun, telling them to "throw the wood down," adding, "God damn you, I'll kill you all." *Buchanan*, 287 N.C. at 410, 215 S.E.2d at 81. Defendant then fired a single shot which hit the deceased. The other men then loaded the deceased onto the truck and the defendant moved his truck to allow them to leave.

The Court held that the facts of the case failed to disclose a "vicious and brutal" killing and because the record revealed that the issues of "premeditation and deliberation" were the primary focus of the jury's deliberations, the defendant was entitled to a new trial. *Id.* at 422, 215 S.E.2d at 88.

In the instant case, the evidence, taken in the light most favorable to the State, tended to show that, unlike the killing in *Buchanan*, the killing of Dawn Jolly was physically and

psychologically "vicious and brutal." Defendant repeatedly exhibited violent behavior towards his wife. Witnesses testified that he once used a set of car keys to inflict a wound on her chest so severe as to scar the skin. He assailed her in the parking lot of a steakhouse, rammed his car into hers and said to her, "You're next. I'm going to get you and I'm going to get your car." He then left the scene warning her not to come home that night. On another occasion he displayed a gun to her, threatened to kill her, and then chased her down the highway at extremely high speeds, firing the gun at her as she fled. Faced with a charge of assault with a deadly weapon, defendant went to the victim's place of employment and shot through her office window just four days prior to her scheduled testimony at his probable cause hearing. She testified at the hearing that although he chased her, she never saw or heard him fire the gun at her, possibly because of this intimidation.

These encounters with defendant caused the victim to suffer severe emotional trauma. She was depressed and cried uncontrollably. She became despondent over the apparent hopelessness of her situation and her inability to free herself from defendant, who continuously threatened and tried to dominate her. She found it necessary to conceal her whereabouts from the defendant. She moved her residence to a secret location and, in order to avoid defendant, traveled circuitous routes to and from work and the day care center; the places that defendant was certain he could find her.

On 19 September defendant followed the victim to the day care center. He parked his car behind her truck so as to block it in from behind. He approached her car, carrying the gun which he admitted having purchased for the purpose of killing his wife. Aware of defendant's numerous prior threats, the trapped victim was horrified by his approach. As she crouched in the truck, attempting to get as far from him as she could, defendant leaned into the truck and shot his wife four separate times. He inflicted numerous wounds, two of which were capable of causing her death. The victim remained conscious for sometime after being shot and said to those who came to her aid, "please call somebody. I've been shot three times." After she struggled to sit up in the ambulance that carried her to the hospital, efforts at resuscitation failed and she was pronounced dead upon arrival at the hospital.

In *State v. Vereen*, 312 N.C. 499, 515, 324 S.E.2d 250, 260, *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526 (1985), the Court held that where "the victim underwent extreme physical pain and unspeakable psychological anguish prior to her death[,]" the evidence of the viciousness and brutality of the defendant's attack on the victim was sufficient to support the theory that the murder was committed with premeditation and deliberation.

The State's evidence showed that defendant subjected the victim to constant psychological abuse prior to and including the day of her killing. When he finally cornered her at the day care center where she had gone to pick up their daughter, he shot her four times with his semiautomatic pistol and then calmly returned to his car and drove away. We hold that this evidence was sufficient to support the submission of an instruction allowing the jury to infer premeditation and deliberation from the vicious and brutal circumstances of the killing. This assignment of error is overruled.

[7] Defendant next assigns as error the admission of certain testimony of Jack Tapp of the Orange County Sheriff's Department. On cross-examination by defendant, Tapp, the chief investigator of the homicide, testified that to his knowledge no gunpowder residue tests (paraffin tests) had been performed on the hands of either the defendant or the deceased. On re-direct examination by the State, Tapp explained the reasons why he decided not to order the performance of a residue test on the victim's hands despite his authority to do so. He explained, "[a]t the time the lady was transported, she was alive; and also looking at the results of the medical exam and the locations of the wounds, it was no doubt in my mind at that time that she had not handled a gun."

The defendant contends the testimony on cross-examination by Mr. Tapp that "it was no doubt in my mind at that time that she had not handled a gun" was inadmissible and tantamount to an opinion that the defendant was guilty of murder. The defendant says that Mr. Tapp had not qualified as an expert and could not testify to this opinion.

This testimony by Mr. Tapp was elicited by the State on re-direct examination after the defendant had elicited testimony from Mr. Tapp on cross-examination that a paraffin test had not been performed on Dawn Jolly. The State could introduce this testimony to explain a matter about which the witness had testified on cross-examination. *State v. Williams*, 315 N.C. 310, 320, 338 S.E.2d 75,

82 (1986). Mr. Tapp was a trained law enforcement officer and had been employed as a criminal investigator by the Sheriff's Department for approximately nine months at the time Mrs. Jolly was killed. This made him better qualified than the jury to form an opinion of the subject matter about which he testified. It was not error to admit this testimony. *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 113 (1990). This assignment of error is overruled.

[8] By his next assignments of error, defendant contends that his right to a fundamentally fair trial was denied by the State's cross-examination of defendant and its final argument to the jury. Defendant was cross-examined as follows:

> Q. Well, so you wanted her to bring your 4 year old daughter?
>
> A. Yes, sir.
>
> Q. To the alcohol detox center to visit with you. Is that right?
>
> A. I don't care where I would have been, I still like to see her.
>
> Q. And that was without regard to what effect, if any, that might have on the child. Is that right?
>
> MR. WINSTON: Object.
>
> COURT: Over-ruled.
>
> A. It won't an alcohol, it was a psychiatric ward.
>
> Q. So it was the psychiatric ward. And you wanted that 4 year old child brought there to see you knowing that you could leave the next day?
>
> A. I didn't know I could leave the next day, no, sir.

Defendant argues that this cross-examination was not intended to test defendant's credibility or to elicit relevant evidence, but only to put before the jury his alleged bad character. We disagree. Although the prosecutor's questions may have suggested to the jury that defendant should have had more concern about the effect that such a setting might have on his young child and, as such, may have suggested that defendant was not a good father, defendant was given the opportunity to explain his adamant desire to see his daughter. We cannot say, as defendant would have us to do, that the prosecutor's questions twisted his testimony "into *de facto* evidence of bad character." Nor can we say that the cross-

examination here at issue was not intended to challenge the veracity of defendant's explanation for his unauthorized departure from the hospital. Defendant had testified earlier that the reason he left the hospital without permission was because his wife had not brought Brandi to visit him as she had said that she would. The State was entitled to challenge this explanation by suggesting that defendant's desire to have his daughter visit him at the hospital was unreasonable. This assignment of error is overruled.

[9] Defendant next contends that the following argument by the prosecutor was improper.

> First of all, Mr. Winston [defense counsel] suggested that when Jason Jolly took the stand and Mr. Coman [the prosecutor] cross examined him regarding some threats he made to one of our witnesses, Candice Sorrell, that Mr. Coman then failed to bring to you the witness who received those threats. . . . The rules of evidence would not permit us to bring you that witness because the rules of evidence do not allow us to challenge a witness on a collateral matter. And the witness's bias is a collateral matter in this case.

Defendant contends that this argument was improper because it asserted that the State's witness had in fact been threatened and it contained an incorrect statement of the law. At the outset we note that defendant failed to object to the foregoing argument. Defendant must therefore show that the argument was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the alleged error. *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986); *State v. Oxendine*, 330 N.C. 419, 410 S.E.2d 884 (1991).

We agree with defendant's contention that there was no evidence before the jury that Jason Jolly had threatened the State's witness. We also agree that it was improper for the State to argue the previously denied allegation as a proven fact, *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283 (1975), and that the argument contained an incorrect statement of the law, 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 48 (3d ed. 1988). However, we do not find that the argument was so prejudicial that the court should have intervened *ex mero motu*. The entire matter of whether Jason Jolly had threatened the witness and whether the rules of evidence would have allowed another witness to so testify is collateral to the issue of defendant's guilt. As defendant concedes,

Jason's testimony was neutral with regard to his father's guilt and we cannot say that the outcome of defendant's trial would have differed if this argument had not been made. The trial judge did not abuse his discretion in failing to intervene *ex mero motu.*

[10] Defendant next assigns as error the prosecutor's argument to the jury that defendant's prior convictions demonstrated a "contemptuousness for the law." Defendant contends, and we agree, that the evidence of defendant's prior convictions was admissible only to impeach defendant's credibility and was not admissible as substantive evidence of guilt of the crime charged and should not have been argued as such. *State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986). Nevertheless, defendant failed to object to this argument at trial. Furthermore, "the impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369, 259 S.E.2d 752, 761 (1979). Here, immediately prior to arguing that the prior convictions demonstrated a contemptuousness for the law, the prosecutor argued that "[the convictions] don't make him guilty of first degree murder; and I think it would offend the 14 of you if I stood there and told you that." This statement served to lessen the impropriety of her subsequent argument. This argument was not so grossly improper that the court should have intervened *ex mero motu.*

[11] Defendant next contends that the trial court erred by overruling his objection to the prosecutor's argument that the prosecutor knew of no problem between the defendant and the State's witness Jay Crawford. After an objection by defense counsel and a subsequent bench conference, the prosecutor modified his argument to the effect that the evidence did not show that there was any problem between defendant and Crawford as of 19 September, the date of the murder. Defendant says that the argument was erroneous because it was an assertion of the prosecutor's personal knowledge and was contrary to the evidence. Defendant contends that the evidence showed that Crawford had threatened defendant prior to 19 September and that this evidence explained why defendant approached Crawford's truck (being driven by the victim) carrying a gun.

After thoroughly reviewing the transcript of defendant's trial, specifically those portions referenced by defendant in his brief, we are unable to find any evidence in the record that Crawford had previously threatened defendant. Defendant testified as to the content of a telephone conversation that he had with the victim's friend, Kim Gunter. Defendant told Gunter that he had just followed her to Durham, North Carolina, and that he knew Dawn was there. Gunter denied that Dawn was there. Defendant testified that, "she made the statement I won't repeat in court what Mr. Jay was going to do to me for following her to Durham." At most, this testimony revealed only that Gunter *believed* that Crawford would do *something* to defendant when he learned that defendant had followed Gunter to Durham. This testimony simply does not amount to evidence that Crawford had threatened defendant.

It is well settled a prosecutor may not place before the jury incompetent or prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence. *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985); *State v. Britt*, 288 N.C. 699, 220 S.E.2d 283. In this case the prosecutor's argument, although phrased initially in terms of what he knew, did not place before the jury any prejudicial matter that was unsupported by the evidence. As stated above there was no evidence that Crawford had threatened defendant and even though defendant's objection was overruled, the prosecutor modified his argument and omitted any reference to his personal knowledge. The modified version of his argument was a fair characterization of the shortcomings of defendant's evidence. This assignment of error is overruled.

[12] After we heard oral arguments in this case, the defendant filed with this Court a motion for appropriate relief. We have determined that we may decide this motion on the basis of the materials before us. N.C.G.S. § 15A-1418(b) (1988).

The motion for appropriate relief shows that at trial, Lee Shoemate testified for the State. Shoemate testified that he was employed by the University of North Carolina Hospital, that he was a graduate of Harvard Medical School, and that he was a licensed physician in North Carolina. Shoemate further testified that it was he who admitted defendant to the hospital for alcohol detoxification and who conducted an admission interview. Shoemate testified that during this interview defendant stated that he had

purchased a .25 caliber handgun and had had thoughts about killing himself and harming his wife.

Subsequent to defendant's trial, hospital officials learned that Shoemate was not a graduate of an accredited medical school and that he may have obtained his medical license by the use of forged documents. Until this time, counsel for the State was unaware of Shoemate's perjury. Counsel for the State promptly notified defendant's appellate counsel of this information.

In his motion, defendant contends that Shoemate's perjured testimony as to his credentials added great credibility to his testimony concerning the inculpatory statements that defendant made to him. Defendant also contends that Shoemate's testimony was material, as that term was defined in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), because his testimony was "the only testimony by a witness as to the alleged statement by defendant going to show premeditation and deliberation[.]"

We disagree with defendant's contentions. As discussed above, when defendant was cross-examined as to whether he had made the inculpatory statements that were attributed to him by Shoemate, defendant admitted having done so. Any question as to the credibility of Shoemate's testimony is rendered moot by defendant's having corroborated Shoemate's testimony that defendant made the statements. Defendant's admission also belies his present contention that Shoemate was the only witness who testified that defendant made the inculpatory statements.

Nor do we agree that Shoemate's perjury was material. Shoemate was not tendered as an expert, nor did he render any medical opinions based upon his observations of defendant. Shoemate merely testified, as any lay witness could have, to the admissions made by defendant upon his admittance to the hospital. N.C. R. Evid. 801(d). Furthermore, where a particular element of a crime is supported by an abundance of evidence, the materiality of any individual item of evidence that tends to prove that element of the crime is decreased. *Agurs*, 427 U.S. at 112-113, 49 L. Ed. 2d at 354-355.

In this case, there was substantial evidence, in addition to defendant's statements to Shoemate, which tended to show that defendant acted with premeditation and deliberation. As discussed above, the killing was vicious and brutal. Without provocation,

defendant inflicted four gunshot wounds on the victim. *State v. Corn*, 303 N.C. 293, 278 S.E.2d 221 (1981). There was evidence that defendant had previously threatened to kill the victim and that on at least one prior occasion he had attempted to do so. *State v. Sanders*, 295 N.C. 361, 245 S.E.2d 674 (1978). There was also evidence that the victim believed that the defendant would kill her if she were ever involved in an intimate relationship with someone else. *State v. Norman*, 331 N.C. 738, 417 S.E.2d 233 (1992). Thus, we conclude that Shoemate's perjured testimony was not "material" within the meaning of *Agurs* and that defendant's motion should therefore be denied.

For the foregoing reasons, we conclude that defendant's trial was free from prejudicial error and that a new trial is not warranted.

No error.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY TAYLOR

No. 170A91

(Filed 4 September 1992)

1. Evidence and Witnesses § 1233 (NCI4th)— statements to cellmate—cellmate not State agent—no Sixth Amendment violation

The trial court did not err in concluding that defendant's cellmate was not an agent of the State and that incriminating statements made by defendant to his cellmate were not obtained in violation of defendant's Sixth Amendment right to counsel where no evidence was presented that the cellmate was deliberately placed in the cell with defendant in order to obtain information from him; the cellmate approached the police first; the police had made no previous agreement with the cellmate to obtain information, and the cellmate received no payment or promise for supplying information; the police told the cellmate that they could make no deals in exchange for information and that the cellmate was not an agent of the State; and the cellmate's testimony during the hearing

on the motion to suppress tended to show that defendant voluntarily made all the statements to the cellmate.

Am Jur 2d, Criminal Law § 970.

Denial of or interference with accused's right to have attorney initially contact accused. 18 ALR4th 743.

2. **Constitutional Law § 353 (NCI4th); Evidence and Witnesses § 1233 (NCI4th)— statements to cellmate—cellmate not State agent—no interrogation—no Fifth Amendment violation**

Defendant's right against self-incrimination under the Fifth Amendment was neither implicated nor violated by the admission of defendant's statements to a cellmate where (1) the cellmate was not an agent of the State and (2) defendant initiated the conversations with the cellmate and no interrogation occurred.

Am Jur 2d, Criminal Law § 936.

3. **Criminal Law § 101 (NCI4th)— statements by defendant—absence of timely disclosure—failure to inform court**

The trial court did not err in admitting defendant's statements to a cellmate on the ground that the State failed to produce these statements within the time frame required by N.C.G.S. § 15A-903 where defendant failed to point out anything in the record indicating when the district attorney received or was made aware of the statements, and defendant also failed to show that he brought this alleged violation of the discovery statute to the trial court's attention or sought sanctions because of the alleged violation. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion.

Am Jur 2d, Criminal Law § 998.

4. **Criminal Law § 1233 (NCI4th)— defendant's statements to another prisoner—no constitutional violation**

The admission of defendant's inculpatory statement to another prisoner did not violate defendant's Fifth or Sixth Amendment rights where the other prisoner was not an agent of the State and there was no interrogation of defendant.

Am Jur 2d, Criminal Law § 974.

Denial of or interference with accused's right to have attorney initially contact accused. 18 ALR4th 743.

5. Evidence and Witnesses § 960 (NCI4th)— hearsay—exception for statements of intent

A murder victim's statement to his supervisor that he wanted time off from work the next day because he planned to meet the defendant and then buy a boat was admissible under the Rule 803(3) exception for statements of then existing intent and plan to engage in a future act. The statement of the victim was sufficiently close in time to the occurrence of the intended future act to be relevant under Rule 401, and no more was required in this regard. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence § 651.

6. Evidence and Witnesses § 960 (NCI4th)— purpose of past meeting—hearsay—inadmissibility as statement of intent

A murder victim's statement to a coworker that he and an unidentified black man who met with him at work had discussed the sale of a gun shop in South Carolina was hearsay as it was offered to prove that someone other than defendant purchased a gun shop in South Carolina from the victim. This statement was not admissible under the Rule 803(3) exception to the hearsay rule because it was not a statement of future intent but was an inadmissible statement of his memory of a past act offered to prove the fact remembered.

Am Jur 2d, Evidence § 651.

7. Evidence and Witnesses § 1468 (NCI4th)— autopsy testimony—chain of custody of bodies

The State established an adequate chain of custody for three bodies for the admission of testimony relating to the autopsies of the bodies where a detective testified that he observed the three bodies at the scene; he photographed the bodies and was present at the autopsy for each victim; and the detective identified the clothes on the bodies as the same as the ones on the bodies at the scene. Furthermore, any weak link in a chain of custody goes to the weight of the evidence and not to its admissibility.

Am Jur 2d, Evidence § 774.

8. Evidence and Witnesses § 1467 (NCI4th)— projectile removed from body—chain of custody

The State established an adequate chain of custody of a projectile taken from a murder victim's body for its admission into evidence where the medical examiner identified the projectile at trial as the one he removed from the victim's body and noted the identification card he had signed that was attached; because of the noticeable distortion of the projectile, witnesses who handled it were able to and did identify it on the basis of this unique characteristic; and each person handling the projectile testified that he had custody of the bullet and it was not altered in any way.

Am Jur 2d, Evidence § 775.

9. Jury § 7.11 (NCI3d)— death qualification of jury—constitutionality

The trial court properly denied defendant's motion for separate juries during his trial and capital sentencing proceeding on the ground that, even though he received a life sentence, a "death qualified" jury is more likely to convict. The Supreme Court will continue to adhere to its prior decisions rejecting the argument that a death qualified jury is more likely to convict and holding that such a jury does not violate defendant's constitutional rights.

Am Jur 2d, Criminal Law § 609.

10. Jury § 7.11 (NCI3d)— death penalty views—excusal for cause—refusal to allow rehabilitation

The trial court did not abuse its discretion in refusing to permit defendant to rehabilitate prospective jurors who stated that their personal or religious beliefs on the death penalty would impair their ability to serve as jurors in a capital trial before allowing the prosecutor's challenge for cause of those jurors where defendant made no showing that additional questioning would have resulted in different answers from those jurors.

Am Jur 2d, Criminal Law § 609.

11. Criminal Law § 1431 (NCI4th)— three murders—consecutive sentences—statement of reasons not required—no abuse of discretion

The trial court was not required to state in the record its reasons for sentencing defendant to three consecutive rather

than concurrent life sentences for three counts of first degree murder, and the trial court did not abuse its discretion in imposing the consecutive sentences. N.C.G.S. § 15A-1354(a).

Am Jur 2d, Criminal Law § 629.

APPEAL by the defendant pursuant to N.C.G.S. §7A-27(a) from judgments sentencing him to three consecutive life sentences for three counts of first-degree murder and to a sentence of imprisonment for armed robbery, entered by *Bowen, J.*, on 24 August 1990 in Superior Court, BRUNSWICK County. Heard in the Supreme Court on 12 May 1992.

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

Daniel F. Read for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried capitally upon proper indictments charging him with three counts of murder and one count of armed robbery. The State's evidence tended to show the following. On or about 12 October 1988, Marion Meetze, his wife Ginger Meetze, and Ginger's daughter Michelle Arnold were shot and killed in their home in Brunswick County. Evidence tended to show that the defendant, who lived in South Carolina, had purchased a gun shop located in South Carolina from Marion Meetze. A dispute arose between the defendant and Marion Meetze over money related to the sale of the gun shop. The defendant shot and killed the three victims using a different weapon for each murder. Marion Meetze was shot with a shotgun, Ginger Meetze with a .22 caliber pistol, and Michelle Arnold with a Desert Eagle .357 magnum pistol.

Ed Barnett, Marion Meetze's supervisor at work, testified that Meetze was employed at the B.F. Goodrich plant in Wilmington, North Carolina. On 12 October 1988, Meetze asked Barnett for the next day off because the defendant was coming to pay him some money for the sale of the gun shop, and Meetze wanted to go to buy a boat. Barnett gave Meetze permission, and Meetze was not at work on 13 October 1988. Meetze did not come to work on Friday, 14 October 1988. Barnett sent two employees to Meetze's house to check on him that day, because it was unusual for him to miss work without an explanation. The two employees

found the bodies of Marion and Ginger Meetze inside the house and noted that the interior of the house was covered in soot resulting from a fire. The two employees immediately called the sheriff.

Detective Gary Shay arrived at the Meetze home shortly thereafter and found the bodies of Marion and Ginger Meetze in the den. Shay observed that Ginger Meetze had been shot in the head; Marion Meetze had been shot in the back. Shay searched the house and found the body of the child Michelle Arnold in an upstairs bedroom. She had been shot in the chest. In the den, Shay collected nine .22 caliber shell casings and several plastic cups that were sitting on the coffee table and end tables. Latent fingerprints matching those of the defendant were found on one of the cups. Shay also found a plastic pen holder on an end table. In the upstairs bedroom, Shay collected the bedding from the bed on which Michelle Arnold's body was found and found .357 caliber projectiles in the bedding and the pillow on the bed.

The interior of the house was covered with black oily soot. An arson expert testified that the burn patterns showed that the fire started in the back of the house and moved to the front and that a flammable liquid was used to set the fire.

Autopsies revealed that each victim died as a result of multiple gunshot wounds. Marion Meetze was shot in the back with a shotgun. Eight lead pellets were removed from his body. The pellets had passed through his heart and liver. Ginger Meetze was shot nine times: seven times in the back and two times in the head. Seven .22 caliber bullets were removed from her body. Michelle Arnold suffered four gunshot wounds, three of which would have been independently fatal. One .357 caliber projectile was removed from her body.

Roger Benton, the owner of a gun shop in Anderson, South Carolina, testified that the defendant sold him a Desert Eagle .357 magnum pistol on 14 October 1988. Michael McCann, a friend of Marion Meetze, testified that he saw the pistol in the gun shop in October 1988 and recognized it as belonging to Marion Meetze because of its unique serial number. The State entered the gun into evidence at trial. Ed Barnett testified earlier that he had seen that same Desert Eagle .357 magnum pistol at Meetze's house a week before the murders.

Lieutenant Ira Parnell, supervisor of the firearms identification laboratory of the State Law Enforcement Division of South Carolina, conducted ballistics tests on the Desert Eagle pistol the defendant had sold to Benton on 14 October 1988. Parnell concluded that the .357 caliber projectiles taken from the bedding and pillow in the upstairs bedroom and the projectile taken from Michelle Arnold's body had all been fired from that same Desert Eagle .357 magnum pistol.

The defendant presented the following evidence at trial. A fingerprint expert testified that other latent fingerprints found on the plastic cups recovered at the scene of the murders did not match the fingerprints of the defendant or any of the three victims. James Register, a co-worker of Marion Meetze, testified that, during the summer of 1988, a black male unknown to Register visited Marion Meetze at work. Meetze and the man engaged in a heated argument after which Meetze was upset. The man, accompanied by Ginger Meetze and her daughter Michelle Arnold, again visited Meetze at work on 1 July 1988. Meetze appeared upset. On 15 September 1988, the same man again visited Meetze at work. They spoke for about an hour in Meetze's office.

Several witnesses testified that the defendant was a law-abiding, peaceful person. Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

The jury found the defendant guilty of three counts of murder in the first degree on the theory that all of the murders were premeditated and deliberate. The jury also found the defendant guilty of armed robbery. At the conclusion of a separate sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered sentences of life imprisonment for each of the murder convictions; those sentences were entered to run consecutively. The trial court also sentenced the defendant to imprisonment for a term of fourteen years for the armed robbery conviction. The defendant appealed the first-degree murder convictions and life sentences to this Court as a matter of right. This Court allowed the defendant's motion to bypass the Court of Appeals on his appeal from his conviction and sentence for armed robbery.

[1] The defendant first contends that the trial court erred by denying his motion to suppress statements he made to David Potter

before trial while both of them were in jail. The defendant argues that these statements were made to an agent of the State, while the defendant was in custody and without the presence of counsel, in violation of the defendant's right against self-incrimination under the Fifth Amendment to the Constitution of the United States and his right to counsel under the Sixth Amendment.

At the conclusion of evidence during a suppression hearing, the trial court concluded that David Potter had not acted as an agent of the State and that none of the defendant's state or federal rights were violated. We agree and conclude that the trial court did not err in denying the defendant's motion.

The defendant was arrested for murder on 9 September 1989 and was given the *Miranda* warnings at that time. The trial court appointed counsel for the defendant sometime during September 1989. In late December 1989, the defendant told David Potter, his cellmate in the Brunswick County Jail, that he had killed a man, a woman, and a child. The defendant said he had shot the man with a 12 gauge shotgun one time, that he had shot the woman with a .22 caliber weapon one time in the head, and that he had shot the child with a .357 magnum pistol. The defendant then attempted to set their house on fire, but the fire extinguished itself because of a lack of oxygen. The defendant stated that he had disposed of the guns used in the murders and that the killings had involved a dispute over the sale of a gun shop.

After the defendant made these statements to Potter, Potter asked to speak to an investigating officer. North Carolina State Bureau of Investigation ("S.B.I.") Agent Kelly Moser came to the jail and interviewed Potter on 22 December 1989. During the interview, Potter told Moser everything the defendant had said. At the end of the interview, Moser told Potter not to make any further contact with the defendant about the crimes and specifically told Potter that he was not an agent of the State and was not working for any law enforcement agency. Potter asked if Moser could make a deal to reduce some of the charges against him. Moser stated that he had no authority to make such a deal.

A short time later, Potter requested a second meeting with Moser. Moser interviewed Potter on 28 December 1989. Potter stated that the defendant had said he had taken the murder weapons apart. In addition, the defendant had told Potter that Marion Meetze had placed a pen and pencil carrier on the table in the den before

the defendant shot him. The defendant also stated that the fire he set was smothered. At the end of the interview, Moser again told Potter not to discuss the crimes with the defendant and that Potter was not working for the State. In addition, Moser had Potter sign a statement stating that Moser had told Potter on 22 December and 28 December 1989 to have no further contact with the defendant and that he was not an agent of the State.

On 15 January 1990, Moser interviewed Potter a third time at Potter's request. The defendant had told Potter of an episode of insurance fraud in which the defendant had participated. The defendant also had stated that the police had a weak case against him. The police were looking for a .22 caliber rifle that was supposedly used in one of the murders, when the defendant had actually used a .22 caliber pistol. At the end of the interview, Moser again advised Potter not to have any further discussions with the defendant regarding the offenses.

At Potter's request, Agent Moser again interviewed Potter on 31 January 1990. Potter stated that the defendant had told him that the police had the wrong murder weapon. The police had obtained a stainless steel caliber .22 Ruger pistol, when the defendant had used a blue steel .22 caliber Ruger pistol. The defendant also had recounted further details of the murder. Again, Moser advised Potter not to talk with the defendant about the crimes and that Potter was not working for any law enforcement agency.

In a fifth interview held at Potter's request on 5 February 1990, Potter recounted more details of the murders to Moser. These facts were essentially the same as those previously recounted. Moser again gave Potter the same warnings he had previously given.

Later in February 1990, Potter requested a sixth meeting with Moser. In this final interview, Potter stated that the defendant told him that he had taken the brass from the murder weapons to a scrap metal facility. Moser again gave Potter the same warnings as given at the end of all of the earlier interviews.

After considering the evidence presented at the hearing on the motion to suppress, the trial court concluded in its Order dated 13 August 1990, signed *nunc pro tunc* 18 September 1990, that Potter was not an agent of the State. Furthermore, the trial court concluded that defendant's federal and state constitutional rights had not been violated.

The defendant, relying on *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115 (1980) and *Maine v. Moulton*, 474 U.S. 159, 88 L. Ed. 2d 481 (1985), argues that Potter was an agent of the State. The defendant admits that Potter's first request to speak to an officer about the defendant's case was at Potter's own initiative. Nevertheless, the defendant contends that the State's responses to Potter's requests for the second to sixth interviews show that Moser had an expectation of receiving further information. Therefore, the defendant argues, Potter was an agent of the State who interrogated the defendant in his cell on behalf of the State and in violation of the defendant's rights under the Fifth and Sixth Amendments of the Constitution of the United States.

In *Massiah v. United States*, 377 U.S. 201, 12 L. Ed. 2d 246 (1964), the Supreme Court of the United States first applied the Sixth Amendment to communications between government agents and the defendant after indictment. In that case, the Court reversed the defendant's conviction because the defendant was denied the protection of the Sixth Amendment right to counsel "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.* at 206, 12 L. Ed. 2d at 250. In that case, a co-defendant allowed federal agents to place a radio transmitter under the seat of his car so that the police could overhear an incriminating conversation he had with the defendant. *Id.* at 203, 12 L. Ed. 2d at 248-49. The Court held that the co-defendant acted as an agent of the State and deliberately elicited incriminating information from the defendant without counsel present, thereby violating the defendant's rights under the Sixth Amendment. *Id.* at 206, 12 L. Ed. 2d at 250.

In *United States v. Henry*, 447 U.S. 264, 65 L. Ed. 2d 115 (1980), the Court dealt with statements made by the defendant to his cellmate Nichols after the defendant had been indicted and while the defendant was in custody. The police had deliberately placed Nichols in the cell to get information from the defendant. To the defendant, Nichols was ostensibly nothing more than a cellmate. Nichols previously had been a paid informant, and in this case he was again paid for the information he obtained. *Id.* at 270, 65 L. Ed. 2d at 122. The Court concluded that Nichols was an agent of the State. *Id.* at 271, 65 L. Ed. 2d at 122. The Court noted that he was not merely a "passive listener" and in

fact had stimulated conversations with the defendant deliberately in order to elicit incriminating information against him. *Id.* at 271, 65 L. Ed. 2d at 121-22. The Court held that the defendant's statements to Nichols should be excluded because the manner in which they were obtained violated the defendant's constitutional rights under the Sixth Amendment. *Id.* at 274, 65 L. Ed. 2d at 125.

In the present case, there was no evidence that Potter was deliberately placed in the defendant's cell in order to elicit information. The State did not pay Potter for any information. During the first interview, Potter asked Moser to make a deal in exchange for the information the defendant had given him. Moser refused and stated that he had no authority to make any deals. The trial court also found that Moser advised Potter that he should have no further discussions with the defendant regarding the crimes and told Potter at all times that he was not working for any law enforcement agency. At the end of the second interview, Potter signed a written statement that he had been so advised.

A recent Supreme Court decision, *Kuhlmann v. Wilson*, 477 U.S. 436, 91 L. Ed. 2d 364 (1986), is controlling here. In that case, the defendant was convicted of common law murder and robbery of a dispatcher of a taxi company. *Id.* at 441, 91 L. Ed. 2d at 372. The police needed information on the identity of the defendant's confederates in the crime. *Id.* at 439, 91 L. Ed. 2d at 372. The defendant was purposely placed in a cell with Benny Lee who had, unbeknownst to the defendant, previously agreed to serve as an informant to the police. *Id.* at 439, 91 L. Ed. 2d at 371. The police told Lee not to ask questions but to simply "keep his ears open." *Id.* at 439, 91 L. Ed. 2d at 372. The defendant admitted to Lee that he committed the murder and robbery of the dispatcher. Lee informed the police of this admission of guilt.

The defendant, after his conviction, learned that Lee was a paid informant and filed a petition for habeas corpus. The Supreme Court ultimately reviewed the case and held that the defendant's statements to Lee were admissible. *Id.* at 456, 91 L. Ed. 2d at 382. The Court stated that the defendant "must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.* at 459, 91 L. Ed. 2d at 384-85. The state trial court had found that Lee only listened to the defendant and did not ask any questions of him. The state trial court concluded, and

the Supreme Court of the United States agreed, that Lee did not deliberately elicit the defendant's incriminating statements. *Id.* at 460-61, 91 L. Ed. 2d at 385.

In the present case, all evidence tended to show that Potter was not an agent of the State. No evidence was presented that Potter was deliberately placed in the cell with the defendant in order to obtain information from him. Potter approached the police first. The police had made no previous agreement with Potter to obtain information, and Potter had received no payment or promise of payment for supplying information. The police told Potter that they could make no deals in exchange for information and that Potter was not an agent of the State. In addition, Potter's testimony during the hearing on the motion to suppress tended to show that the defendant voluntarily made all of the statements to Potter.

"Findings of fact concerning the admissibility of a confession are conclusive and binding if supported by competent evidence." *State v. Nations*, 319 N.C. 318, 325, 354 S.E.2d 510, 514 (1987). The evidence presented supported the trial court's findings of fact which in turn supported the trial court's conclusions of law, including its conclusion that Potter was not an agent of the state. No evidence supporting contrary findings or conclusions of law was presented. We therefore conclude that under the principles stated and applied in *Massiah*, *Henry*, and *Kuhlmann*, the trial court did not err in concluding that Potter was not an agent of the State and that the statements made by the defendant to his cellmate were not obtained in violation of the defendant's rights under the Sixth Amendment.

[2] The defendant also argues that his statements to Potter were obtained in violation of his rights under the Fifth Amendment of the Constitution of the United States. According to the defendant, the statement was obtained in violation of his rights as set forth in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 294 (1966). The defendant contends he could not voluntarily waive his rights because he did not know Potter was a police informant.

We reject the defendant's arguments. As previously stated, we conclude that Potter was not an agent of the State. Therefore, the protections of the Fifth Amendment are not implicated, because there was no action by a law enforcement officer or other individual acting on the State's behalf. *See Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d

984 (1981); *State v. Nations*, 319 N.C. 329, 331, 354 S.E.2d 516, 518 (1987).

Furthermore, no interrogation of the defendant was involved. The trial court found and concluded that the defendant voluntarily spoke to Potter in their cell and that they "engaged in conversation during which time they discussed why they were incarcerated." In *Edwards*, the Supreme Court concluded that if the defendant initiated the conversation, then the defendant's rights under the Fifth Amendment were not implicated. 451 U.S. at 486, 68 L. Ed. 2d at 387. The defendant in the present case initiated the conversations with Potter; therefore, no interrogation occurred. The defendant's rights under the Fifth Amendment in the present case were neither implicated nor violated.

[3] The defendant also argues under this assignment of error that the State failed to produce the defendant's statements to Potter within the time frame required by N.C.G.S. § 15A-903. The defendant has not pointed out anything in the record in this case indicating when the District Attorney received or was made aware of the statements. The defendant also has failed to show that he brought this alleged violation of the discovery statute in question to the trial court's attention or sought sanctions because of the State's alleged violation.

A major purpose of the discovery procedures of Chapter 15A is "to protect the defendant from unfair surprise." *State v. Alston*, 307 N.C. 321, 330, 298 S.E.2d 631, 639 (1983). When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion. *Id.* at 331, 298 S.E.2d at 639. This assignment is overruled.

[4] The defendant argues in his next assignment of error that the trial court erred by denying his motion to suppress an inculpatory statement he made to another prisoner, Mark Pearce. The defendant argues that his statement to Pearce was obtained in violation of his rights under the Fifth and Sixth Amendments.

After hearing evidence, the trial court found and concluded that on 2 October 1989 the defendant admitted to Pearce that he committed the three murders. After the conversation with the defendant, Pearce asked to speak to an investigating officer. S.B.I. Agent Kenneth Moser was called to interview Pearce. Pearce

repeated the contents of the conversation to Moser. Moser advised Pearce that he had no authority to make any deals and that Pearce was not working for any law enforcement agency. The trial court, in an Order dated 13 August 1990, signed *nunc pro tunc* 18 September 1990, found that Pearce had no prior knowledge of the defendant's crimes and no prior contact with law enforcement officials. The trial court concluded that Pearce was not an agent of the State and that his testimony as to the defendant's statement to him did not violate the defendant's state or federal constitutional rights.

For reasons similar to those we have given in dealing with the defendant's statements to Potter, we conclude that the trial court did not err in denying the defendant's motion to suppress his statement to Pearce. This assignment is overruled.

The defendant next assigns as error the trial court's admission of the testimony of Ed Barnett regarding the statements made to him by Marion Meetze, one of the victims. The following examination occurred during trial:

> Q. [Assistant District Attorney]: Did you have a conversation with Mr. Meetze before he left work on that Wednesday?
>
> A. [Ed Barnett] Before I left, I did, yes.
>
> Q. What time did you leave?
>
> A. I normally left around 6:00 in the afternoon.
>
> Q. And what conversation did you have with him before he left work, or before you left work, that day?
>
> Mr. Ramos [Defendant's counsel]: Objection.
>
> The Court: Overruled.
>
> A. We, of course, normally talked about what was going on at work, and he had asked me to be off on Thursday and which I told him, fine.
>
> Q. Did he give you an explanation of why he wanted to be off Thursday?
>
> Mr. Ramos: Objection.
>
> The Court: Overruled.
>
> A. Yes, sir, he said that the Taylor guy was coming to pay him the money, and he and Ginger had found a boat for [$]600

> or $650 they were going to buy on Thursday, and he wanted the day off because Ginger was supposed to go back to Greenville on Friday. Her mother was going to have some kind of minor surgery, so she was going to be gone, so he wanted the day off Thursday to go buy this boat.

[5] The defendant argues that this testimony was inadmissible hearsay not within any exception and, furthermore, its admission was extremely prejudicial to him because it was the only evidence from a disinterested witness that placed the defendant at the scene at the time of the murders. We conclude that this testimony was hearsay, but that it was admissible under Rule 803(3) of the North Carolina Rules of Evidence. Rule 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

N.C.G.S. § 8C-1, Rule 803 (1988).

We conclude that the victim's statement to Barnett falls within the exception described in Rule of Evidence 803(3). When explaining the reasons for asking for time off, Marion Meetze told Ed Barnett that he planned to meet the defendant and then buy a boat. The victim stated his then-existing intent and plan to engage in a future act; he was going to meet the defendant for a particular reason. *See State v. McElrath*, 322 N.C. 1, 19, 366 S.E.2d 442, 452 (1988). We thus conclude that the trial court ruled correctly in overruling the defendant's objection to this testimony.

The defendant also argues under this assignment that the victim's statement was not close enough in time to the actual future event to be admissible under this exception to the hearsay rule. Rule 803(3) does not contain a requirement that the declarant's statement must be closely related in time to the future act intended. N.C.G.S. § 8C-1, Rule 803(3) (1988). A review of the cases interpreting Rule 803(3) does not reveal that any such requirement has been read into the statute by this Court. *See, e.g., State v.*

Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990); *State v. McElrath*, 322 N.C. 1, 19, 366 S.E.2d 442, 452 (1988). We conclude that the statement by the victim Marion Meetze to Ed Barnett was sufficiently close in time to the occurrence of the intended future act—meeting the defendant—to be relevant under Rule 401 and that no more was required in this regard. N.C.G.S. § 8C-1, Rule 401 (1988). The defendant also contends that this testimony was "extremely prejudicial." Although it is not entirely clear, we assume he is arguing that the admission of Barnett's testimony was unfairly prejudicial under Rule 403. Exclusion of evidence under Rule 403 is within the sound discretion of the trial court. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 434 (1986). The defendant has shown no abuse of discretion and we find none. This assignment of error is without merit.

[6] The defendant next assigns as error the trial court's exclusion of testimony of James Register, a coworker of Marion Meetze, regarding statements the victim Marion Meetze made to him. Register testified that in the summer of 1988 an unidentified black man met with Meetze at work. Meetze appeared to be upset after this meeting. Defense counsel asked Register what Marion Meetze said after the meetings. The trial court sustained the State's objections to these questions. The defendant proffered the substance of Register's testimony on *voir dire*. Register on *voir dire* testified that Meetze stated he and the stranger had discussed the sale of a gun shop in South Carolina.

The defendant without elaboration argues that this testimony was admissible under the *McElrath* standard. The defendant appears to argue that the statement falls within the Rule 803(3) exception to the hearsay rule and is also relevant to show that someone other than the defendant had a motive to kill Marion Meetze.

We conclude that the statement by Meetze to Register does not fall within the Rule 803(3) exception to the hearsay rule and that the trial court did not err by sustaining the State's objections to this testimony. The statement was clearly hearsay as it was offered to prove that someone other than the defendant purchased a gun shop in South Carolina from Meetze. The statement was not a statement of future intent of the declarant Meetze as required by Rule 803(3), but rather was a statement of his memory of a past act offered to prove the fact remembered. *See State v. McElrath*, 322 N.C. 1, 19, 366 S.E.2d 442, 452 (1988). Therefore, it was not

admissible. *Id.*; N.C.G.S. § 8C-1, Rule 803(3) (1988). This assignment is overruled.

The defendant next assigns as error the trial court's action in admitting into evidence a projectile removed from Michelle Arnold's body and testimony regarding the autopsies of the three victims. The defendant argues that the State failed to establish an adequate chain of custody, either for the projectile or for the bodies of the three victims. We conclude that the trial court did not err in admitting the projectile as real evidence or admitting testimony relating to the autopsies of the bodies.

[7] The defendant argues that Detective Gary Shay who saw the three bodies at the scene of the murders and who was present during the autopsies never identified the bodies autopsied as the same ones recovered at the scene. The defendant also contends there was no evidence that the three bodies were in the same condition when autopsied as when they were found at the scene or that they were even the same bodies.

In resolving this issue, we apply the following legal principles:

> This Court has stated that a two-pronged test must be satisfied before real evidence is properly received into evidence. The item offered must be identified as being the same object involved in the incident and it must be shown that the object has undergone no material change. *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510, *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137, *reh'g denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed.2d 1181 (1980). The trial court possesses and must exercise sound discretion in determining the standard of certainty that is required to show that an object offered is the same as the object involved in the incident and is in an unchanged condition. *Id.* A detailed chain of custody need be established only when the evidence offered is not readily identifiable or is susceptible to alteration and there is reason to believe that it may have been altered. *See State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *review denied*, 307 N.C. 471, 298 S.E.2d 694 (1983). Further, any weak links in a chain of custody relate only to the weight to be given evidence and not to its admissibility. *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976). *See also State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983).

State v. Campbell, 311 N.C. 386, 388-89, 317 S.E.2d 391, 392 (1984). Applying these principles, we conclude that the State established an adequate chain of custody for the three bodies. Detective Gary Shay testified that he observed the three bodies at the scene. He photographed the bodies and was then present at the autopsy of each victim. Detective Shay identified the clothes on the bodies as the same as the ones on the bodies at the scene. The State clearly established a chain of custody for the bodies. Furthermore, any weak link in the chain of custody goes to the weight of the evidence, not its admissibility. *Id.*

[8] The defendant contends that there was a break in the chain of custody of the projectile taken from Michelle Arnold's body. According to the defendant, S.B.I. Agent Diane Brown never testified that she received the projectile back from testing before she returned it to Detective Shay. Citing no authority, the defendant argues that the admission of the projectile as real evidence was error.

The State presented evidence that clearly identified the projectile tested as being the same .357 caliber projectile taken from Michelle Arnold's body and as being in the same condition as when retrieved. The medical examiner removed the projectile from Michelle Arnold's body during the autopsy. He described the projectile as a "distorted, large-caliber bullet." The medical examiner identified the projectile at trial as the one he removed from Michelle Arnold's body and noted the identification card he had signed that was attached. Because of the noticeable distortion of the projectile, witnesses who handled it were able to and did identify it on the basis of this unique characteristic. A review of the record and transcript reveals testimony of several witnesses which established a clear chain of custody of the projectile. Each person handling the projectile testified that he had custody of the bullet and it was not altered in any way. Again, we note that any weak link goes to the credibility of the evidence, not its admissibility. *Campbell*, 311 N.C. at 389, 317 S.E.2d at 392. The defendant's assignment of error is without merit.

[9] The defendant next assigns as error the trial court's denial of his motion for separate juries during his trial and capital sentencing proceeding on the ground that, even though he received a life sentence, a "death qualified" jury is more likely to convict. As a result, he argues he was denied due process. The State first points out that there is no record of the trial court's disposition

of the defendant's motion. We are unable to review the trial court's action if the action is not reflected in the record on appeal. N.C. App. R. 9(b)(3); *State v. Williams*, 304 N.C. 394, 415, 284 S.E.2d 437, 451 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). We have, in any event, frequently held that the "death qualification" of a jury does not violate the defendant's rights under the Constitution of the United States or the Constitution of North Carolina. *E.g., State v. Barts*, 316 N.C. 666, 678, 343 S.E.2d 828, 836 (1986) *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Oliver*, 309 N.C. 326, 337, 307 S.E.2d 304, 313 (1983). The defendant concedes that we have often rejected the argument that a "death qualified" jury is more likely to convict the defendant. *State v. Reese*, 319 N.C. 110, 119, 353 S.E.2d 352, 358 (1987); *State v. Rogers*, 316 N.C. 203, 214-15, 341 S.E.2d 713, 722 (1986); *State v. Cherry*, 298 N.C. 86, 104, 257 S.E.2d 551, 563 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). We continue to adhere to our prior holdings. This assignment is without merit.

[10] The defendant next assigns as error the trial court's refusal to allow him to rehabilitate prospective jurors who stated that their personal or religious beliefs on the death penalty would impair their ability to serve as jurors in a capital trial. The Supreme Court of the United States has held that the proper standard for determining whether a juror is qualified is whether the juror's views would " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting from *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The manner and extent of inquiry on *voir dire* is within the trial court's discretion. *State v. Reese*, 319 N.C. 110, 120, 353 S.E.2d 352, 358 (1987). We have held:

> 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.

State v. Oliver, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981) (citations omitted), *quoted in Reese*, 319 N.C. at 120-121, 353 S.E.2d at 358.

We have carefully examined the answers given by those jurors the defendant claims might have been rehabilitated. The defendant made no showing that additional questioning would have resulted in different answers from those jurors and, thus, has failed to show an abuse of discretion by the trial court in denying his motion to rehabilitate the excused jurors.

[11] The defendant, citing no authority, next assigns as error the trial court's failure to state in the record its reasons for sentencing the defendant to three consecutive life sentences rather than concurrent sentences. The defendant argues that the Fair Sentencing Act, N.C.G.S. §§ 15A-1340.1—1340.7, requires the trial court to support its sentence with findings of fact related to aggravating and mitigating factors. The Fair Sentencing Act is inapplicable here. The defendant was sentenced under N.C.G.S. § 15A-2000 for convictions of three counts of first-degree murder, not under the Fair Sentencing Act.

The judgment of a court is presumed valid and just. *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983) (*citing State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 130 (1962)).

> "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play."

Id. at 598, 300 S.E.2d at 697 (*quoting Pope*, 257 N.C. at 335, 126 S.E.2d at 130).

N.C.G.S. § 15A-1354 grants the trial court discretion to sentence a defendant convicted of multiple offenses to consecutive terms. N.C.G.S. § 15A-1354(a) provides:

> Authority of the Court—When multiple sentences of imprisonment are imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

N.C.G.S. § 15A-1354(a) (1988). The trial court had the discretion to impose consecutive sentences for multiple offenses. *See State*

v. Johnson, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987). The defendant in the present case was convicted of three counts of first-degree murder. The jury recommended sentences of life imprisonment after finding and weighing the mitigating circumstances and aggravating circumstances. The defendant has not shown and we do not find an abuse of discretion by the trial court in sentencing the defendant to serve consecutive life sentences. This assignment of error is without merit.

The defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES CALVIN BERNARD MILLS

No. 392PA91

(Filed 4 September 1992)

1. Indigent Persons § 19 (NCI4th)— motion for funds to hire experts—failure to show particularized need

The trial court did not err in denying the pretrial motion of a defendant charged with first degree murder for funds to employ experts in the fields of psychiatry or psychology, forensic serology, DNA identification testing, forensic chemistry, genetics, metallurgy, pathology, private investigation and canine tracking where defendant failed in his motion to make a showing of particularized necessity for the appointment of experts.

Am Jur 2d, Criminal Law §§ 771, 1006.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19; Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis. 74 ALR4th 388.

2. Indigent Persons § 24 (NCI4th)— pretrial motion for appointment of DNA expert—failure to show particularized need—failure to renew motion at trial

Defendant's assertion in his pretrial motion that he was in need of an expert in DNA testing "so that he may adequate-

ly prepare for introduction of such evidence, if any, at trial" was insufficient to demonstrate a particularized need for the appointment of an expert in DNA testing. Furthermore, the trial court did not err in denying defendant's motion for the appointment of a DNA expert because a need for such an expert became evident when the State introduced DNA evidence at trial where defendant did not renew his motion for appointment of a DNA expert or call to the court's attention specific circumstances showing a particularized need.

Am Jur 2d, Criminal Law §§ 771, 1006.

Right of indigent defendant in state criminal case to assistance of psychiatrist or psychologist. 85 ALR4th 19; Right of indigent defendant in state criminal case to assistance of chemist, toxicologist, technician, narcotics expert, or similar nonmedical specialist in substance analysis. 74 ALR4th 388.

3. Criminal Law § 113 (NCI4th)— discovery—late furnishing of lab reports—no bad faith by State—dismissal of charges refused

The trial court did not abuse its discretion by denying defendant's motion to dismiss for failure of the State to comply with discovery procedures because laboratory reports were furnished by the district attorney's office to defendant after the commencement of the trial where the evidence supported the trial court's findings that the long time lapse between the submission of items to the S.B.I. laboratory and the receipt of its analysts' reports by the district attorney resulted from an unavoidable turnover in S.B.I. personnel rather than from any bad faith on the part of the State, and that there was no inexcusable delay by the district attorney in delivering the lab reports in a timely fashion after he received them.

Am Jur 2d, Depositions and Discovery §§ 427, 449.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR4th 105.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

4. Criminal Law § 113 (NCI4th)— discovery—evidence not contained in report—offer of mistrial rather than dismissal

The trial court did not abuse its discretion by offering to grant a mistrial rather than a dismissal of the charges against defendant for failure of the State to comply with discovery requirements when information not contained in a serologist's report furnished to defendant—that luminol sprayed in a bathroom cabinet of defendant's trailer produced a positive reaction for blood—was introduced into evidence where the trial court concluded that this evidence was merely corroborative of other evidence; the trial court admonished the prosecutor to screen any further scientific evidence to ensure that it comported with discovery disclosures made to the defense; and the trial court found that the State did not act in bad faith during discovery. The trial court's admonition to the prosecutor and offer of a mistrial to defendant were proper exercises of discretion supported by reason.

Am Jur 2d, Depositions and Discovery §§ 427, 449.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence or the like—modern cases. 27 ALR4th 105.

Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction. 34 ALR3d 16.

5. Evidence and Witnesses § 2923 (NCI4th)— direct examination of own witness—impeachment by prior charges not permitted

A defendant charged with murder could not call the victim's husband as a defense witness and then attempt to impeach him by inquiring into prior charges or indictments against the husband for killing his first wife and shooting his second wife since a party is not free on direct examination to impeach his witness by evidence of specific acts or prior convictions. N.C.G.S. § 8C-1, Rules 608, 609.

Am Jur 2d, Witnesses §§ 978-984.

6. Evidence and Witnesses § 295 (NCI4th)— murder victim's husband—crimes against previous wives—inadmissibility

Evidence that a murder victim's husband had committed crimes against his previous wives was inadmissible if its only

purpose was to prove his character in order to show that he acted in conformity therewith by killing the victim. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Witnesses § 895.

7. **Evidence and Witnesses § 113 (NCI4th)— alternative theory of murderer's identity—prior charges against victim's husband—inadmissibility**

In a prosecution for first degree murder, defendant's proposed questioning of the victim's husband about prior charges and indictments against the husband for killing his first wife and shooting his second wife was not admissible under the holding of *State v. McElrath*, 322 N.C. 1 (1988), to support an alternative theory as to the murderer's identity where defendant presented no other evidence tending to support the alternative theory that the husband killed the victim even though the trial court determined that some of the evidence proffered by defendant for this purpose on voir dire was probably competent.

Am Jur 2d, Evidence § 441.

8. **Evidence and Witnesses § 1486 (NCI4th)— identification of knife—sufficient foundation**

A sufficient foundation was presented for a witness to identify the alleged murder weapon, a knife, as belonging to defendant where the witness, before being shown the knife at trial, had already testified in detail as to the appearance of defendant's knife prior to and on the day of the murder and that he had compared the knife with his own.

Am Jur 2d, Evidence § 774.

APPEAL by defendant as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by *Albright, J.*, at the 27 February 1989 Criminal Session of Superior Court, ROWAN County, upon a verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 12 May 1992.

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

David Y. Bingham for defendant-appellant.

FRYE, Justice.

Defendant, James Calvin Bernard Mills, was indicted on one count of first-degree murder by a Rowan County grand jury. Defendant was tried capitally to a jury, which returned a verdict of guilty of murder in the first degree on the basis of malice, premeditation and deliberation. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment, and the trial judge imposed judgment accordingly. Defendant gave notice of appeal to this Court on 29 March 1989. The record on appeal was not timely filed; however, on 2 October 1991 we allowed defendant's petition for writ of certiorari in order to permit a direct appeal of his murder conviction.

Defendant brings forward several assignments of error. After a thorough review of the record, we conclude that defendant received a fair trial, free of prejudicial error.

I.

The State presented evidence tending to show the following facts and circumstances. On 19 April 1987, the body of Carolyn Odessa Mills was found in her apartment at Number 53 Weant Street Apartments, East Spencer, North Carolina. The victim had multiple stab wounds to the body. Dr. Cheryl Thorn, a forensic pathologist, testified that, in her opinion, the cause of death was exsanguination, the loss of blood.

Prior to her death, the victim had been living with her husband, James E. "Speedy" Mills, and her son, Leroy Thomas, in Apartment Number 54 on Weant Street. A few days before the murder, the family moved to Number 53 because Number 54 was being remodeled. The day before her murder, the victim was the only one who had keys to Number 53. That day, when Thomas returned to Number 53, he could not get into the apartment. He walked to the nearby mobile home of defendant, Bernard Mills, son of the victim's husband, Speedy Mills. Defendant said that he had a key which fit Number 53, but when they returned to the apartment, the key would not unlock the door. Defendant then retrieved a green knife, and cut a hole in the screen door. He and Thomas eventually pried the door open. At trial, Thomas described defendant's knife as having a green handle with a circular emblem of an animal in the middle. Thomas testified that while

they were trying to get into the apartment, he compared his own knife to that of defendant, and they were very similar in size.

On the morning of 19 April, Thomas received a message from Speedy Mills that he could not get into Number 53. Thomas asked the maintenance supervisor to let them into the apartment. Upon entering the apartment, Thomas went into the kitchen and saw blood everywhere. When he looked around the corner, he saw his mother's body on its back in the living room, and "got out of there." He observed that his mother was wearing a negligee and that she had a bad wound to her neck. Speedy said, "Oh, God, my wife is dead." Thomas then went to defendant's mobile home to tell him what had happened. Defendant and Thomas returned to Number 53 and stood outside. While outside, Thomas asked defendant if he could borrow defendant's knife to scrape something from the windshield of his car. Defendant replied that his knife was in his trailer.

Detective T. A. Swing of the Rowan County Sheriff's Department photographed the crime scene and the body and collected physical evidence. Two of the victim's fingertips had been cut off and were found in the kitchen. Detective Swing testified that in addition to the blood in the apartment, a green-handled knife was pointed out to him by Max Bryant, Area Supervisor of the State Bureau of Investigation (S.B.I.), in the wooded area behind Number 53. The blade was dull and bloody, and the tip of the knife was missing. Detective Swing used a diagram and an aerial photograph to illustrate the relatively close location of Number 53 to defendant's mobile home. Detective Swing testified that during a search of defendant's mobile home on 21 April, he discovered two pairs of socks—a black nylon pair and a gray athletic pair—as well as a pair of white athletic shoes. The gray socks had a reddish-brown stain in the area where the ball of the foot would be. On 28 April, pursuant to a search warrant, blood, head hair, and pubic hair were taken from defendant and submitted to the S.B.I. laboratory.

Sandra Walker, defendant's ex-girlfriend, testified that on the night of 18 April, she saw defendant leaving Weant Street between 9 and 10 p.m. They acknowledged each other in passing.

Eric Mitchell, a friend of defendant, testified that they were together drinking alcohol the evening of 18 April. At the time, defendant had his lock-blade pocketknife with him. Mitchell testified that defendant said that the victim was the cause of his and Sandra

Walker's breakup. Mitchell testified that a few days later defendant told him that the police wanted to speak to Mitchell and that if he were asked about a knife, he was to tell them that he, Mitchell, had asked defendant for a knife on the night of the murder, but defendant did not have one. Mitchell identified the knife at trial but observed that the blade had a point when he saw it earlier.

Benita Chalk testified that about 2 a.m. on 19 April, defendant, who wanted to date her, knocked on her door and awakened her. After fifteen or twenty minutes, she still would not let him in. Defendant left, walking in the direction of Number 53 and in the opposite direction from his mobile home.

S.B.I. Agent D.J. Spittle, of the Serology Unit, testified that he had received a number of blood samples from items taken from defendant's apartment, including shoes, socks, and fibers taken from the carpet, couch, and walls. The victim's blood type was B; defendant's blood type was A. The blood taken from the knife was type B. The blood on the athletic socks was consistent with the victim's blood and could not have come from defendant, unlike the blood on the tennis shoes.

S.B.I. Special Agent Troy Hamlin, an expert in the fields of hair examination and comparison and physical match comparison, testified that he had examined the knife, and the victim's bandana, gown and robe and compared the hairs thereon to her known head hair. The hairs were microscopically consistent. Agent Hamlin also testified that he had compared the knife tip embedded in the victim's skull with the knife alleged to be defendant's, and that in his opinion, the tip was an exact match to the missing portion of the knife blade.

Dr. George Herrin, staff scientist at Cellmark Diagnostics, explained the process of Deoxyribonucleic acid (DNA) identification testing to the jury. Dr. Wesley Kloos, professor of genetics and microbiology at North Carolina State University, testified that he was familiar with the techniques that Dr. Herrin had discussed and that such techniques were widely accepted in the medical community.

Karen Rubenstein, a molecular biologist with Cellmark Diagnostics, was accepted as an expert in DNA identification testing. She testified that from her analysis of defendant's socks and the

victim's bandana, the blood found on both originated from the same person.

S.B.I. Special Agent Bill Lane testified that during an interview with defendant after defendant's arrest, defendant stated that on the night that the victim was killed he was "super intoxicated," and did not remember anything until Leroy Thomas knocked on the door the next morning. Defendant stated that he could have, or could not have, killed the victim. On cross-examination, Special Agent Lane admitted that defendant consistently denied killing the victim.

Defendant testified in his own behalf. He testified that after he left Benita Chalk's apartment, he returned to his trailer. He undressed and went to bed. He was awakened by Leroy Thomas, with news that Thomas' mother had been killed. Defendant testified that he kept his knife in a white bucket in his trailer, so when Thomas asked to use his knife to scrape something from his windshield, he told him it was in the trailer. When he returned to his mobile home to get the knife, it was missing. Defendant denied that the socks introduced into evidence were his. He also denied that the knife introduced into evidence as the murder weapon was his. He stated that he had never admitted to anyone that he could have killed the victim.

II.

[1] Defendant first contends that the trial court committed reversible error by denying his pretrial motion for appointment of experts. Defendant filed a Motion for the Appointment of Experts seeking funds to employ experts in the fields of psychiatry or psychology, forensic serology, DNA identification testing, forensic chemistry, statistics, genetics, metallurgy, pathology, private investigation, and canine tracking. The trial court entered an order denying defendant's motion on the ground that defendant had failed to demonstrate a sufficient particularized need for such experts, concluding that "[d]efendant's request as presented amounted to little more than a highly fanciful 'wish list.' " The State argues that the trial court properly exercised its discretion in denying defendant's motion on the grounds that defendant failed to show the availability of any of the ten or more experts he requested, he failed to present any reasonable assessment of the costs involved, and he failed to make a threshold showing in his motion for the appointment of experts. We agree with the trial court

and the State that defendant, in his pretrial motion, failed to make a showing of particularized necessity for the appointment of experts.

The statutory and common law principles governing the appointment of an expert witness for an indigent defendant are well settled. N.C.G.S. § 7A-450(b) provides in relevant part:

> (b) Whenever a person, under the standards and procedures set out in this Subchapter, is determined to be an indigent person entitled to counsel, it is the responsibility of the State to provide him with counsel and the other necessary expenses of representation.

N.C.G.S. § 7A-450(b) (1986). Section 7A-454 provides:

> The court, in its discretion, may approve a fee for the service of an expert witness who testifies for an indigent person, and shall approve reimbursement for the necessary expenses of counsel. Fees and expenses accrued under this section shall be paid by the State.

N.C.G.S. § 7A-454 (1986).

An indigent defendant must demonstrate that the matter subject to expert testimony is " 'likely to be a significant factor' " at trial. *State v. Moore*, 321 N.C. 327, 344, 364 S.E.2d 648, 657 (1988) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 82, 84 L. Ed. 2d 53, 60 (1985)). A defendant satisfies this burden by demonstrating that the assistance of an expert would materially assist him in the preparation of his defense, or that the denial of this assistance would deprive him of a fair trial. *State v. Parks*, 331 N.C. 649, 658, 417 S.E.2d 467, 472 (1992). " 'Mere hope or suspicion that favorable evidence is available is not enough to require that such help be provided.' " *Id.* (quoting *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)). This "particularized showing demanded by our cases is a flexible one and must be determined on a case-by-case basis." *Id.* The determination of whether a defendant has made an adequate showing of particularized necessity lies within the discretion of the trial judge. *State v. Watson*, 310 N.C. 384, 390, 312 S.E.2d 448, 453 (1984). In determining whether the defendant has made the requisite showing, the court " 'should consider all the facts and circumstances known to it at the time the motion for [expert] assistance is made.' " *Parks*, 331 N.C. at 656, 417

S.E. 2d at 471 (quoting *State v. Moore*, 321 N.C. at 335-36, 364 S.E.2d at 652) (citation omitted).

[2] In his brief and during oral argument, defendant placed emphasis upon the trial court's denial of his motion to appoint a DNA expert. Because we believe defendant's argument that a DNA expert should have been appointed is his strongest argument, we focus our attention on the DNA expert as well. In support of his request for the appointment of a DNA expert, defendant set forth the following in his motion:

> Defendant is informed and believes, and therefore alleges, after timely discovery by the State of North Carolina, that the State intends to submit the sock mentioned supra for special examination, to wit for DNA identification. This is a process of which Defendant has as yet been unable to discuss because of, at least, the novelty of the process. Defendant is in need of an expert in Deoxyribonucleic Acid Identification Testing so that he may adequately prepare for introduction of such evidence, if any, at trial.

In support of *each* of the ten experts requested, defendant presented the following in his motion:

> If Defendant is not provided with the assistance that he requests, he will be denied equal protection of the law and due process in violation of the Fourteenth Amendment on [sic] the Constitution. The services of each of the above experts is necessary to enable the Defendant to prepare effectively for trial, evidence on his own behalf, and to cross-examine the State's expert witnesses. The evidence which will be the subject of expert opinion it [sic] critical to a determination of which penalty is appropriate. In addition, the analyses which will be performed by the experts will entail subjective opinion about which experts may disagree. Without expert assistance, the Defendant has no means available to review such evidence, and determine the reliability, or lack thereof, of any analyses performed, or to present evidence in his own behalf. Thus, denial of expert assistance in the circumstances presented here will deprive the Defendant of his right to present a defense, his right to the effective assistance of counsel and his right to present mitigating evidence will be abridged in violation of the Eighth and Fourteenth Amendments to the Constitution and Defendant's rights under the procedures set forth in

N.C.G.S. 15A-2000, *et seq.*, especially as it applies to the presentence hearing.

Defendant now argues that "given the new field of study, the fact that this Court had not even ruled on the admissibility of DNA evidence at the time of . . . trial[1], and the importance of the expert testimony to the State's case[,]" he did make a sufficiently particularized showing of need, and that the trial court's denial of his motion deprived him of a fair trial. We disagree.

In his motion seeking the appointment of an expert in DNA identification testing, defendant asserted that he was "in need of an expert in Deoxyribonucleic Acid Identification Testing so that he may adequately prepare for introduction of such evidence, *if any*, at trial." (Emphasis added.) As quoted above, this reasoning was essentially the same reasoning given by defendant in support of his motion for appointment of all of the experts. While defendant did show that appointment of the experts might help him in general at trial, he did not do so with the degree of particularity required under other cases deciding this issue. *E.g.*, *Parks*, 331 N.C. 649, 653, 417 S.E.2d 467, 472 (error for trial court to deny motion for appointment of a psychiatrist where specific "facts and circumstances" demonstrating need were before the court at time of the motion). To the contrary, defendant's showing demonstrates no more than a general desire to have an expert assist him in some vague manner in the event that DNA evidence might be introduced at trial. Such a showing is insufficient. *See Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1, 86 L. Ed. 2d 231, 236 n.1 (1985) ("undeveloped assertions that the requested assistance would be beneficial" insufficient); *State v. Hickey*, 317 N.C. 457, 469, 346 S.E.2d 646, 654 (1986) (mere general desire to discover evidence which might be used for impeachment purposes does not satisfy the requirement that a defendant demonstrate a threshold showing of need); *State v. Johnson*, 317 N.C. 193, 199, 344 S.E.2d 775, 779 (1986) (mere assertion that expert was needed to analyze all available information and to possibly testify on the defendant's behalf insufficient showing of particularized need in absence of specific facts). We hold, therefore, that at the time the motion was made, the facts

1. In *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990), decided after defendant's trial, this Court held that DNA evidence was admissible at trial as a new scientific method of proof because its reliability had been established by expert testimony.

and circumstances known to the trial court did not amount to a threshold showing of particularized necessity. *See Ake*, 470 U.S. 68, 84 L. Ed. 2d 53; *Parks*, 331 N.C. 649, 417 S.E.2d 467; *Moore*, 321 N.C. 327, 364 S.E.2d 648.

Notwithstanding any failure to show a particularized need at the time of his motion for the DNA expert, defendant, at oral argument, contended that such need became evident during the course of the trial. However, defendant did not renew his motion for appointment of a DNA expert, nor did he call to the court's attention specific circumstances showing a particularized need. We hold, therefore, that the trial court did not err in denying defendant's motion.

[3] In his next argument, defendant contends that the trial court committed reversible error by denying his motion to dismiss for failure of the State to comply with discovery procedures in violation of his constitutional and statutory rights. Defendant argues that the receipt of two reports after the commencement of trial on 27 February 1989 resulted in his prejudice: 1) On the afternoon of the first day of trial, defendant was provided with a laboratory report concerning results of tests performed on the alleged murder weapon; and 2) on 2 March 1989, defendant was provided with a laboratory report pertaining to latent lifts and fingerprints, the crime scene search, and the murder weapon. Defendant also contends that a third report, that of serologist Agent D.J. Spittle, although received before trial, was provided to him several months after the assistant district attorney received it and that information different from that contained in the report was allowed into evidence, all to his prejudice.

The State contends that there is no showing of bad faith on its part and no showing of dilatory action in the transmission of the laboratory reports from the district attorney's office to the defense. The State further argues that sanctions for violating discovery rules are within the discretion of the trial judge and will not be disturbed absent a showing of an abuse of discretion. We agree with the State and hold that the trial court did not abuse its discretion in denying defendant's motion to dismiss.

This Court discussed the principles regarding discovery procedures in the recent case of *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805 (1991):

> The purpose of these procedures is to protect the defendant from unfair surprise. *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, --- U.S. ---, 112 L. Ed. 2d 1062 (1991); *State v. Alston*, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983). Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions addressed to the sound discretion of the trial court. *State v. Weeks*, 322 N.C. 152, 171, 367 S.E.2d 895, 906 (1988). "[T]he discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the State in its noncompliance with the discovery requirements." *State v. McClintick*, 315 N.C. 649, 662, 340 S.E.2d 41, 49 (1986). "The choice of which sanctions to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion." *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986).

Tucker, 329 N.C. at 716-17, 407 S.E.2d at 809-10; *see also* N.C.G.S. § 15A, Article 48 (1988).

In the instant case, the trial court made the following relevant findings of fact:

> (3) The long delay between the analysis and the formal preparation of the report is attributable to a personnel crisis in the SBI laboratory. Indeed, the laboratory has been plagued by an inordinately high turnover of qualified lab personnel. During the period in question, 6 out of 10 experts left the employ of State Bureau of Investigation for better paying jobs. The efficiency of the lab has been seriously hampered by this regrettable situation.
>
> . . . .
>
> (8) There has been no inexcusable delay by the District Attorney in delivering the lab reports in a timely fashion after he received the same. On March 8, 1988, the Court was in recess throughout the entire day, and at the direction of the Assistant District Attorney, agents Leonard, Duncan and Hamlin talked with counsel for the defendant and were interviewed by him with respect to the particulars of the results of their analysis and examination of latent lifts from the crime scene and physical evidence submitted for examination to determine

the presence of latent lifts, if any, and all resulting comparisons therefrom.

. . . .

(10) While this Court cannot put its stamp of approval upon the sequence and timing of the development and transfer of scientific evidence in the case, under the totality of the circumstances, the time lag is understandable and explainable, and the Court can perceive no prejudice that has resulted to the defendant as to his ability to present his defense.

The trial court made the following conclusion of law:

[T]he inordinate delay between the submission of evidence for fingerprint examination and analysis and the delivery of lab reports to the District Attorney does not result from any intentional effort to evade discovery, nor does it result from any deliberate strategy to prevent the defendant from obtaining the results of scientific tests.

We believe that there is ample evidence to support the trial court's findings of fact which in turn support its conclusion of law. We are therefore bound by these findings. *See generally State v. Moore*, 301 N.C. 262, 267, 271 S.E.2d 242, 246 (1980) (trial court's findings of fact are binding upon an appellate court when supported by competent evidence), *overruled on other grounds* by *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 573-74 (1986).

Agent R.C. Duncan, Assistant Supervisor of the Latent Evidence Section of the S.B.I., testified on *voir dire* that because of a high rate of turnover in personnel, the S.B.I. had been seriously hampered in its ability to perform analyses and generate reports. Agent Duncan testified that in the latter part of 1987, the S.B.I. lost six of its ten examiners, who left primarily for better paying jobs elsewhere. He testified that after the turnover, the S.B.I. was left with between 800 and 1000 cases to divide between the supervisor and three examiners. We find this evidence sufficient to support the trial court's findings that the long time lapses between the submission of the items to the S.B.I. laboratory and the receipt of its analysts' reports resulted from an unavoidable turnover in personnel rather than from any bad faith on the part of the State.

[4] Defendant further contends that the trial court abused its discretion by offering to grant a mistrial rather than dismissing

the charges against him for failure of the State to comply with discovery requirements. During the course of the trial, the prosecutor called Agent Spittle, who testified that luminol had been sprayed inside the bathroom cabinet in defendant's trailer where the socks were found, and that a positive reaction resulted. Defendant objected, and outside the jury's presence, informed the trial court that this particular testimony was not contained in Agent Spittle's report. The prosecutor stated that he had not referred to the laboratory report when he briefly discussed the matter with Agent Spittle prior to his testimony, and he had simply forgotten that the bathroom cabinet was not specifically mentioned in the report. At that point, the trial court asked defendant if he wanted a mistrial, and directed defense counsel to discuss the problem privately with defendant. After continued discussion with defense counsel, the trial court concluded that since evidence had already been presented that the socks were found in the cabinet and that they were bloody, the fact that the luminol spray of the cabinet produced a positive reaction was simply corroborative evidence. Defense counsel then stated that he was not moving for a mistrial but was moving instead for dismissal of the charges against defendant. After hearing *voir dire* testimony from Agent Spittle, the trial court declared that it was not going to dismiss the charges since dismissal would be too severe, particularly in view of the preliminary nature of the evidence. The trial court did, however, admonish the prosecutor to screen any further scientific evidence to ensure that what he offered at trial comported with discovery disclosures made to the defense. Defendant now contends that "giving him the choice between a mistrial and continuing the trial was not fair. Rather, the trial [c]ourt should have dismissed the charges." We disagree.

As we said earlier, whether a party has complied with discovery is a question left to the discretion of the trial court. *State v. Weeks*, 322 N.C. at 171, 367 S.E.2d at 906. The choice of which sanction, if any, to apply for violating discovery is also a matter of discretion. *Id.* Discretionary rulings of the trial court will not be disturbed on the issue of failure to make discovery absent a showing of bad faith by the State. *State v. McClintick*, 315 N.C. at 662, 340 S.E.2d at 49. In the instant case, there was competent evidence supporting the trial court's findings and conclusions that the State did not act in bad faith during discovery. Also, the trial court's admonition to the prosecutor and offer of a mistrial to defendant

were proper exercises of discretion supported by sound reasons. For the foregoing reasons, we hold that the trial court did not abuse its discretion by denying defendant's motion to dismiss as a sanction for the State's violation of discovery procedures.

In his third argument, defendant contends that the trial court committed reversible error by excluding relevant evidence which implicated a third party as the perpetrator of the murder. Defendant argues that he should have been allowed to present evidence tending to show that defendant's father, Speedy Mills, the husband of the victim, was the actual perpetrator of the murder. Prior to trial, defendant filed a motion to "be allowed to question James E. [Speedy] Mills about convictions and charges more than ten years old." In the motion, defendant alleged that Speedy Mills had been convicted of killing his first wife and of shooting his second wife. The victim was his third wife. Defendant asserted that these facts constituted evidence of habit or routine practice and were otherwise relevant. The trial court denied the motion to the extent that defense counsel sought to question Speedy Mills about prior *charges* and *indictments* more than ten years old, but granted the motion to the extent that defense counsel sought to question Mills about *convictions* more than ten years old. We find no error.

[5, 6] The general rule regarding evidence of prior charges and indictments is that "[a]ccusations that [a witness] has committed other extrinsic crimes are generally inadmissible even if evidence that [the witness] actually committed the crimes would have been admissible." *State v. Meekins*, 326 N.C. 689, 699, 392 S.E.2d 346, 351 (1990); *see also State v. Williams*, 279 N.C. 663, 185 S.E.2d 174 (1971) (a witness may not be cross-examined as to whether he has been indicted or is under indictment for a criminal offense other than that for which he is on trial). In the instant case, not only did defendant seek to elicit information about prior charges and indictments, he sought this information from his own witness. Under the above-stated principles, this testimony would be generally inadmissible. Even if offered for impeachment purposes, such questioning is prohibited under our rules of evidence. N.C.G.S. § 8C-1, Rule 608, allows impeachment of a witness by inquiries into specific instances of conduct under limited circumstances and only on cross-examination. N.C.G.S. § 8C-1, Rule 608 (1988). Rule 609 allows inquiries into prior convictions under limited circumstances and only during "cross-examination or thereafter." N.C.G.S. § 8C-1,

Rule 609 (1988). Moreover, as Professor Brandis has noted, "it . . . remains true that the calling party is not free on direct examination to impeach his witness by evidence of specific acts or prior convictions." 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 40 (3d ed. 1988). It follows, therefore, that defendant cannot call Speedy Mills as defendant's witness and then attempt to impeach him by inquiring into prior charges or indictments against Speedy Mills. Furthermore, "[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). Accordingly, evidence that Speedy Mills had committed crimes against his previous wives was inadmissible if its only purpose was to prove his character in order to show that he acted in conformity therewith by killing his third wife.

[7] Notwithstanding these general principles, defendant contends that the proffered questioning is permissible under this Court's holding in *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988). In *McElrath*, this Court held, contrary to the trial court's ruling, that a drawing tending to support an alternative theory as to the murderer's identity was admissible, particularly since the State's evidence was totally circumstantial, and since defendant had already presented other admissible evidence tending to support his theory. *McElrath* is distinguishable from the present case in that defendant presented no other evidence tending to support an alternative theory as to the murderer's identity.

Prior to trial, defendant indicated an interest in introducing testimony that on the morning of the murder, Speedy Mills was missing from his place of employment from 12:30 a.m. to 3 a.m., that Mills had taken out a life insurance policy on his wife shortly before her death, and that Mills had shot the victim previously. During trial, after the State rested, the trial court allowed defendant to make a *voir dire* proffer of evidence. Thereafter, the trial court concluded that some of the proffered evidence was probably competent, but declared that the alternative theory of the perpetrator's identity was "in disarray." Defense counsel responded, "Yes, Your Honor." The trial judge said: "Looks at this point like that theory has fallen upon the rocks and shoals. . . ." Defense counsel then announced his desire to go forward. Ultimately, defendant never called any of the witnesses to testify as to the above evidence, even after the trial court had determined that some of the evidence was probably competent. This exchange between the

trial judge and defense counsel, coupled with defendant's decision not to call any of the witnesses presented at the *voir dire* hearing, indicates that defendant opted to forego his theory that Speedy Mills was the perpetrator of the murder. Defendant, rather than the trial judge, was responsible for defendant not introducing the evidence about which defendant now complains. Because defendant presented no evidence tending to support an alternative theory as to the murderer's identity, *McElrath* is not controlling. Accordingly, the trial court did not err in prohibiting defendant from questioning Speedy Mills about prior charges and indictments against him.

[8] Defendant's final contention is that the trial court committed reversible error by admitting the alleged murder weapon into evidence. Defendant contends that the reference to the alleged murder weapon, the knife, as belonging to defendant should have been excluded because there was no foundation or basis for this testimony. This contention is completely without merit. Before the victim's son, Leroy Thomas, was shown the knife at trial, he had already testified in detail as to the appearance of defendant's knife prior to the murder and on the day of the murder, and stated that he had even gone so far as to compare the knife with his own. This was sufficient foundation or basis for Thomas to identify the knife as belonging to defendant. *See State v. King*, 287 N.C. 645, 660, 215 S.E.2d 540, 549 (1975) (hammer "similar to" one used to hit victim sufficient identification), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976).

In defendant's trial, we find no error.

No error.

STATE OF NORTH CAROLINA v. GEORGE EDWARD PATTERSON

No. 325PA91

(Filed 4 September 1992)

1. Criminal Law § 572 (NCI4th)— armed robbery—deadlocked jury—refusal to grant mistrial—no error

The trial court did not err in an armed robbery prosecution by inquiring into the numerical division of the jury and

refusing to grant a mistrial where the jury began its deliberations at 3:57 p.m. on 24 August 1989 and deliberated until court was adjourned for the evening at 5:06 p.m.; the jury resumed its deliberations at 9:37 a.m. on 25 August 1989; the jury returned to the courtroom to view exhibits at 9:56 a.m. and resumed its deliberations at 10:27 a.m.; at 11:15 a.m., the jury sent a note to the court stating that it was unable to reach a unanimous decision; the prosecutor asked for the Allen charge and the defense counsel asked for an inquiry into the numerical division of the jury; the court made that inquiry and the jury indicated that it was divided eleven to one; the trial court then instructed the jury in accordance with N.C.G.S. § 15A-1235, emphasizing five separate times that each juror was to abide by his or her conscientious conviction as to the weight or effect of the evidence; the jury resumed its deliberations at 11:24 a.m.; the jury sent a note to the court at 11:55 a.m. stating that it was deadlocked; defendant moved for a mistrial, but the court brought the jury back, expressed its appreciation, indicated that it would be to everyone's advantage for deliberations to continue and recessed for lunch; the court repeated the Allen charge after lunch; the jury returned a verdict fifty-five minutes later; and each juror expressed assent to the verdict when polled. Any error in inquiring into the numerical division of the jury was invited, and, based upon the totality of the circumstances, neither the court's refusal to grant a mistrial nor any of its other actions were coercive of the jury's verdict.

Am Jur 2d, Trial § 1583.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury. 77 ALR3d 769.

2. Evidence and Witnesses § 1907 (NCI4th)— armed robbery— Identikit composite drawings—not hearsay

The trial court did not err in an armed robbery prosecution by admitting into evidence composite drawings of the perpetrators created by an investigator using an Identikit procedure during consultations with four witnesses the day after the robbery. A composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness's eyes rather than

the witness's camera. No assertion or statement is involved. N.C.G.S. § 8C-1, Rule 802.

Am Jur 2d, Evidence § 783.

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 42 ALR3d 1217.

3. Evidence and Witnesses § 1907 (NCI4th)— armed robbery—Identikit composite drawings—not properly authenticated—harmless error

There was no prejudicial error in an armed robbery prosecution where the trial court erroneously admitted composite drawings of the perpetrators without evidence that the pictures accurately portrayed the eyewitnesses' recollections of what the perpetrators had looked like, but the State introduced two eyewitnesses who testified in open court and whose identifications were unequivocal and definite. N.C.G.S. § 8C-1, Rule 901(a).

Am Jur 2d, Evidence § 783.

Admissibility in evidence of composite picture or sketch produced by police to identify offender. 42 ALR3d 1217.

4. Evidence and Witnesses § 222 (NCI4th)— flight—detective's efforts to locate defendant—instruction on flight

The trial court did not err by admitting a detective's testimony concerning his efforts to locate defendant or by giving an instruction on flight where defendant's accomplice testified that he warned defendant to flee the jurisdiction and the detective testified that he conducted an exhaustive search for twelve years until defendant turned up in California.

Am Jur 2d, Evidence § 281.

5. Criminal Law § 83 (NCI4th)— armed robbery—indictment dismissed with leave—not properly reinstated—no objection before arraignment—error waived

A defendant in an armed robbery prosecution waived any error in the State's alleged failure to comply with the requirements for reinstating an indictment where defendant contended that the indictment against him was dismissed with leave ten years before he was tried and that the prosecutor did not give proper notice of reinstatement as required by

N.C.G.S. § 15A-932, but defendant failed to object prior to his arraignment. N.C.G.S. § 15A-932(b) is a procedural calendaring device, is not jurisdictional, and failure to comply with its requirements does not result in the failure of the pleading to charge an offense within the meaning of N.C.G.S. § 15A-952(d).

Am Jur 2d, Criminal Law § 408.

Justice FRYE concurring in the result.

Justices WEBB and WHICHARD join in this concurring opinion.

ON discretionary review of the decision of the Court of Appeals, 103 N.C. App. 195, 405 S.E.2d 200 (1991), finding no error in the defendant's trial or in the judgment entered on 28 August 1989 by *Booker, J.*, in the Superior Court, GUILFORD County. Heard in the Supreme Court on 12 March 1992.

Lacy H. Thornburg, Attorney General, by Phillip A. Telfer, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Teresa A. McHugh and Mark D. Montgomery, Assistant Appellate Defenders, for the defendant-appellant.

MITCHELL, Justice.

The defendant was indicted for robbery with a firearm in violation of N.C.G.S. § 14-87. He was tried at the 21 August 1989 Criminal Session of Superior Court, Guilford County. The jury found the defendant guilty of robbery with a firearm, and the trial court entered judgment imposing a sentence of life imprisonment. The Court of Appeals found no error in the defendant's trial. On 7 November 1991, this Court entered its order allowing the defendant's petition for discretionary review.

The defendant brings forth several assignments of error for our review. First, he contends that the trial court erroneously inquired into the jury's division and then erroneously refused to grant a mistrial after it became clear that the jury was hopelessly deadlocked. Second, the defendant argues that the admission of composite drawings created by use of police "Identi-kit" procedures amounted to prejudicial error, since no proper foundation was laid and the drawings were inadmissible hearsay. Third, the defendant

argues that he was prejudiced by testimony concerning police efforts to locate him, which were irrelevant to the issue of flight, and that the trial court's jury instruction on flight was not supported by the evidence. Finally, the defendant argues that the trial court's entry of judgment against him was void because he was not tried upon a proper indictment. We find the defendant's arguments without merit.

The State's evidence tended to show that two men robbed the Shoney's Restaurant on Randleman Road in Greensboro on 9 April 1977. Thomas Avant testified that he and the defendant agreed to rob the restaurant. They drove to the restaurant in Avant's girlfriend's car at about 1:00 or 2:00 a.m. on the morning in question. They entered the restaurant, where a supervisor asked what they were doing. Avant testified that either he or the defendant told the supervisor it was a "stick up" and ordered him to go into the restaurant office. The defendant was carrying a .22 caliber pistol. The manager was unable to open the safe in the office, and the defendant hit him on the head two or three times with the pistol. Avant went to the cash register and took out all the money. He and the defendant then put all the employees in a cold storage room and left.

Avant was arrested several days after the Shoney's robbery; he later pled guilty to several robbery charges. Avant testified that a week or two later he sent word to the defendant to get out of town. Thereafter, in hope of receiving help with regard to the charges and convictions against him, Avant told a detective with the Greensboro Police Department that the defendant had been his partner in the Shoney's Restaurant robbery.

Ralph Schultz testified that he was the manager present and in charge of the Shoney's Restaurant in question on the morning of 9 April 1977. Schultz unequivocally identified the defendant as one of the men who held him at length and then robbed him at gunpoint early that morning. He corroborated Avant's testimony as to what occurred during the robbery. Schultz testified that during the robbery the defendant hit him with a pistol and threatened to kill the employees.

Two or three weeks before trial, Schultz had been shown a photographic lineup that contained a picture of the defendant. He did not identify the photograph of the defendant as being the second robber with Avant. Schultz testified that the different angles

and distances from which the pictures were taken confused him, but that he had recognized the defendant as the second robber as soon as the defendant walked into the courtroom.

Kenneth Baldwin and Earnest Hardy were also present in the restaurant when the robbery occurred. They both testified that although they could not positively identify the defendant as one of the robbers, there were some similarities in appearance, most notably a mark under the defendant's eye.

[1] In his first assignment of error, the defendant contends that the trial court improperly coerced a verdict by inquiring into the numerical division of the jury and by refusing to grant a mistrial when the jury appeared deadlocked. The record indicates that the jury began its deliberations at 3:57 p.m. on 24 August 1989 and deliberated until court was adjourned for the evening at 5:06 p.m. The jury resumed its deliberations at 9:37 a.m. on 25 August 1989. Approximately ten minutes later, the jury asked to be allowed to examine certain exhibits. The jury returned to the courtroom at 9:56 a.m. to view the exhibits. The jury resumed its deliberations at 10:27 a.m. At 11:15 a.m., the jury sent a note to the trial court stating: "We are unable to reach a unanimous decision at this time."

Before bringing the jury back into the courtroom, the trial court heard from the prosecutor and counsel for the defendant. The prosecutor asked that the trial court instruct the jury in accord with the version of the "Allen charge" set forth in N.C.G.S. § 15A-1235 and allow the jury to continue to deliberate. Counsel for the defendant requested that the trial court inquire as to the numerical division of the jury without asking whether the majority was leaning toward conviction or acquittal. The trial court made the inquiry specifically requested by counsel for the defendant, and the jury indicated that it was divided eleven to one. The trial court then instructed the jury in accord with N.C.G.S. § 15A-1235, emphasizing five separate times that each juror was to abide by his or her conscientious conviction as to the weight or effect of the evidence. The jury returned to the jury room to resume its deliberations at 11:24 a.m.

At 11:55 a.m., the jury sent a note to the trial court stating: "We are hopelessly deadlocked. It does not appear that any time or further deliberations would change the existing vote." The defendant moved for a mistrial at that point. The trial court denied

the motion and brought the jury back into the courtroom. The trial court expressed its appreciation for the work of the jury to that point and stated: "I think it would be to everyone's advantage, however, if you would continue your deliberations for some time yet. And this is not to put pressure on anybody to make any change." The trial court then recessed court for lunch, saying: "Perhaps a little bit of time away from the problem might be of some assistance."

After the lunch break, the trial court repeated the Allen charge and told the jurors they should "continue [their] deliberations for a while." The jury retired to the jury room for further deliberations and returned a verdict of guilty fifty-five minutes later. The jury was polled at the request of the defendant, and each juror expressed his or her individual assent to and agreement with the verdict.

By his first assignment of error, the defendant contends that the trial court improperly coerced the jury into returning a guilty verdict. The defendant argues that the actions of the trial court in coercing a verdict violated his right to trial by jury guaranteed by the Sixth Amendment to the Constitution of the United States and Article I, Section 24 of the Constitution of North Carolina. As the defendant failed to raise the federal constitutional issue at trial, however, he has waived any error in that regard and may not address it on appeal. *State v. Bussey*, 321 N.C. 92, 95, 361 S.E.2d 564, 566 (1987). We turn, then, to consider the defendant's arguments relating to the alleged error of the trial court in coercing a verdict in violation of the Constitution of North Carolina.

The defendant first argues in this regard that the trial court coerced a verdict by inquiring into the numerical division of the jury. The defendant specifically requested that the trial court make this inquiry. Therefore, any error in this regard was invited error which does not entitle the defendant to any relief and of which he will not be heard to complain on appeal. N.C.G.S. § 15A-1443(c) (1988); *State v. Rivers*, 324 N.C. 573, 380 S.E.2d 359 (1989).

The defendant next argues that the trial court improperly coerced a verdict by "refusing to grant a mistrial when the jury was deadlocked." It is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits a trial court from coercing a jury to return a verdict. *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984). In determining whether a trial court's

actions are coercive under this section of our Constitution, we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time it acted. *Bussey*, 321 N.C. at 96, 361 S.E.2d at 566. The record reveals that the jury in the present case deliberated for a total of less than four hours before returning its verdict. This certainly was not an inordinately long period for deliberations in a trial which lasted three days and involved a felony which could lead to a sentence of imprisonment for life. Further, when the trial court sent the jury back to the jury room for further deliberations, it instructed the jury strictly in accordance with N.C.G.S. § 15A-1235(c). On each such occasion, the trial court reminded jurors not to forsake their honest convictions arising from the evidence. The trial court was faced with a situation in which the jury reported that it was deadlocked after rather scant deliberations which had been broken by various recesses. The trial court never impugned the efforts of the jury or implied in any way that the jury might be held for any unreasonable period of time to reach a unanimous verdict. Based upon the totality of the circumstances facing the trial court, we conclude that neither its refusal to grant a mistrial nor any of its other actions at trial were coercive of the jury's verdict. This assignment of error is without merit.

[2] In the defendant's second assignment of error, he contends that the trial court erred by admitting composite drawings of the perpetrators of the robbery in question, prepared with the participation of eyewitnesses to that crime and according to those witnesses' descriptions of the perpetrators. The defendant argues that those drawings or pictures were inadmissible because they were hearsay and also because they were not properly authenticated.

We first examine the defendant's contention that the composite pictures were inadmissible hearsay under the North Carolina Rules of Evidence. Under our Rules of Evidence, "[h]earsay is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802 (1988). "Hearsay" is defined as "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). In this context, a "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." N.C.G.S. § 8C-1, Rule 801(a) (1988).

The Court of Appeals concluded that the composite pictures were inadmissible hearsay in the present case, because it viewed "a sketch as but a silent depiction or replication of 'an assertion made in words' about a suspect's corporeal appearance and thus a statement for purposes of the application of exclusionary Rule 802." *State v. Patterson*, 103 N.C. App. at 204, 405 S.E.2d at 206. The Court of Appeals then noted that North Carolina has not adopted a rule similar to Federal Rule of Evidence 801(d)(1), which provides that under certain circumstances, statements that are out-of-court identifications are not hearsay. *Id.* at 205, 405 S.E.2d at 206. The Court of Appeals concluded that, without an "escape hatch" such as that provided by Federal Rule 801(d)(1) removing prior identifications from the hearsay rule, the composite pictures in the present case were inadmissible hearsay. *Id.* at 205, 405 S.E.2d at 207. We do not agree.

The composite sketches or pictures in question here were created by Special Investigator J.A. Armfield using an "Identi-kit" procedure during consultations with four witnesses the day after the robbery. At trial, Armfield testified that the kit had hundreds of different facial features which he could place on clear plastic plates to construct a composite picture. He explained:

> [T]he composite process is performed by creating an original face, and then asking the individuals what's wrong with it, . . . at this point we begin changing the features of the face until the individual is satisfied that what we have is as close as we can get to the person they are trying to identify.

The State contends that no out-of-court statements of the witnesses themselves were introduced through the testimony of Special Investigator Armfield. The State argues that the composite pictures did not constitute "statements" and, therefore, were not hearsay under our Rules. The State reasons in support of this argument that the composite pictures are akin to a photograph, in that they are produced by mechanical procedures essentially re-creating a picture and not producing a "statement" or an "assertion" within the meaning of our Rules of Evidence. We agree.

Other appellate courts have had the opportunity to consider whether composite pictures fall within the definition of a "statement" under their jurisdictions' versions of Rule 801(a). Since North Carolina's Rule 801(a) mirrors the language of the versions applied in those jurisdictions, we find such cases instructive on questions

of whether such composite pictures are statements under our version of Rule 801(a).

In *United States v. Moskowitz*, 581 F.2d 14 (2d Cir. 1978), the United States Court of Appeals for the Second Circuit considered whether the trial court should have excluded a sketch of the defendant made by a police artist the day after the robbery in question. The court held that the composite drawing introduced against the defendant was not a "statement" under Federal Rule 801(a). *Id.* at 21. It explained that "[t]he sketch itself, as distinguished from [the witnesses'] statements about it, need not fit an exception to the rule against hearsay because it is not a 'statement' and therefore can no more be 'hearsay' than a photograph identified by a witness." *Id.*

In a similar case, the Supreme Court of Connecticut considered the admission of a composite picture made the day after the crime by the victim, who was aided by a state trooper using Identi-kit procedures. *State v. Packard*, 184 Conn. 258, 439 A.2d 983 (1981). The court noted that the composite picture had been admitted into evidence to show its likeness to the defendant. *Id.* at 274, 439 A.2d at 992. The court concluded that the picture was like a "sketch, photograph, map, chart or other pictorial, graphic or schematic illustration which are *not statements*, but nonverbal modes of testimony." *Id.* (emphasis added). As a result, the court concluded that admission of the composite picture was not hearsay.

We recognize that some courts have expressed a contrary view and have deemed such composite pictures to be hearsay. *See, e.g., People v. Johnson*, 505 N.Y.S.2d 451, 122 A.D.2d 812 (1986); *Commonwealth v. Rothlisberger*, 197 Pa. Super. 451, 178 A.2d 853 (1962). However, we are persuaded by the reasoning of cases such as *Moskowitz* and *Packard* and conclude that a composite picture of a perpetrator prepared by police pursuant to the directions of a witness to a crime does not constitute a "statement" under North Carolina Rule of Evidence 801(a). Such a composite picture is the functional equivalent of a photograph in that it merely reflects the perpetrator's likeness, albeit as recorded by the witness's eyes rather than the witness's camera. No assertion or statement is involved. Therefore, a composite picture is not "hearsay" as defined by Rule 801(c), and Rule 802 does not apply to bar the admission of a composite picture into evidence.

[3] We next examine under this assignment the defendant's contention that the composite pictures in the present case were inadmissible because they were not properly authenticated. The Court of Appeals concluded that the composite pictures were properly authenticated under Rule 901(a) by the testimony of Special Investigator Armfield, but that they failed the relevancy test of Rule 401 because the State failed to offer evidence that they accurately portrayed the eyewitnesses' recollections of what the perpetrators had looked like. *Patterson*, 103 N.C. App. at 203, 405 S.E.2d at 205. We conclude, however, that the absence of evidence tending to show that the composite pictures accurately portrayed the men the eyewitnesses had seen committing the crime in question in this case resulted in a failure to satisfy the requirement of authentication precedent to admissibility prescribed by Rule 901(a). *See In re Rogers*, 297 N.C. 48, 67, 253 S.E.2d 912, 924 (1979) (decided prior to the enactment of the North Carolina Rules of Evidence); *see generally* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 35 (3d ed. 1988). For this reason—different from that relied on by the Court of Appeals—we agree with the conclusion of the Court of Appeals that the trial court erred in admitting the composite pictures into evidence.

We also agree with the conclusion of the Court of Appeals that any error in the admission of the composite pictures in the present case was harmless error. As the error alleged by the defendant in this regard did not arise under the Constitution of the United States, the defendant has the burden of showing prejudice by establishing that, had the error in question not been committed, a different result would have been reached at his trial. N.C.G.S. § 15A-1443(a) (1988).

In the present case, the State produced two eyewitnesses who testified in open court—the defendant's accomplice and the victim Schultz, the manager of Shoney's. Both identifications were unequivocal and definite. The defendant has made no showing that, given such unequivocal and unshakeable testimony identifying him as one of the perpetrators of the crime, the composite pictures changed the result reached at trial. Therefore, the defendant has failed to meet his burden of showing prejudice. This assignment is without merit.

[4] The defendant argues under his next assignment of error that the trial court erred in admitting testimony concerning a detective's

efforts to locate him because the testimony was not relevant as tending to show flight. The defendant specifically objects to the detective's testimony that he contacted thirteen different people in six different states and the District of Columbia over eleven years in an effort to find the defendant. The defendant contends that there was no evidence that he was ever in any of these places; therefore, he argues, the testimony prejudicially painted a picture of a fugitive on the run. In addition, the defendant contends under this assignment that the trial court's instruction on flight was erroneous because it was not supported by the evidence.

The rule in North Carolina is that evidence of flight by the accused may be used as some evidence of guilt. *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 698 (1973). Such evidence creates no presumption of guilt, "but may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt." *Id.* In *Lampkins*, the investigating police officer testified: "I made numerous checks at locations throughout the east side [of Winston-Salem] in an attempt to locate the defendant, and it was approximately four months later that I finally talked with him." *Id.* at 522, 196 S.E.2d at 698. We concluded that such evidence was sufficient to support the trial court's instruction to the jury concerning flight, as it reasonably supported the inference that the defendant had fled after committing the crime. *Id.* at 525, 196 S.E.2d at 699.

In the present case, the testimony of the detective was relevant to show flight. The defendant's accomplice testified that he warned the defendant to flee the jurisdiction. The detective testified that he conducted an exhaustive search, including interviewing many family members and personal friends of the defendant, for twelve years until the defendant turned up in California. This evidence clearly supports the inference that the defendant was avoiding apprehension, thus supporting the instruction on flight. *Id.* This assignment of error is without merit.

[5] In his last assignment of error, the defendant contends that the trial court's entry of judgment against him is void because the indictment he was tried upon was defective. The defendant argues that the indictment against him was dismissed with leave ten years before the defendant's trial and was never properly reinstated; he contends that, as a result, the trial court lacked jurisdiction to try him. We do not agree.

We note regarding this assignment of error that the State has made a motion to amend the record pursuant to Rules 37(a) and 27(c) of the North Carolina Rules of Appellate Procedure to include three trial calendars from the Superior Court reflecting the reinstatement of this case in the Superior Court, Guilford County, following the dismissal with leave filed on 4 October 1979. We allow this motion.

A dismissal with leave may be entered by a prosecutor when a defendant: "(1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or (2) fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found." N.C.G.S. § 15A-932(a) (1988). A prosecutor may reinstate the proceedings "by filing written notice with the clerk." N.C.G.S. § 15A-932(d) (1988).

We are aware that our Court of Appeals in *State v. Reekes*, 59 N.C. App. 672, 297 S.E.2d 763, *disc. rev. denied*, 307 N.C. 472, 298 S.E.2d 693 (1982), has implied that placing a case on the trial calendar subsequent to a dismissal with leave is sufficient to meet the written notice requirement for reinstatement of an indictment under N.C.G.S. § 15A-932. However, we expressly decline to comment on or consider that issue in deciding the case before us.

Assuming *arguendo* that the prosecutor did not give proper written notice of reinstatement as required by N.C.G.S. § 15A-932, we conclude that the defendant waived any such error by failing to object before his arraignment. An indictment is a pleading for the State in a criminal case. *See* N.C.G.S. §§ 15A-921(7) and -923. Under N.C.G.S. § 15A-952(b)(6) and (c), motions addressed to criminal pleadings must be made before the defendant is arraigned. An exception to this rule applies to "[m]otions concerning jurisdiction of the court or the failure of the pleading to charge an offense [which] may be made at any time." N.C.G.S. § 15A-952(d) (1988). However, the statute in question, N.C.G.S. § 15A-932(d), which provides for reinstatement of an indictment after a dismissal with leave is taken, is not "jurisdictional" in nature, nor does failure to strictly comply with its requirements result in the "failure of the pleading to charge an offense" within the meaning of N.C.G.S. § 15A-952(d). Instead, the dismissal with leave contemplated in N.C.G.S. § 15A-932(b) is a procedural calendaring device, which

> results in removal of the case from the docket of the court, but all process outstanding retains its validity, and all necessary actions to apprehend the defendant, investigate the case, or otherwise further its prosecution may be taken, including the issuance of nontestimonial identification orders, search warrants, new process, initiation of extradition proceedings, and the like.

N.C.G.S. § 15A-932(b).

By failing to object prior to his arraignment, the defendant waived any error involved in the State's alleged failure to comply with the written notice requirement under N.C.G.S. § 15A-932(d). Accordingly, this assignment of error is without merit.

For the foregoing reasons, which differ substantially from the reasons relied upon by the Court of Appeals in its opinion in this case, the holding of the Court of Appeals that there was no error in the defendant's trial is affirmed.

Affirmed.

Justice FRYE concurring in result.

I respectfully disagree with the Court's holding that the composite pictures in this case are not hearsay. I believe they are hearsay and, not falling within any recognized exception to the hearsay rule, should have been excluded as substantive evidence. I agree with the Court, however, that the admission of the composite pictures in this case did not prejudice defendant. I therefore concur in the result reached by the Court.

As a preliminary matter, I agree with the Court that the composite pictures were not properly authenticated, and therefore should not have been admitted into evidence for that reason. Having reached this conclusion, it seems unnecessary for the Court to even reach the issue of whether the composite pictures also should have been excluded as hearsay. Because the Court reached this issue, however, I must register my disagreement.

The Court errs, I believe, in its conclusion that the composite pictures are not "statements" or "assertions" within our Rules of Evidence. I cannot accept the Court's adoption of the State's argument that the composite pictures "are akin to a photograph, in that they are produced by mechanical procedures essentially

re-creating a picture and not producing a 'statement' or an 'assertion' within the meaning of our Rules of Evidence." *State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992). Instead, I find persuasive the following analysis from the unanimous opinion of the Court of Appeals below:

> The threshold question is whether the sketches are "statements" within the meaning of Rule [of Evidence] 801(a): "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The North Carolina Commentary to this definition of "statement" points out the seeming non-difficulty of interpretation of the first sub-part:
>
> > It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of 'statement.'
>
> The State quotes *Moskowitz*, for the proposition that "the sketch itself, as distinguished from [the victims'] statements about it, need not fit an exception to the rule against hearsay because it is not a 'statement' and therefore can no more be 'hearsay' than a photograph identified by a witness." [*United States v. Moskowitz*, 581 F.2d 14, 21 (2d cir.), *cert. denied*, 439 U.S. 871, 58 L. Ed. 2d 184 (1978)]. Reasoning from the language in the State Commentary to Rule 801(a)(1), we view a sketch as but a silent depiction or replication of "an assertion made in words" about a suspect's corporeal appearance and thus a statement for purposes of the application of exclusionary Rule 802.
>
> . . . .
>
> In the present case, absent any State rule parallel to the Federal Rule 801(d)(1) "escape hatch" from the hearsay rule for prior statements and prior identifications, this Court cannot say that a sketch based on oral assertions, and on oral assertions alone, is not a "statement" and, therefore, not subject to the hearsay rules, as a preliminary matter. In that sense, the composites here are not analogous to photographs because the sketches are not necessarily an "accurate" representation of what they in fact purport to show.
>
> Under either a relevance analysis or a hearsay analysis, the sketches in this case were inadmissible. The relevance

of the sketches was not established because the witnesses who had seen the robbers did not testify at trial about the accuracy of the police composites. As "statements," Rule 802 of the North Carolina Rules of Evidence requires their exclusion if offered as substantive evidence, because they do not come within a hearsay exception.

State v. Patterson, 103 N.C. App. 195, 203-205, 405 S.E.2d 200, 206-07 (1991); *accord State v. Motta*, 66 Haw. 254, 659 P.2d 745 (1983); *Commonwealth v. Rothlisberger*, 197 Pa. Super. 451, 178 A.2d 853 (1962).

Put simply, it seems clear that had the police artist repeated the statements made to him by the eyewitnesses, these statements would be classified as hearsay. How, then, can the product of these statements—the composite pictures—be somehow transformed into nonhearsay? I don't believe it can and thus am unable to join the Court's opinion. I therefore concur only in the result reached by the Court.

Justices WEBB and WHICHARD join in this concurring opinion.

STATE OF NORTH CAROLINA v. CHARLES WILSON JEUNE

No. 496A91

(Filed 4 September 1992)

1. Criminal Law § 506 (NCI4th)— witness serving as bailiff—not jury custodian—no presumption of prejudice

A deputy sheriff who testified for the State and served as a bailiff did not act as custodian or officer in charge of the jury so as to require a conclusive presumption of prejudice where the evidence showed that the deputy had no contact with jurors outside the courtroom, he had no communication with any of the jurors except to tell them to take their seats, and the only service he performed for the jury was in holding the gate open and opening the jury room door.

Am Jur 2d, Trial § 1501.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 ALR3d 1012.

2. **Criminal Law § 506 (NCI4th)— bailiff in criminal trial—jury custodian—no per se rule**

The decision of *State v. Wilson*, 314 N.C. 653, did not create a per se rule that a bailiff in a criminal trial is necessarily a custodian or officer in charge of the jury for purposes of the conclusive presumption rule.

Am Jur 2d, Trial § 1501.

Propriety and prejudicial effect, in criminal case, of placing jury in charge of officer who is a witness in the case. 38 ALR3d 1012.

3. **Criminal Law § 314 (NCI4th)— joinder of charges against two defendants—necessity for motion by State**

N.C.G.S. § 15A-296(b)(2)a provides for joinder of charges against two or more defendants only upon motion of the State and thus provides no basis for a motion by defendant to compel joinder of his case for trial with that of his brother.

Am Jur 2d, Indictments and Informations § 210.

4. **Kidnapping § 1.2 (NCI3d)— removal of victim—defendant not driver—sufficiency of evidence**

There was substantial evidence that defendant removed the victim from one place to another to support his conviction of kidnapping, although defendant's brother was the driver of the car in which the victim was removed, where the evidence tended to show that defendant was a passenger in the car; defendant jumped over the front seat and restrained the victim in the back seat when she tried to escape; and the victim, restrained by defendant, was then driven to an open field where she was raped by both men.

Am Jur 2d, Abduction and Kidnapping § 32.

5. **Kidnapping § 1.3 (NCI3d)— first degree kidnapping—sexual assault—inclusion of fellatio in definition—absence of fellatio evidence—no plain error**

Any error in the trial court's instruction in a first degree kidnapping case defining the element of sexual assault as in-

cluding rape and fellatio when there was no evidence that defendant engaged in fellatio with the victim was not plain error where the jury, in addition to finding defendant guilty of first degree kidnapping, also found defendant guilty of first degree rape, and therefore the jury would have found that the essential element of a sexual assault had occurred regardless of whether the trial judge included fellatio in his definition of sexual assault.

Am Jur 2d, Abduction and Kidnapping §§ 9, 21.

6. **Criminal Law § 496 (NCI4th)— review of testimony—denial of jury request—exercise of discretion**

The trial court did in fact exercise its discretion in denying the jury's request, after jury deliberations had begun, to review the testimony of a kidnapping and rape victim where the court first stated that a transcript of the victim's testimony was not available and then stated that the court "in its discretion" was denying the request because it would be difficult and time consuming for the court reporter to read back lengthy testimony.

Am Jur 2d, Trial § 1577.

7. **Kidnapping § 2 (NCI3d)— first degree kidnapping verdict—arrest of judgment—sentence for second degree kidnapping**

The trial court did not err in sentencing defendant for second degree kidnapping, although the jury was not instructed on second degree kidnapping and there was no specific adjudication of guilt as to that offense, where the jury found defendant guilty of first degree kidnapping and first degree rape; the trial court, consistent with double jeopardy principles, arrested judgment on the first degree kidnapping charge because the rape was the sexual assault used to elevate the kidnapping to first degree; and by finding defendant guilty of first degree kidnapping, the jury necessarily found proof beyond a reasonable doubt of each and every element of second degree kidnapping.

Am Jur 2d, Abduction and Kidnapping § 34.

APPEAL by the State of North Carolina pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 388, 409 S.E.2d 919 (1991), vacating judgments

entered by *Gardner, J.*, on 13 August 1990 in Superior Court, LINCOLN County, and remanding for a new trial. The State's petition for temporary stay was granted by the Supreme Court on 12 November 1991. Defendant'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 13 April 1992.

Lacy H. Thornburg, Attorney General, by Clarence J. Delforge, III, Assistant Attorney General, for the State.

Brenda S. McLain for defendant.

FRYE, Justice.

Defendant, Charles Wilson Jeune, was convicted by a Lincoln County jury of first-degree rape and first-degree kidnapping for the 13 January 1990 abduction and rape of a Lincoln County woman. The Court of Appeals, by a 2-1 vote, ordered a new trial on both charges after concluding that a witness for the State acted as a custodian or officer in charge of the jury in violation of defendant's rights under the Sixth and Fourteenth Amendments of the United States Constitution. *State v. Jeune*, 104 N.C. App. 388, 409 S.E.2d 919 (1991). We disagree with the Court of Appeals and reverse. We also reject defendant's additional assignments of error and therefore remand this case to the Court of Appeals with instructions to remand to the trial court to reinstate defendant's convictions and sentences.

I.

FACTUAL BACKGROUND

The State's first witness was the victim, a twenty-four-year-old textile worker from Lincoln County. She testified that she and her husband drove to Hickory, North Carolina, on 13 January 1990 to watch a boxing match called a Tuff Man Contest. On their way home, the couple got into a shouting match. The victim's husband stopped the car about one mile from their home, opened the hood and disabled the vehicle. He then began walking home. The victim, after attempting to start the car, also began walking home and saw her husband accept a ride from a motorist in a passing car. It was cold outside. After walking a few minutes, a car stopped and two men offered the victim a ride. Both men were in the front seat: defendant was the passenger; his brother, Frederick Jeune, was driving. She accepted and got in the back seat. The

victim testified that when she told the men where to turn in order to take her home, "they just kept going down the road, and that's when I got scared."

The victim testified that she tried to jump out of the car when it stopped at an intersection, but defendant jumped in the back seat, "held me down and told me I wasn't going anywhere until they were through with me." The victim, who was wearing boots, said she kicked at the rear window on the driver's side, but the "more I fought, the madder the both of them got, and they—he told me, if you don't calm down, we're going to have to kill you." Defendant and his brother turned onto a dirt road and stopped in an open field. Frederick ripped the victim's panty hose off and noticed a tampon. He jerked it out and said, "The g-- d--- bitch is on the rag"; he threw the tampon out the window. Defendant then raped the victim. The victim testified that while she was being raped by defendant, Frederick opened the rear door and forced her to perform oral sex. After defendant raped the victim, Frederick raped her, she testified. The victim testified that both men said they had a gun and threatened to kill her if she did not do as she was told. She also said that defendant had a knife.

The men then drove the victim to a convenience store and let her out. The victim testified that she immediately ran inside the store and notified the police by telephone, providing them with a description of the car and her two assailants. A deputy sheriff responded to the call and told the victim he would take her to the hospital. Before arriving at the hospital, however, the deputy informed the victim that two suspects had been stopped; he drove by the stopped car and she identified the two men standing outside as the men who had attacked her. They were defendant and his brother.

Beatrice Potter, the clerk at the convenience store, testified that when the victim came into the store, "she was crying. She couldn't hardly hold her body still, she was shaking so bad. . . ."

Lincoln County Sheriff's Deputy Rick Spake, the deputy who responded to the call from the convenience store, testified that the victim "was crying heavily. She seemed to be upset, disoriented. I don't know, maybe nervous is the word. She was real fidgety, nervous type. Obviously upset." Deputy Spake also testified that he and a detective, following directions provided by the victim, found the open field where the victim said she was raped. Deputy

Spake testified that he found a moist tampon on the ground. The tampon was introduced into evidence.

Sheriff's Deputy David Carpenter testified that he examined defendant's car and found a scuff mark on the driver's side rear window where the victim said she had kicked with her boots. Deputy Carpenter said he did not find a gun or knife in the car. No weapon was introduced at trial.

Both defendant and his brother testified that they were at defendant's house on 13 January 1990 playing Monopoly with defendant's wife and sister-in-law. Both were drinking. Defendant testified he had a "couple shots of liquor" and "probably about three beers." Around midnight, they left to buy more beer and get something to eat. On the way to the store, they saw a woman walking along the road and gave her a ride. Both testified that the woman was upset, told them about the fight with her husband, and said she did not want to go straight home. The three then drove around, eventually stopping in an open field where, according to both brothers, she willingly had sex with them; Frederick also testified that she asked him if he wanted to have oral sex, and he agreed.

Defendant testified that he never saw a tampon and offered no explanation as to how it got outside the car; on cross-examination, however, he acknowledged that the woman did not open any windows or doors while she was in the car. Both defendant and Frederick testified that the woman was not upset when she exited their car at the convenience store. In fact, both testified that the woman asked for their telephone numbers so they could see each other again. "She wasn't acting unusual," defendant testified, "she was acting like a normal person would act."

Defendant was indicted by a Lincoln County grand jury for first-degree rape, first-degree kidnapping, second-degree sexual offense, and crime against nature. The sexual offense and crime against nature charges were dismissed by the trial judge at the conclusion of the State's evidence. Defendant was convicted on 25 July 1990 of first-degree rape and first-degree kidnapping. On 13 August 1990, Judge Gardner sentenced defendant to life imprisonment for the first-degree rape conviction. Judge Gardner arrested judgment on the first-degree kidnapping conviction and sentenced defendant to thirty years in prison for second-degree kidnapping. The Court of Appeals ordered a new trial on both charges on the grounds

that Deputy Carpenter, a witness for the State, had served as a bailiff during part of defendant's trial and was therefore an officer in charge of the jury. *Jeune*, 104 N.C. App. at 396, 409 S.E.2d at 923. Judge Greene dissented, concluding that Deputy Carpenter, although a bailiff, was not in charge of the jury. *Id.* at 399, 409 S.E.2d at 925 (Greene, J., dissenting). The State appealed based on Judge Greene's dissent. We granted the State's petition for a temporary stay. 330 N.C. 199, 412 S.E.2d 67 (1991). We also allowed defendant's petition for discretionary review as to additional issues. 330 N.C. 616, 412 S.E.2d 92 (1992).

II.

STATE'S APPEAL

[1] After giving his instructions to the jury, Judge Gardner asked if there were any objections. The following colloquy then occurred:

> MR. MORRIS [defense attorney]: No objections to the instructions, Your Honor. But it worries me that the deputy working with the jury now is a witness in the case. Opening the door for them and all. I don't think that should be.
>
> THE COURT: What did he do particularly?
>
> MR. MORRIS: Opening the door, and standing here as they are coming out.
>
> THE COURT: Who did that?
>
> MR. MORRIS: This gentleman sitting over here.
>
> THE COURT: What is your name, sir?
>
> MR. CARPENTER: David Carpenter.
>
> THE COURT: What did you do, Mr. Carpenter?
>
> MR. CARPENTER: I held that gate open, and opened the jury room door.
>
> THE COURT: Did you have any communication with any of the jurors?
>
> MR. CARPENTER: No, sir.
>
> THE COURT: Did you say anything to them when you opened the door?

> MR. CARPENTER: No, when I opened the door I told them to take their seats and sit down.

Defendant argues, and the Court of Appeals held, that because Deputy Carpenter, a witness for the State, served as a bailiff, he was necessarily the custodian or officer in charge of the jury so as to require a new trial.

We have held consistently and unequivocally that where a witness for the State acts as custodian or officer in charge of the jury in a criminal trial, prejudice is conclusively presumed, and the defendant must have a new trial. *State v. Bailey*, 307 N.C. 110, 112, 296 S.E.2d 287, 289 (1982); *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982); *State v. Macon*, 276 N.C. 466, 473, 173 S.E.2d 286, 290 (1970); *see also Turner v. Louisiana*, 379 U.S. 466, 13 L. Ed. 2d 424 (1965). In *State v. Wilson*, 314 N.C. 653, 336 S.E.2d 76 (1985), we extended this rationale to include situations in which an immediate family member of the prosecutor, defendant, defendant's counsel or a crucial witness serves as custodian or officer in charge of the jury. *Id.* at 656, 336 S.E.2d at 77. We adopted the rule that prejudice is conclusively presumed in such cases in order to safeguard the integrity of our system of trial by jury. As we said in *Mettrick*:

> No matter how circumspect officers who are to be witnesses for the State may be when they act as custodians or officers in charge of the jury in a criminal case, cynical minds often will leap to the conclusion that the jury has been prejudiced or tampered with in some way.

Id. at 385, 289 S.E.2d at 356.

To determine whether the State's witness (or an immediate family member as in *Wilson*) acted as a custodian or officer in charge of the jury, "we look to factual indicia of custody and control and not solely to the lawful authority to exercise such custody or control." *Mettrick*, 305 N.C. at 386, 289 S.E.2d at 356. Accordingly, in *Mettrick*, we awarded the defendant a new trial because two witnesses—the sheriff and a deputy—were alone with jurors for extensive periods of time outside the courtroom and clearly exercised custody and control over them. The sheriff and deputy drove prospective jurors in two activity buses from Caldwell County to Ashe County. *Id.* at 384, 289 S.E.2d at 355. The deputy also transported the jurors to lunch that day, and drove jurors

in one of the buses back to Caldwell County for the evening. *Id.* The following day, the sheriff transported eleven jurors and alternates from Caldwell County back to Ashe County. *Id.* Both the sheriff and deputy were alone with jurors in a bus for more than three hours. "Without question," we held, "the jurors' safety and comfort were in the officers' hands during these periods of travel." *Id.* at 386, 289 S.E.2d at 356.

By contrast, in *Bailey*, we held that prejudice could not be conclusively presumed where the sheriff, a witness for the State, drove three jurors to a restaurant for an evening meal during a break in jury deliberations. *Bailey*, 307 N.C. at 113, 296 S.E.2d at 289. Although we held that there was *actual* prejudice in that case, we specifically held that the sheriff had not acted as "an officer in charge of the jury so as to permit a conclusive presumption of prejudice." *Id.*

Before turning to the facts of this case, we note that neither defendant nor the Court of Appeals suggests that there was *actual* prejudice in this case. Defendant's argument, and the decision of the Court of Appeals, is based on the conclusive presumption rule. After a careful review of the transcript and record, we also find no evidence of actual prejudice to defendant.

Turning then to the facts of this case, we find a remarkable resemblance to the facts in *Macon*, a case in which this Court held that two sheriff's deputies/bailiffs, both witnesses for the State, did not act as custodians or officers in charge of the jury. We described the deputies' duties as follows:

> Here, the deputies were not in the presence of the jurors outside the courtroom, had no communication at any time with them, and had no custodial authority over them. The exposure of the jury to these bailiffs was brief, incidental, and without legal significance. . . . The only service of the bailiffs to the jurors was in 'opening the door to send them out or call them in as occasion required.'

Macon, 276 N.C. at 473, 173 S.E.2d at 290. Because the deputies did not have custodial authority over the jury, we held prejudice could not be conclusively presumed. *Id.* Similarly, in this case, the undisputed evidence shows that Deputy Carpenter had no contact with jurors outside the courtroom, had no communication with any of the jurors, except to tell them to take their seats, and

had no custodial authority over them. The only service performed by Deputy Carpenter was in holding the gate open and opening the jury room door. As in *Macon*, the "exposure of the jury to these bailiffs was brief, incidental, and without legal significance." *See Macon*, 276 N.C. at 473, 173 S.E.2d at 290.

We hold that Deputy Carpenter did not act as custodian or officer in charge of the jury, as those terms are used in this context, and therefore prejudice cannot be conclusively presumed. Given that there is no evidence of actual prejudice to defendant, his rights under the Sixth and Fourteenth Amendments have not been violated, and he is not entitled to a new trial.

[2] Defendant argues, however, that the Court of Appeals was correct in its implicit holding that this Court, in *Wilson*, created a per se rule that whenever a person serves as a bailiff in a criminal trial, she or he is necessarily an officer in charge of the jury for purposes of the conclusive presumption rule. *See Jeune*, 104 N.C. App. at 396, 409 S.E.2d at 923. Although *Wilson* may be read to support such a proposition, it was not our intention to create such a per se rule. In *Wilson*, our attention was focused on a series of conversations between jurors and the wife of the prosecutor, who was serving as the bailiff. *See Wilson*, 314 N.C. at 655, 336 S.E.2d at 76-77. It was because of these "friendly conversation[s]" that we awarded the defendant a new trial. *Id.* at 655, 336 S.E.2d at 77. We also extended the conclusive presumption rule of *Macon*, *Bailey* and *Mettrick* to include situations in which an immediate family member of certain key players in a criminal trial serves as custodian or officer in charge of the jury. *Wilson*, 314 N.C. at 656, 336 S.E.2d at 77. However, it is incorrect to read *Wilson* for the proposition that a bailiff in a criminal trial is *necessarily* a custodian or officer in charge of the jury so as to require a conclusive presumption of prejudice.

III.

DEFENDANT'S ASSIGNMENTS OF ERROR

[3] Defendant argues in his first assignment of error that he was denied a fair trial because the trial judge rejected his motion to consolidate his trial with the trial of his brother, Frederick. According to defendant's brief, Frederick was acquitted in another trial of the same crimes for which defendant was convicted. This acquittal, defendant argues, demonstrates that "in some way the judicial

system has failed." Defendant's solution to this perceived "failure" is for this Court to award him a new trial. We disagree.

First, defendant calls our attention to the fact that one of the statutory bases for joining charges against two or more defendants for trial is that each defendant is charged with accountability for each offense. *See* N.C.G.S. § 15A-926(b)(2)a (1988). Defendant notes that both he and his brother were charged with the rape and kidnapping of the victim and that their defenses were not antagonistic. However, we note that the statute specifically provides only for joinder of charges against two or more defendants, as distinguished from joinder of two or more charges against the same defendant, upon motion of the State. The pertinent portion of the statute provides:

> (2) Upon written motion *of the prosecutor*, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense[.]

N.C.G.S. § 15A-926(b)(2) (1988) (emphasis added). Thus, the statute provides no basis for a motion by defendant to compel joinder of his case for trial with that of his brother. This assignment of error is rejected.

[4] Next, defendant argues that the trial judge erred by failing to dismiss the charge of first-degree kidnapping because of insufficient evidence that defendant removed the victim from one place to another. Again, we disagree.

The rules governing motions to dismiss in criminal cases are well settled and familiar. *State v. Faison*, 330 N.C. 347, 368, 411 S.E.2d 143, 149 (1991) (and cases cited therein). Simply put, a motion to dismiss should be allowed when, viewing the evidence in the light most favorable to the State, the State fails to present substantial evidence of each essential element of the crime charged and of the defendant being the perpetrator of the crime. *Id.* If the evidence will permit a reasonable inference that the defendant is guilty of the crime charged, the trial judge should allow the case to go to the jury. *Id.*

The trial judge in this case correctly instructed the jury that in order to convict defendant of first-degree kidnapping, the State must prove, *inter alia*, that "[d]efendant unlawfully removed a per-

son from one place to another." Defendant's argument, essentially, is that he cannot be convicted of first-degree kidnapping because *he* did not drive the car to the location where the victim was raped. The undisputed evidence is that defendant's *brother* was the driver of the car; thus, argues defendant, there was insufficient evidence that he, the passenger in the car, removed the victim from one place to another. This argument strains credulity. Of course, only one person can drive a car at any given time, but that does not mean that only one person can participate in the unlawful removal of a person by vehicle. In this case, viewed in the light most favorable to the State, there was substantial evidence that it was *defendant* who jumped over the front seat of the car and restrained the victim when she tried to escape. According to the victim's testimony, it was *defendant* who "held me down and told me I wasn't going anywhere until they were through with me." The victim, restrained by *defendant*, was then driven to an open field where, according to her testimony, she was raped by both men. Certainly, the trial judge did not err by concluding there was substantial evidence that defendant had removed the victim from one place to another. This assignment of error is without merit.

[5] In his third assignment of error, defendant argues the trial judge committed plain error when instructing the jury on first-degree kidnapping. The trial judge's instruction for first-degree kidnapping reads, in pertinent part:

> In Case Number 90 CRS 336, the Defendant has been accused of First Degree Kidnapping. For you to find the Defendant guilty of First Degree Kidnapping, the State must prove five things beyond a reasonable doubt.
>
> . . . .
>
> And Fifth, that the person had been sexually assaulted. The sexual assault includes rape and engaging in fellatio by force and against her will. Fellatio is described as follows, as any touching by the lips or tongue of one person and the male sex organ of another.

(Emphasis added.) Defendant argues it was improper to include the underlined portion of the instruction because there was no evidence that defendant engaged in an act of fellatio with the

victim; indeed, the charges of second-degree sexual offense and crime against nature were dismissed by the trial judge because of insufficient evidence at the close of the State's evidence.

Defendant acknowledges that there was no objection at trial to the challenged instruction and thus any error must be reviewed under the plain error rule. *See* N.C. R. App. P. 10(b)(2), (c)(4). Under the plain error rule, defendant can only prevail if "it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.' " *State v. Black*, 308 N.C. 736, 740-41, 303 S.E.2d 804, 806-07 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)); *accord State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991). Assuming error, defendant cannot demonstrate that this jury instruction had a probable impact on the jury's verdict.

The jury, in addition to finding defendant guilty of first-degree kidnapping, also found defendant guilty of first-degree rape. The challenged instruction specifically defined sexual assault as including rape. Therefore, the jury would have found that a sexual assault occurred—satisfying the fifth essential element for first-degree kidnapping—regardless of whether the trial judge included fellatio in his definition of sexual assault. This assignment of error is rejected.

[6] In his fourth assignment of error, defendant argues that the trial judge erred by refusing to exercise discretion in denying the jury's request, after jury deliberations had begun, to review the victim's testimony.

If the jury, after retiring for deliberations, asks to review a witness' testimony, the decision whether to allow the review rests within the discretion of the trial judge. *State v. Eason*, 328 N.C. 409, 451, 402 S.E.2d 809, 821 (1991); *State v. Lang*, 301 N.C. 508, 510, 272 S.E.2d 123, 124 (1980). There is error when the trial judge refuses to exercise discretion in the erroneous belief that he or she has no discretion as to whether to allow a review of testimony. *Lang*, 301 N.C. at 510, 272 S.E.2d at 125. Defendant argues that Judge Gardner failed to exercise his discretion in denying the jury's request. Defendant is mistaken. When asked by the jury to "hear [the victim's] complete testimony," Judge Gardner responded:

> All right, ladies and gentlemen of the jury, a transcript of [the victim's] testimony is not available. It would be difficult and time consuming for the court reporter to read back lengthy testimony, so the Court, *in its discretion*, is DENYING your request to hear the testimony of [the victim]. You are to base your decisions in this case on your recollection of the evidence as it was presented at trial, so you may retire to the jury room and resume your deliberations, please.

(Emphasis added.) Clearly, Judge Gardner exercised discretion in denying the jury's request. We therefore reject this assignment of error.

[7] In his final assignment of error, defendant argues that the trial judge erred by sentencing him for second-degree kidnapping. We disagree.

The jury found defendant guilty of first-degree kidnapping. First-degree kidnapping differs from second-degree kidnapping in that the former includes the following essential element not present in the latter: "the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b) (1986). All other essential elements for first- and second-degree kidnapping are identical. *See* N.C.G.S. § 14-39(a), (b).[1] Thus, someone properly found guilty of first-degree kidnapping is *necessarily* guilty of second-degree kidnapping. *State v. Coats*, 100 N.C. App. 455, 460, 397 S.E.2d 512, 516 (1990), *disc. rev. denied*, 328 N.C. 573, 403 S.E.2d 515 (1991).

The trial judge, consistent with double jeopardy principles enunciated by this Court, arrested judgment on the first-degree kidnapping charge because a "defendant may not be separately punished for the offenses of first degree rape and first degree kidnapping where the rape is the sexual assault used to elevate kidnapping to first degree." *State v. Mason*, 317 N.C. 283, 292,

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1. The trial judge correctly instructed the jury that in order to find defendant guilty of first-degree kidnapping, jurors must find that the State had proven the following five things beyond a reasonable doubt: (1) that defendant unlawfully removed a person from one place to another; (2) that the person did not consent to this removal; (3) that defendant removed that person for the purpose of facilitating his commission of rape; (4) that this removal was a separate and complete act independent of and apart from the rape; and (5) that the person had been sexually assaulted. Only the fifth element separates the crimes of first-degree and second-degree kidnapping.

345 S.E.2d 195, 200 (1986); *accord State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986); *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986). Defendant argues, however, that the trial judge erred by sentencing defendant for second-degree kidnapping because the jury was not instructed on second-degree kidnapping, and there was no specific adjudication of guilt as to that offense.

We find no merit in defendant's argument. As explained above, by finding defendant guilty of first-degree kidnapping, the jury necessarily found him guilty of second-degree kidnapping. By its verdict, the jury found proof beyond a reasonable doubt of *each and every element* of second-degree kidnapping. The trial judge therefore did not err by sentencing defendant for second-degree kidnapping.

We note that this Court, albeit implicitly, decided this issue six years ago in *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195. In that case, the trial judge erroneously sentenced the defendant for both first-degree kidnapping and first-degree rape. A review of the record in that case reveals that the trial judge—like Judge Gardner in this case—did not instruct the jury on second-degree kidnapping, and the jury in that case—like the jury in this case—did not find the defendant guilty of second-degree kidnapping. We remanded for a new sentencing hearing with the following instructions: "The trial court may arrest judgment on the first degree kidnapping conviction and *resentence for second degree kidnapping*, or it may arrest judgment on the rape conviction." *Id.* at 292-93, 345 S.E.2d at 200 (emphasis added). Defendant's assignment of error is rejected.

IV.

SUMMARY

In sum, we reverse the decision of the Court of Appeals granting defendant a new trial. We also reject defendant's assignments of error. This case is therefore remanded to the Court of Appeals with instructions to remand to the trial court to reinstate defendant's convictions and sentences.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES BARTLETT UPCHURCH, III

No. 89A90

(Filed 1 October 1992)

1. **Jury § 6.4 (NCI3d)— murder—jury selection—prosecutor's comment—potential sentencing hearing—curative instructions—no prejudice**

There was no prejudice during jury selection for a first degree murder prosecution where the prosecutor said to potential jurors concerning the death penalty that "there is a very good possibility that you may have to answer that question." The prosecutor was explaining the distinction between the two phases of a capital trial and did not inform the jury that a sentencing phase was certain in defendant's trial, and the trial court gave a curative instruction. The statements and questions by the State were not of such a highly incriminating nature as to make the court's curative instruction insufficient to avert any prejudice.

Am Jur 2d, Jury §§ 195 et seq.

2. **Jury § 6.3 (NCI3d)— murder—jury selection—improper comment by prosecutor—proper instruction by court**

There was no prejudice during jury selection in a first degree murder prosecution from the prosecutor's comment that a juror would have to "look the monster in the eye" where the court sustained defendant's objection, granted the motion to strike, and instructed that juror and other members of the panel to disregard the statement.

Am Jur 2d, Jury §§ 195 et seq.

3. **Jury § 6.3 (NCI3d)— murder—jury selection—comment by prosecutor—comparison to codefendants—no prejudice**

There was no prejudice during jury selection for a murder prosecution where the court allowed the prosecutor to ask potential jurors whether they could weigh the testimony of two potential witnesses as they would other witnesses even though the two witnesses had entered a plea arrangement. The facts behind the plea bargains were fully aired during the trial and defendant failed to show any prejudice.

Am Jur 2d, Jury §§ 195 et seq.

4. Criminal Law § 395 (NCI4th)— murder—jury selection—comment by judge on trial—comparison to football game

The trial court did not express an opinion during jury selection for a murder prosecution when it described the proceeding to potential jurors as being like the two halves of a football game. Although defendant contended that the trial court unwittingly communicated an opinion that the case would have a penalty phase, the court used the term "may" and did not express an opinion.

Am Jur 2d, Trial § 277.

5. Criminal Law § 528 (NCI4th)— murder—bench conference concerning next witness—"probation officer" spoken loudly—mistrial denied

There was no abuse of discretion in the denial of a mistrial in a murder prosecution where the prosecutor spoke the words "probation officer" loudly during a bench conference concerning the next witness and evidence of defendant's prior convictions had not yet been admitted. Testimony during voir dire did not indicate that any of the witnesses heard the probation officer referred to by name, neither witness questioned knew whether the probation officer was defendant's or one of the codefendants', the trial court told the jurors to disregard anything they had heard and asked if they would be able to do that, none of the jurors said that they would be unable to do so, the trial court subsequently asked whether the jurors had heard anything at the conference, and no juror said that he had.

Am Jur 2d, Trial § 499.

6. Constitutional Law § 342 (NCI4th)— murder—unrecorded bench and chambers conferences—no error

The trial court did not err in a murder prosecution by conducting 78 unrecorded bench conferences and 2 unrecorded chambers conferences with counsel where defendant did not show or contend that he was absent from the courtroom during these proceedings and defendant acknowledges that his counsel was present at all of the bench and chambers conferences; defendant failed to show that his actual presence would have added to his defense; and defendant failed to show that the conferences implicated his confrontation rights or that his

presence would have had a reasonably substantial relationship to his opportunity to defend.

Am Jur 2d, Trial §§ 226, 227.

7. **Constitutional Law § 342 (NCI4th)— murder—judge's contact with juror—letter for employer—no constitutional error**

There was no prejudicial constitutional error in a murder prosecution where the record was abundantly clear that the court's contact with a juror outside defendant's presence was about a letter signed for the juror for the benefit of the juror and her employer, consistent with the customary practice of our courts to ease employed jurors' stress during jury duty.

Am Jur 2d, Trial §§ 272 et seq.

Postretirement out-of-court communications between jurors and trial judge as grounds for new trial or reversal in criminal case. 43 ALR4th 410.

8. **Burglary and Unlawful Breakings § 72 (NCI4th)— burglary—family residence of coconspirator—permission to enter—no authority**

A defendant in a first-degree burglary prosecution was without consent to enter a house where defendant entered into a conspiracy with a fellow college student to kill the coconspirator's parents. As a child who had a room in his parents' home, the authority of the coconspirator (Pritchard) was not unlimited and it cannot be said that either Pritchard or defendant had any good faith, reasonable belief that Pritchard had authority to give defendant permission to enter his parents' home for purposes of their conspiracy in the middle of the night when Pritchard was not there.

Am Jur 2d, Burglary § 13.

Maintainability of burglary charge, where entry into building is made with consent. 93 ALR2d 531.

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

There was *McKoy* error in a murder prosecution where the trial court instructed the jury to answer "no" to each mitigating circumstance that it failed to answer unanimously

and the State could not meet its burden of establishing that the error was harmless beyond a reasonable doubt.

Am Jur 2d, Trial § 1121.

10. Constitutional Law § 207 (NCI4th)— separate convictions for burglary and murder—felony murder rejected—burglary as aggravating factor for murder

The trial court did not violate defendant's right to be free from double jeopardy where defendant was convicted separately of burglary and first degree murder based on premeditation and deliberation, but not of felony murder, and the court submitted to the jury as an aggravating circumstance that the offense was committed while defendant was engaged in a burglary. N.C.G.S. § 15A-2000(e)(5).

Am Jur 2d, Criminal Law §§ 277, 279.

APPEAL as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by *Watts, J.*, at the 2 January 1990 Special Criminal Session of Superior Court, PASQUOTANK County, upon a jury verdict finding defendant guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his convictions of felonious assault, first-degree burglary, felonious larceny and conspiracy was allowed by this Court on 23 September 1991. Heard in the Supreme Court on 9 March 1992.

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

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant.

LAKE, Justice.

Defendant was indicted for the murder of Leith Peter Von Stein and was tried capitally at the 2 January 1990 Special Criminal Session of Superior Court, Pasquotank County. The jury found defendant guilty of first-degree murder on the theory of premeditation and deliberation. Following a sentencing proceeding, the jury recommended a sentence of death for the murder conviction, and on 30 January 1990, the trial court sentenced defendant to death in accordance with the jury's recommendation. Defendant also was

sentenced to life imprisonment for first-degree burglary, twenty years for felonious assault with a deadly weapon with intent to kill inflicting serious injury, and six years for felonious larceny and conspiracy to commit murder, all to run consecutively. We find no prejudicial error in the guilt phase of defendant's trial, but conclude that defendant is entitled to a new sentencing hearing under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990).

The evidence presented by the State at trial tended to show that on 25 July 1988, Bonnie Bates Von Stein was residing in Washington, North Carolina, at 110 Lawson Road, with her husband, Leith Peter Von Stein, and her two children from a previous marriage, Chris and Angela Pritchard. Mr. and Mrs. Von Stein were married in 1979 when the children were preteens. According to Mrs. Von Stein, the children had a good relationship with her husband.

In 1987, Mr. Von Stein's parents, who operated a family dry cleaning business in Winston-Salem, died and left Von Stein approximately $1,000,000. Von Stein had a $700,000 life insurance policy on his own life, with his wife as beneficiary and her children as contingent beneficiaries. Upon Leith Von Stein's death, $600,000 of the million-dollar inheritance from his parents was to fund a trust for the benefit of the children. The balance was to fund a spousal trust for the benefit of Mrs. Von Stein. Upon her death, the spousal trust fund was to go to the children's trust fund. The corpus of the children's trust was to be distributed when Angela Pritchard turned thirty-five years old. The children were aware of the inheritance, but were unaware of the mechanics of the trust.

Chris Pritchard graduated from high school in June 1987 and enrolled at North Carolina State University in August for the fall semester. His first semester grades were fair and during the spring semester of 1988, his grades declined.

Between the spring semester and the first session of summer school, Chris Pritchard noticed a sign posted in his dorm with information about the game Dungeons and Dragons. The sign listed a room number for interested persons. Pritchard went to the room and met Neal Henderson and the defendant. The three decided to play the game on a regular basis. Pritchard first learned to play the game when he was twelve years old. Pritchard and the defendant would also drink beer and smoke marijuana together.

Dungeons and Dragons is a role-playing game in which people create their own world of characters. Pritchard, Henderson and the defendant played the game based on the sword and sorcery theme of medieval times. The general classes of characters included bards, magic users, thieves and fighters.

Early during the first session of summer school in 1988, Chris Pritchard returned home to Washington for a brief visit. Mr. Von Stein and Chris argued over Chris' academic performance, with the two almost engaging in a physical fight. During dinner, Von Stein again challenged Chris to a fight, but Chris refused. Following the confrontation, Mr. and Mrs. Von Stein agreed that she should be the one to discipline the children. For the remainder of the first summer session, Chris did not return home, and the Von Steins continued to pay for his education and to provide him with $50 a week in spending money. When Chris failed to welcome his sister when she drove to Raleigh for a prearranged visit on the July 4th weekend, and Bonnie Von Stein could not reach him by phone for two days, Mrs. Von Stein filed a missing person report. Later, when Chris did call, Mrs. Von Stein asked him to begin keeping an account of how he was spending his money. Chris also enrolled for the second session of summer school.

On Wednesday, 20 July 1988, while they were in summer school, Pritchard and defendant discussed the subject of what would happen if Pritchard's parents were dead. Pritchard told defendant that if anything happened to his parents, he would assist defendant in opening his own restaurant and they could live in a big house in North Raleigh and drive fine cars. At this time, Pritchard ostensibly was not serious about the proposals. The next day, Pritchard spoke seriously with defendant for the first time about killing his parents for their money. Pritchard was aware that his stepfather had inherited over a million dollars and told the defendant that his parents were millionaires.

Pritchard and the defendant decided to start a fuse-box fire at the Von Stein house that Saturday and to put crushed sleeping pills in the Von Steins' food so that they would sleep through the fire. They planned to crush a fuse and put it in the fuse box to make it look like an accident. When defendant asked about the possibility of Angela Pritchard being present in the house, Chris Pritchard said, "Well, if she is there, then I guess her, too; but if she is not, that's fine too."

According to the plan, Pritchard went home on Friday, 22 July. On Saturday morning he told his parents he was leaving to go see some friends. Instead, Pritchard drove to Raleigh to pick up the defendant. In Raleigh, the defendant gave Pritchard a package of crushed sleeping pills. The two of them drove back to Washington that afternoon. Pritchard dropped defendant off at a location away from the house where defendant was to wait until Pritchard returned. Pritchard then went home and prepared hamburgers for the family lacing the food with the sleeping pills. After dinner, Pritchard told his family he was returning to Raleigh. After leaving his parents' home, Pritchard drove back to where defendant was staying. The two of them tried unsuccessfully to crush a fuse. Defendant told Pritchard the plan would not work so they returned to Raleigh. The defendant's new plan was to chop off the Von Steins' heads. The defendant wanted to purchase a machete, but no Army surplus stores were open.

The next day, defendant and Pritchard bought a hunting knife at a K-Mart in Raleigh. The new plan involved Neal Henderson driving the defendant to Washington. Chris Pritchard would stay in Raleigh to establish his alibi. Henderson needed to drive Pritchard's 1965 Mustang because defendant did not have a driver's license. If defendant was stopped while driving the Mustang without a license, then the murder could be traced back to Pritchard. The defendant was to commit the murders so that it would look like a burglary. Defendant planned to use the hunting knife and a baseball bat to carry out the murders. Henderson would wait and drive defendant back to Raleigh. To make it look like a burglary, defendant would steal some items of personal property from the house. Pritchard told the defendant where his mother always kept her purse in the kitchen and where she kept money in the bedroom. Henderson said it sounded fine to him, but it was agreed that Henderson and defendant would further discuss it.

While at Henderson's apartment, Pritchard drew a floor plan of his home for defendant and a map of his neighborhood. Both Henderson and defendant were present. Defendant was to receive $50,000 and a Porsche for his part in the plan and Henderson was to receive $50,000 and a Ferrari. Pritchard promised defendant and Henderson the money would come from his inheritance.

On Sunday night, 24 July, Henderson arrived at the campus parking lot where he had agreed to meet the defendant. Defendant

was standing by some trees and had with him a green backpack, a baseball bat, black tennis shoes and dark clothing, which included a ski mask. They arrived in Washington around 2:30 a.m. and, after locating the house, they drove around for a short while until defendant told Henderson to park the car. Defendant told Henderson to wait for him to return and that he would be back in thirty minutes.

That evening, the Von Steins had gone out to dinner. Mr. Von Stein went to bed upon returning home. At about 11:00 p.m., after checking on the many cats and her rooster, and making sure that the front and rear doors were locked, Mrs. Von Stein went upstairs to join her husband in their bedroom. She closed the door to their bedroom because their daughter was playing her radio and had a large fan running. After reading in bed, Mrs. Von Stein went to sleep around midnight.

Mrs. Von Stein was suddenly awakened by the sound of her husband's screams. Although there was much confusion, she was aware of an intruder standing at the foot of their bed. Her husband was making a series of short, piercing screams. Mrs. Von Stein reached out her hand to her husband, but was struck by some type of weapon which fractured her thumb. As Mr. Von Stein continued to scream, the intruder continued to strike both of them. She saw her husband being hit with a weapon, and then she was struck repeatedly in the head until she lost consciousness.

Momentarily regaining consciousness, Mrs. Von Stein observed the intruder standing near her feet. Again, the person struck her with an object as she was lying on the floor. She next remembered the door being closed softly and hearing thumps and "whooshes" through the wall, causing her to fear that her daughter was also being attacked.

Later, Mrs. Von Stein again regained consciousness. Although disoriented, she was aware that she was on the floor. When she reached for the bed she realized her husband's fingers were limp, but she thought she heard him breathing. She realized that she had been injured and knew she had to get help. She was able to push herself towards the telephone and pull it down on top of her chest. She called the operator who connected her with the police.

At 4:27 a.m. on 25 July 1988, a dispatcher with the Beaufort County Sheriff's Department received the call from Mrs. Von Stein.

The dispatcher had trouble understanding her, but eventually was able to direct officers to the Von Steins' address.

Sergeant Tetterton of the Washington Police Department arrived at the scene, followed by other officers. The front door of the house was locked, but the back door was standing open. He and another officer observed a slit in the screen over one of the glass storm windows. Upon further observation, Sergeant Tetterton noticed that the glass was broken and that there was glass on the floor of the inside back porch.

Upstairs, the officers found Mrs. Von Stein lying on the floor of her bedroom with a stab wound to her chest. The telephone receiver was still in her hand. Mr. Von Stein's body was on the bed, was bloody, and had no vital signs. The officers found Angela Pritchard in her room, ten to twelve feet from her parents' room. They asked her to wait downstairs. Angela was relatively unemotional when told her mother was wounded and her stepfather dead.

Meanwhile, Neal Henderson waited in the car for thirty minutes, but defendant did not return. Henderson drove closer to the subdivision to look for defendant and about ten minutes later, he saw the defendant running towards the car. When the defendant entered the car, he told Neal, "I did it. I can't believe I did it. I never want to see that much blood again the rest of my life. Let's get out of here." Immediately, Henderson drove away and after they were on the main highway, the defendant told Henderson to stop in a dark place where the defendant could change clothes because there was blood on him. After changing, defendant threw his bloody clothes in the trunk.

Upon entering Pitt County, Henderson and the defendant stopped at a dark, secluded spot on the side of the road in order to dispose of the bloody clothes. Defendant threw the clothes, the knife and the maps on the ground, poured some gasoline over the items and set them on fire. Later, Henderson and the defendant stopped for gas and to wash the mud off the car. Defendant gave Henderson money to buy the gas, which Henderson estimated to be approximately $60 to $80 in tens and twenties.

Around 4:30 a.m. on 25 July 1988, a farmer noticed a fire on the side of Highway 264. After seeing news reports on television of the murder, the farmer notified the police, who found the remains of burned clothing, a knife, the rubber sole of a Reebok tennis

shoe, and a partially burned, hand-drawn map of the neighborhood around the Von Steins' home. A handwriting comparison later revealed that Chris Pritchard had most likely drawn the map.

The autopsy performed on Mr. Von Stein's body on 25 July 1988 revealed lacerations to the scalp in five areas which were caused by blunt impacts to the victim's head, seven stab wounds to the victim's back and one stab wound to the left chest. In addition, there were numerous bruises and scrapes consistent with defensive moves. The knife found in the burning rubble, identified as State's Exhibit No. 40, could have caused these wounds. The knife wound to the left chest entered the victim's heart and, according to the autopsy report, resulted in the victim's death within a "very few minutes."

Mrs. Von Stein's injuries included a stab wound to her chest, which caused internal bleeding and a collapsed lung. She also sustained several open cuts to her head and a fractured thumb. Because the room was dimly lit and she was not wearing her glasses, Mrs. Von Stein was unable to identify her assailant. She could only describe the person as appearing dark and bulky and being armed with a stick, club or bat. No forensically significant fingerprints were found in the house.

For many months Chris Pritchard lied to his family, friends, and authorities. In June 1989, he was arrested, and, in late December, just before the trial, he first confessed to the police and his family. In June 1989, the police also arrested Neal Henderson who cooperated with them in their investigation. At defendant's trial, Henderson testified that Pritchard and defendant first approached him two or three weeks before the attack and asked him to be the driver. He identified the baseball bat used in the assault and defendant's knapsack, which defendant carried that night and left in the Von Stein home. Witnesses for defendant testified that they had never seen defendant with the knapsack.

At the penalty phase, one of defendant's high school teachers testified that defendant had been identified as a gifted student, had attended Governor's School, and had been a member of various school clubs, including the engineering, mathematics, yearbook, and African-American history clubs. A psychologist testified that his testing of defendant revealed an absence of violent tendencies and the presence of a primary mode of dealing with situations by denying feelings and thoughts. Defendant's mother testified that defend-

ant had been raised on a farm as part of a close, church-going family. His parents divorced when defendant was eighteen years old.

JURY SELECTION AND GUILT PHASE

I.

Defendant's first assignment of error concerns the constitutional rights to due process, an impartial jury, and the Eighth Amendment right to enhanced reliability in a capital case. Defendant here contends that the trial court committed reversible constitutional error during jury selection by (1) permitting the State to express repeatedly the opinion that a penalty phase was highly likely; (2) failing to excuse all potential jurors who heard the State assert that jurors who sat in the case would "look the monster in the eye"; (3) permitting the State to refer to defendant and the two co-defendants alike as "charged, indicted co-conspirators"; and (4) comparing the contingent phases of bifurcated trials to the halves of a football game. Defendant contends that, in these exchanges, the State repeatedly and improperly stated its opinion that defendant was guilty. Defendant contends that the tactics of the State and the conduct of the trial court implicitly communicated to the jury that defendant was probably or certainly guilty resulting in a jury unfairly primed to vote for guilt.

A.

[1] Defendant contends that the prosecutor prejudiced defendant by saying to potential jurors concerning the imposition of the death penalty in this case "there is a very good possibility that you may have to answer that question." However, the record also shows that prior to this statement, the prosecutor asked the members of the panel if they were aware that

> if and when Mr. Upchurch were [sic] found guilty of murder in the first degree that you, if you were selected to sit upon the jury, that you would be called upon to participate, sit in on the second phase of that trial, that is the penalty phase of that trial?

It is apparent from the transcript that the prosecutor was explaining the distinction between the two phases of a capital trial and was stressing the importance of each phase. The State did not inform the jury that a sentencing phase was certain in defendant's trial.

The trial court overruled defendant's objections to the State's comments. Defendant then moved to excuse all venire persons who had heard the remarks. Defendant argues that error occurred not only as to the jurors who were directly questioned, but also as to jurors in the venire who were listening and who eventually sat on defendant's jury. The trial court denied the motion, noting that it had given an instruction to disregard and that it would allow inquiry into the effectiveness of the instruction with subsequent persons called to the box. Defendant then moved for a mistrial which was denied.

On appeal, defendant argues that the curative instruction was not sufficient to remove the prejudice in this case, but he failed to show any prejudice he suffered in regards to the State's comments and the ineffectiveness of the court's instruction. When a court properly instructs jurors not to consider certain statements, any prejudice is ordinarily cured. *State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992); *State v. Smith*, 301 N.C. 695, 272 S.E.2d 852 (1981). The statements and questions by the State were not of such a highly incriminating nature as to make the court's curative instruction insufficient to avert any prejudice. *State v. Silva*, 304 N.C. 122, 282 S.E.2d 449 (1981). *See also State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984). The trial court properly instructed the jurors, and, therefore, the defendant was not prejudiced. *See generally Drdak*, 330 N.C. 587, 411 S.E.2d 604; *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Pruitt*, 301 N.C. 683, 273 S.E.2d 264 (1981).

B.

[2] Defendant excepted to the prosecutor's comment during jury selection that a juror would have to "look the monster in the eye." The trial court sustained his objection, granted the motion to strike, and instructed that juror and other members of the panel to disregard the statement.

As we have stated above, and as this Court has held in *Pruitt*:

> Ordinarily, when incompetent or objectionable evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in the admission of the evidence is cured. *E.g., State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). In like manner, improper argument or remarks by counsel are usually cured by appropriate in-

> structions by the court to the jury. *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970). Assuming, *arguendo*, that the testimony about which defendant complains was erroneously admitted, there was no prejudice because of the curative instructions which the jury received.

Pruitt, 301 N.C. at 688, 273 S.E.2d at 268. Because the trial court properly instructed the jurors in his favor, defendant was not prejudiced. *See generally Drdak*, 330 N.C. 587, 411 S.E.2d 604; *Bullard*, 312 N.C. 129, 322 S.E.2d 370; *Pruitt*, 301 N.C. 683, 273 S.E.2d 264.

C.

[3] Defendant also objected to the State's remarks that defendant's claims equate him with his co-defendants, who had already pled guilty. The trial court allowed the prosecutor to ask potential jurors whether they could weigh the testimony of two potential witnesses as they would other witnesses even though they had entered a plea arrangement. The facts behind the plea bargains between the State and Pritchard and Henderson were fully aired during the trial. Defendant fails to show any prejudice resulting from the State's comparison of defendant to the two co-defendants. *Bullard*, 312 N.C. 129, 322 S.E.2d 370.

D.

[4] The trial court, when describing the proceeding to the potential jurors, used the metaphor that the two phases of a capital case are like two halves of a football game. Defendant contends that the trial court thereby unwittingly communicated an opinion that this case would have a penalty phase, when the occurrence of a penalty phase is actually contingent. However, the trial court stated that the two phases of a capital trial "may" be seen like two halves of a football game. The defendant acknowledges that the trial court used the term "may." This comparison was not an expression of an opinion. *See State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989), wherein this Court held that the trial court did not express an opinion on defendant's guilt by instructing the jury that the evidence tended to show that defendant confessed.

II.

[5] Defendant's second assignment of error concerns the trial court's failure to adequately respond to the potential for unconstitutional prejudice. Near the end of the State's evidence, the prosecutor

used the words "probation officer" during a bench conference. The defendant argues that the jury would have understood the bench conference was in reference to the State's next witness. However, the evidence of defendant's prior convictions had not yet been allowed into evidence.

Near the end of the State's case, the trial court asked the State for the identity of its next witness. The trial court directed counsel to approach the bench when the State requested a lunch recess to think about which witness to call next.

Defendant contends error was committed when the trial court failed to grant defendant's motion for a mistrial after the words "probation officer" were spoken within the hearing of the jury during a bench conference following a query by the trial court as to who would testify next for the State. The following exchange between the trial court and the prosecuting attorney took place prior to the bench conference:

> THE COURT: Thank you. Mr. Norton, who is your next witness going to be?
>
> MR. MASON: Your Honor, I think we are going to have to discuss that during the lunch break.
>
> THE COURT: Let me see you gentlemen up here, please.

During the bench conference that followed, the words "probation officer" or "parole officer" were spoken so that certain individuals not participating in the bench conference could hear them. This is the basis of defendant's claim of prejudicial error. The transcript next indicates that the trial court said:

> THE COURT: Mr. Norton, do not speak so that you can be heard by the jury.
>
> Members of the jury, if any of you have heard anything that Mr. Norton said you put it out of your minds immediately. You pay no attention to it. And it must not influence your verdict upon any of these matters that will come to your consideration in this case. Can all of you do that? If you can't, let me know about it right now.
>
> (No response from the jurors)
>
> THE COURT: Members of the jury, let me ask you one other question at this point in time. I just gave you that in-

struction that you were not to consider anything that you might have heard during the bench conference. Did any of you hear anything that was said at the bench conference? If you did I want you to raise your hand right now. If you heard any remarks made by counsel or anything that may have been said by me other than what I directed to you when I gave you that instruction, please raise your hand right now.

(No response from the jurors)

After the jury was dismissed, defendant moved for a mistrial on the grounds that Mr. Norton had, during the bench conference, referred to a potential witness as a "probation officer." The motion was denied.

After the lunch recess, the trial court permitted defendant to make an offer of proof relevant to his pre-recess motion for mistrial. The offer consisted in part of testimony by Kathleen Davis and Carolyn Richardson. Davis testified that she had been seated on the third row from the back of the courtroom during the bench conference and that she had heard someone facing the bench distinctly say the words "probation officer." Richardson testified that she was seated on the second to last row on the opposite side of the courtroom from Davis and that she heard the same phrase. Both testified that they did not know who had spoken the words nor to whom the words referred. Defendant also requested and received an affidavit from the court reporter, in which she said that she was eight feet from the bench and nine feet from the nearest juror, that she heard most of the conference, and that the words "probation officer" were louder and more distinct than the other words, and that she knew that the District Attorney had made the statement. The trial court again denied the motion for mistrial. The State did not call the probation officer.

Regarding the standard of review for a denial of a motion for a mistrial, this Court has stated:

> It is well settled that the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. . . . [A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Barts, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986) (citations omitted).

Defendant argues that the witnesses' testimony during the voir dire indicates that it is highly likely that the jury also heard the words "probation officer" and knew to whom the words referred. However, the testimony and the affidavit in support of this motion do not indicate that any of the witnesses heard the probation officer referred to by name. Neither witness questioned knew whether the probation officer referred to was Chris Pritchard's, Neal Henderson's, or the defendant's probation officer. The trial court told the jurors that if they heard anything they should disregard it, and he asked if any in the jury would be unable to do so. None of the jurors said that they would be unable to do so. The trial court subsequently asked the jurors whether they had heard anything at the conference and no juror said that he had. As stated above, a mistrial on review will be granted only where abuse of discretion is found. There is sufficient evidence in the record to support the trial court's ruling that the mishap did not sufficiently prejudice defendant's case to warrant a mistrial. After reviewing the record, we cannot say that the ruling was so arbitrary that it was not the result of a reasoned decision. Therefore, we overrule this assignment of error.

III.

[6] Defendant next assigns error to the trial court's unrecorded bench and in-chambers conferences and one communication with a juror. Defendant contends these occurrences violated his right to presence at each stage of a capital trial under Article I § 23 of the North Carolina Constitution. During jury selection and trial, the trial court conducted seventy-eight unrecorded bench conferences and two unrecorded chambers conferences with counsel. The record also shows one unrecorded exchange with a juror.

A.

The issue raised by this assignment of error is controlled by *State v. Buchanan*, 330 N.C. 202, 410 S.E.2d 832 (1991). In *Buchanan*, this Court held that a defendant's state constitutional right to be present at all stages of his capital trial was not violated when the trial court conducted bench conferences with counsel for both parties while the defendant was present in the courtroom. In that case, in rejecting the contention that a defendant's constitutional

right included his personal presence at a bench conference, this Court held:

> Though defendant himself did not attend the conferences in this case, we conclude that the trial court's bench conferences with defense counsel and counsel for the State did not violate defendant's state constitutional right to be present at all stages of his trial. As stated above, defendant was personally present in the courtroom during the conferences. Further, and perhaps more importantly, his actual presence was not negated by the trial court's actions. At each of the conferences defendant was represented by his attorneys. Defendant was able to observe the context of each conference and inquire of his attorneys at any time regarding its substance. Through his attorneys defendant had constructive knowledge of all that transpired. Following the conferences defense counsel had the opportunity and the responsibility to raise for the record any matters to which defendant took exception. At all times defendant had a first-hand source of information as to the matters discussed during a conference. It also is relevant that bench conferences typically concern legal matters with which an accused is likely unfamiliar and incapable of rendering meaningful assistance. Other conferences typically deal with administrative matters that are nonprejudicial to the fairness of defendant's trial. In addition, such conferences do not diminish the public interest associated with defendant's right to presence. Unlike the excusal of prospective jurors following *ex parte* communications, in this case defendant, through his attorneys, had every opportunity to inform the court of his position and to contest any action the court might have taken.

Buchanan, 330 N.C. at 223, 410 S.E.2d at 844.

In the instant case, the defendant has not shown or contended that he was absent from the courtroom during these proceedings. The defendant acknowledges that his counsel was present at all of the bench conferences and in-chambers conferences. The defendant fails to show that his actual presence at the bench conferences or at the in-chambers conferences would have added to his defense. Defendant fails to demonstrate, and the record does not in any way suggest, that the bench conferences conducted implicated defendant's confrontation rights or that his presence at conferences would have had a reasonable substantial relation to his opportunity

to defend. He has not met his burden of establishing that any of the conferences concerned his rights of confrontation or that his presence at any of the conferences was necessary to insure his opportunity to defend himself. Further, a number of these unrecorded bench conferences were conducted at the request of defense counsel. Thus, defendant's assignments of error relating to state constitutional claims are without merit.

Defendant also asserts that his absence from the unrecorded bench conferences violated his Sixth Amendment right under the Constitution of the United States. Defendant failed to raise this issue before the trial court, therefore, this issue is deemed waived. *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986). Furthermore, this very contention was rejected by this Court in *Buchanan*. This assignment of error is overruled.

B.

[7] With regard to the single asserted contact with a juror outside the presence of the defendant, the State contends the record does not show that the trial court's contact with the juror was improper. The record in this regard clearly shows this occurrence was raised by the trial judge himself in speaking directly to the jurors in open court, and the record clearly shows the full nature and extent of the communication. The record reflects:

> THE COURT: If any of you [the jury members] need some sort of statement or certificate, or letter to your employer or employers to tell them where you are so that they don't get unhappy and upset and the like, if you would let us know about that, we will be happy to supply it to you, either Mrs. Thompson, the clerk, or if necessary, I will be happy to sign a letter myself as I did for Mrs.—I can't remember your name.
>
> JUROR: Green.
>
> THE COURT: I will be happy to do that if any of you need such. If at the first recess, if you will just let Ms. Andrews know about it, we'll be happy to prepare whatever you need in that regard.

Again, a few moments later, the Court stated:

> But if any of the others of you need such, again, if you will let Ms. Andrews know, we'll be happy to assist you with that.

The record is thus abundantly clear as to what this complained-of communication was all about—that, consistent with the customary practice of our trial courts to ease employed jurors' stress during jury duty, a letter was signed for a juror, Juror Green, for the benefit of that juror and her employer. This was the full sum and substance of this communication or contact. There was no objection or request by defense counsel to examine the letter. Defendant has therefore failed to meet his burden of establishing constitutional error. *See Buchanan*, 330 N.C. 202, 410 S.E.2d 832. Even assuming that there was error in the contact with the juror, the error was harmless beyond a reasonable doubt. *See State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991).

IV.

[8] Defendant also assigns error to his conviction on the first-degree burglary charge. In essence, defendant contends that the agreement embodied in the conspiracy between himself and Pritchard furnished authorized consent to enter the home and therefore established his defense to first-degree burglary. Defendant asserts that the evidence was uncontradicted that Chris Pritchard was a resident of the Lawson Road home in Washington and, therefore, claims that the State failed to prove that Pritchard was without the capacity to consent to entry by others. Thus, defendant maintains, the State failed to show Pritchard lacked authority to grant defendant's entry and, therefore, the requisite wrongful entry for a first-degree burglary conviction was not and could not be established.

The issue in this assignment of error is whether entry of the Von Stein house was without the consent of anyone authorized to give consent. Defendant argues that, because Pritchard was a resident of the home, he inherently had the ability to authorize defendant's entry. This Court has considered this argument in *State v. Meadows*, 306 N.C. 683, 295 S.E.2d 394 (1982), *rev'd on other grounds*, 307 N.C. 628, 300 S.E.2d 351 (1983). In that case the Court held:

> 'The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein.' *State v. Person*, 298 N.C. 765, 768, 259 S.E.2d 867, 868 (1979). The breaking

and entry of the dwelling must be without the consent of anyone authorized to give consent. *State v. Boone*, 297 N.C. 652, 256 S.E.2d 683 (1979); *State v. Friddle*, 223 N.C. 258, 25 S.E.2d 751 (1943); *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911); *State v. Rowe*, 98 N.C. 629, 4 S.E. 506 (1887); *State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 691 (1976); Annot., *Burglary—Entry with Consent*, 93 A.L.R. 2d 531 (1964).

306 N.C. at 689-90, 295 S.E.2d at 398.

As a child who had a room in his parents' home, Pritchard's authority was not unlimited. Although one may consent to entry by another into an occupied dwelling, consent as a defense is not established until authority to consent is determined to be valid. "[I]t is no defense to a burglary charge where defendant is given consent to enter by one having no authority to do so." *Smith v. State*, 477 N.E.2d 857, 863 (Ind. 1985) (citing *State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672 (1976)).

Chris Pritchard was not the owner of the home, thus any authority he may have had depends upon the circumstances under which consent was given or implied. Just as circumstances can imply authority to consent to entering the home, circumstances can also indicate, or clearly show, an inability to give valid consent. While it may have been proper for Pritchard to consent to a friend entering the home during normal visiting hours to wait for his arrival, it does not necessarily follow that Pritchard would have had the same authority to give consent under other circumstances.

Under the facts of this case, it cannot be said that either Pritchard or defendant had any good-faith, reasonable belief that Pritchard had authority to give defendant permission to enter his parents' home in the middle of the night when Pritchard was not there. When Pritchard began to plot his parents' death, both he and defendant could not reasonably have believed that Pritchard had any authority to give valid consent for entry for the purposes of their conspiracy. Any authority he may have had was exceeded and any implied consent was invalid from its inception. Therefore, as Pritchard had exceeded any authority he may have had, entry of the dwelling by defendant clearly was without the consent of anyone authorized to give consent. As in *Meadows*, we conclude this assignment of error and contention is without merit in light of the evidence. Since we find no error in and uphold the first-

degree burglary conviction, defendant's further contention that his felonious larceny conviction (as dependent on his burglary conviction) should be reduced to misdemeanor larceny, is also meritless and fails.

PENALTY PHASE

V.

[9] In his next assignment of error, defendant contends he is entitled to a new sentencing proceeding under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We agree.

In *McKoy*, the United States Supreme Court held unconstitutional, under the eighth and fourteenth amendments of the federal constitution, jury instructions directing that, in making the final determination of whether death or life imprisonment is imposed, no juror may consider any circumstance in mitigation of the offense unless the jury *unanimously* concludes that the circumstance has been proved. Our review of the record reveals, and the State agrees, that the defendant's jury was so instructed. The trial court instructed the jury to answer "no" to each mitigating circumstance that it failed to find unanimously. The issue, then, is whether the *McKoy* error can be deemed harmless. "The error . . . is one of federal constitutional dimension, and the State has the burden to demonstrate its harmlessness beyond a reasonable doubt." *State v. McKoy*, 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990); N.C.G.S. § 15A-1443(b) (1988).

Issue No. 2 stated: "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" Twelve possible mitigating circumstances were then listed. The trial court instructed that the jury must unanimously find by the preponderance of the evidence at least one of these mitigating circumstances before Issue No. 3 could be considered. Indeed, the jury found five mitigating circumstances unanimously, while rejecting seven. Issue No. 3 stated: "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?" The trial court instructed the jury that if it did not unanimously find beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, it should answer Issue No. 3 "no" and recommend a life sentence. If it found

unanimously beyond a reasonable doubt that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, the jury was to answer "yes" and proceed to Issue No. 4. Issue No. 4 stated: "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 present from the evidence?"

Defendant contends that there was evidence in the case to support a finding of all the rejected mitigating circumstances as well as ones not expressly submitted. Defendant argues that the trial court's instruction on Issue No. 4 did not cure the faulty instructions on Issue No. 2 and Issue No. 3 because the jury would not have reached Issue No. 4 if it had found at Issue No. 3 that the mitigating circumstances were sufficient to outweigh the aggravating circumstances. In light of "the constitutional importance of preserving the jury's ability to consider under proper instructions all evidence proffered by a capital defendant that could reasonably mitigate the sentence to something less than death . . . it would be a rare case in which a *McKoy* error could be deemed harmless." *State v. McKoy*, 327 N.C. at 44, 394 S.E.2d at 433 (citation omitted). This is not the rare case contemplated by *McKoy*.

The State concedes that there was error in the instructions pursuant to the holding in *McKoy v. North Carolina*. In addition, the State is unable to distinguish this Court's decisions in *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); *State v. Huff*, 328 N.C. 532, 402 S.E.2d 577 (1991); and *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426. Therefore, the State cannot meet its burden of establishing that the error was harmless beyond a reasonable doubt.

A new sentencing hearing, under *McKoy*, is required.

VI.

[10] In his final assignment of error, defendant contends that the trial court violated defendant's right to be free from double jeopardy. The trial court submitted to the jury during the penalty phase the aggravating circumstance that the offense was committed while defendant was engaged in the commission of a burglary. The jury had rejected the felony murder rule as a theory of guilt

for first-degree murder in the first phase of the trial. Defendant contends this precludes admission of the same issue under the same burden of proof in the penalty phase.

Defendant's argument ignores the fact that the jury, in the guilt phase, convicted defendant separately of burglary *and* of first-degree murder on the basis of premeditation and deliberation. Therefore, *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979) controls. In *Cherry*, the Court held that when a defendant is convicted of first-degree murder under the felony murder rule, the trial court shall not submit to the jury at the sentencing phase an aggravating circumstance regarding the underlying felony. There it was held improper to submit the aggravating circumstance in N.C.G.S. § 15A-2000(e)(5) when the defendant was engaged in the commission of one of the enumerated felonies, except where the defendant was convicted of first-degree murder on the basis of his premeditation and deliberation. This assignment of error is without merit.

For the reasons stated, we find no error in the guilt phase of defendant's trial, but remand for a new capital sentencing proceeding.

No error in the guilt phase;

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

STATE OF NORTH CAROLINA v. ALLEN LORENZO GAINES, BRYAN CORNELIUS HARRIS, AL MUSTAFA COLEMAN

No. 147PA92

(Filed 1 October 1992)

1. Criminal Law § 1305 (NCI4th)— capital or noncapital trial— purpose of pretrial hearing

In any pretrial hearing in a first degree murder case to determine the capital or noncapital nature of the trial, the trial court must determine upon the record and facts before it, as submitted by the parties, whether there is sufficient

evidence to support the submission of an aggravating circumstance to the jury.

Am Jur 2d, Criminal Law § 418.

2. **Criminal Law § 1333 (NCI4th)— capital trial—aggravating circumstance—standard of proof**

In ruling on whether an aggravating circumstance set forth in N.C.G.S. § 15A-2000(e) should be submitted, the trial court must use the same standard applied in determining the appropriateness of a motion to dismiss at the end of the evidence.

Am Jur 2d, Trial § 857 et seq.

3. **Criminal Law § 1342 (NCI4th)— capital trial—aggravating circumstance—law officer—official duties**

In determining whether an off-duty police officer serving as a security guard for a private enterprise was performing "official duties" at the time he was killed within the meaning of N.C.G.S. § 15A-2000(e)(8), the trial court must examine the particular nature, extent and circumstances of the secondary employment, the way in which such employment is routinely regarded by the employer and employee, and the nature of the actions taken by the officer at the time in question.

Am Jur 2d, Sheriffs, Police, and Constables § 46 et seq.

4. **Criminal Law § 1342 (NCI4th)— off-duty police officer—motel security guard—ejection rather than arrest of defendants—official duties**

The election of a uniformed off-duty police officer employed as a motel security guard to eject defendants from the motel premises rather than to arrest them for trespassing cannot be considered a bar to finding that he was acting pursuant to his official duties as a law enforcement officer in addition to any duties he was performing for the motel. The act of making an arrest does not define the point at which a uniformed officer, either on or off duty, begins to act officially rather than acting merely for private purposes.

Am Jur 2d, Sheriffs, Police, and Constables § 46 et seq.

5. Criminal Law § 1342 (NCI4th)— off-duty police officer—retention of official status

A police officer retains his official law enforcement officer status even while "off duty" unless it is clear from the nature of his activities that he is acting *solely* on behalf of a private entity, or is engaged in some frolic or private business of his own.

Am Jur 2d, Sheriffs, Police, and Constables § 46 et seq.

6. Criminal Law § 1342 (NCI4th)— capital trial—aggravating circumstance—murder of law officer—motel security guard—ejection of defendants from motel premises—official duties

The aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(8) relating to the murder of a law enforcement officer includes duly sworn law enforcement officers in uniform when they are performing off-duty, secondary law enforcement related duties when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public. Therefore, a uniformed police officer employed as a motel security guard was engaged in his official duties when he ejected defendants from the motel premises where police department policy provided that officers engaged in secondary employment must enforce the law and not be bound by rules or restrictions of a private employer, and it is clear that the officer was at all times acting as a law enforcement officer under the full supervision and control of the municipal police department for the sole purpose of enforcing the law.

Am Jur 2d, Sheriffs, Police, and Constables § 46 et seq.

7. Criminal Law § 1342 (NCI4th)— capital trial—aggravating circumstance—murder of law officer—motel security guard—engaged in official duties—killed because of official duties

There was sufficient evidence for the jury to find that a uniformed off-duty police officer employed as a motel security guard "was engaged in the performance of his official duties" at the time he was killed where he had ejected defendants from the motel premises; defendants returned to the motel and one defendant, with a nylon stocking over his face, pointed a shotgun at the officer and shot him; and the officer was rising and drawing his weapon at the time he was killed. Furthermore, the jury could find that the officer was killed

"because of the exercise of his official duty" where the evidence tended to show that the sole purpose of defendants' second visit to the motel was to kill the officer because of his earlier law enforcement actions involving them.

Am Jur 2d, Sheriffs, Police, and Constables § 46 et seq.

ON writ of certiorari, pursuant to N.C.G.S. § 7A-32, to review the order of *Lewis (Robert D.), J.*, entered on 3 March 1992, in Superior Court, MECKLENBURG County, ordering that the defendants be tried non-capitally on first-degree murder charges. Heard in the Supreme Court 10 September 1992.

Lacy H. Thornburg, Attorney General, by Joan Herre Byers and Robin Perkins Pendergraft, Special Deputy Attorneys General and John J. Aldridge, III, Assistant Attorney General, for the State-appellant.

Malcolm R. Hunter, Jr., Appellate Defender, by M. Gordon Widenhouse, Jr., Assistant Appellate Defender, for defendant-appellee Gaines.

Fred W. DeVore, III, for defendant-appellee Coleman.

Charles L. Morgan, Jr., for defendant-appellee Harris.

The North Carolina Association of Police Attorneys, by Randle L. Jones and Richard Hattendorf, amicus curiae.

LAKE, Justice.

The issue presented by this case has not been addressed by this Court and thus is one of first impression in North Carolina. At issue here is whether, in determining the capital or non-capital nature of first-degree murder trials, the aggravating circumstance as set forth in the capital punishment statutory law of this state, specifically N.C.G.S. § 15A-2000(e)(8), may be applicable to the murder of law enforcement officers who are at the time engaged in secondary, supplemental employment for a private enterprise.

Under this subsection of the statute, in order for the State to proceed to try the case capitally, the evidence for the State must be sufficiently substantial to permit a jury to find that the first-degree murder was "committed against a law-enforcement officer" (1) while he was "engaged in the performance of his official duties" or (2) "because of the exercise of his official duty." N.C.G.S.

§ 15A-2000(e)(8) (1988). We hold that the aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(8) may indeed be applicable to the murder of law enforcement officers who are at the time engaged in secondary employment in determining whether a first-degree murder case should be tried capitally.

For the purposes only of the pretrial hearing in this case and this appeal, the parties have stipulated to the facts. The defendants, Allen Lorenzo Gaines, Bryan Cornelius Harris and Al Mustafa Coleman, were each indicted on 2 December 1991 on one count of first-degree murder of Charlotte Police Officer Eugene Griffin. The State determined it would try the defendants capitally upon one aggravating circumstance, i.e., N.C.G.S. § 15A-2000(e)(8). On 4 February 1992, defendant Gaines filed a motion for pretrial determination of the applicability of the aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(8), and defendant Coleman filed a similar motion on 17 February 1992. These motions both specified that the State contends that only one aggravating circumstance is supported by the evidence, i.e., N.C.G.S. § 15A-2000(e)(8), and that the State intends to request that this aggravating circumstance be submitted to the jury at the sentencing phase for a possible sentence of death. These motions further stated that the defendants contend that the evidence to be presented by the State, whether at trial or at sentencing, is insufficient as a matter of law to call for the submission to the jury of the aggravating circumstance set forth in N.C.G.S. § 15A-2000(e)(8). Defendants assert that the evidence is insufficient because Officer Griffin was a privately employed security guard at the time of his death and was not shot "because of the exercise of his official duty."

On 19 February 1992, Judge Robert D. Lewis held a hearing pursuant to the procedure approved in *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984) to determine whether the killing of Officer Griffin "was committed against a law-enforcement officer . . . while engaged in the performance of his official duties or because of the exercise of his official duty." N.C.G.S. § 15A-2000(e)(8). After review of the stipulated facts and other documents, the trial court held there was insufficient evidence to find that the killing of Officer Griffin occurred while he was engaged in the performance of his official duties, or because of the exercise of his official duties. Accordingly, the trial court ordered that each defendant be tried for non-capital first-degree murder since the State identified no other aggravating circumstance as set out in N.C.G.S. § 15A-2000(e)

as being present from the anticipated evidence in the case. On 13 April 1992, the State filed a petition for writ of certiorari which this Court granted on 24 June 1992.

I.

On 22 November 1991, Officer Eugene Griffin, a duly sworn law enforcement officer with the Charlotte Police Department, was working in a secondary employment capacity for the Red Roof Inn. In addition to his regular police officer pay, Officer Griffin was being paid in accordance with his law enforcement officer status by the Red Roof Inn to provide, as a law enforcement officer, security for the motel, its property and its occupants. He was engaged in this secondary employment during hours that were not his regularly scheduled "on-duty" or on-shift hours with the Charlotte Police Department. In accord with the Charlotte Police Department regulations regarding such secondary employment, Officer Griffin wore his Charlotte Police Department uniform, which included his department-issued service revolver, his badge of office and his portable hand-held radio. The Red Roof Inn is within the territorial limits and jurisdiction of the Charlotte Police Department.

The employment of Officer Griffin with the Red Roof Inn was approved and regulated by the Charlotte Police Department in accordance with its General Order No. 8. The order specifically governs and controls a sworn law enforcement officer's ability to accept and the manner in which he performs any secondary, supplemental employment. Officer Griffin, according to the stipulation of facts, was complying with the requirements of General Order No. 8 attached to said stipulation. This general order provides in particular that officers shall not work "off duty" in a police-related capacity for businesses that are not frequented by the general public. The general order further required that any officer so engaged be supervised by the Charlotte Police Department during his or her secondary employment by a full-time Coordinator "consistent with guidelines imposed by the department." Additionally, this general order specifically provided that "officers engaged in secondary employment conform to the same standard of conduct as applies to their on-duty activities. (This would specifically include the requirement that they enforce the law and not let themselves be bound by rules or restrictions a private employer may wish to enforce for his own purposes)."

At approximately ten minutes past twelve midnight, on 22 November 1991, defendant Gaines, accompanied by defendants Harris and Coleman, drove a black Nissan 200SX into the parking lot of the Red Roof Inn and parked close to the door of the lobby which was then occupied by Officer Griffin and the motel night auditor. Music from the automobile radio was loud and could be heard from within the office of the motel. After parking, the defendants exited the vehicle and approached the stairwell by the front-lobby entrance. Officer Griffin went to investigate and approached the defendants who were there to see a person in Room 201 named Anthony "Buster" Williams. Defendant Coleman was partially up the stairway and the remaining two defendants were standing close by when Officer Griffin stopped them. He advised them in words to the effect that "there was not going to be a party here tonight" and further that only one of the three would be allowed to visit the occupant in Room 201. Defendant Gaines began arguing loudly with Officer Griffin about his not allowing all three of them to go to the room. With Officer Griffin's permission, defendant Coleman proceeded upstairs and attempted to see Williams who did not open his door. Defendant Gaines questioned and argued with Officer Griffin as to his authority to deny all three of them access to the room, and Officer Griffin replied that he was a police officer employed by the Red Roof Inn and that they were to do what he said. Defendant Gaines persisted in arguing with Officer Griffin, whereupon the officer grabbed him by his coat with both hands and said "you will listen to what I say and you will leave the property." Defendant Coleman then came back downstairs and after further words with Officer Griffin the defendants left the motel property in the black Nissan. As they drove past the lobby door and Officer Griffin, the defendants yelled obscenities and cranked their automobile radio to full volume.

After the car left, Officer Griffin returned to his seat in the lobby of the motel and resumed conversation with the motel's night auditor. The two discussed why the three young men were at the motel. In the meantime, defendant Gaines was angry and upset because the police officer had "yoked him up." He told one of his companions who inquired what had happened, "That's o.k., that's o.k. Watch." He drove the Nissan to a nearby house or apartment, went inside and returned with a long shotgun. When defendants Coleman and Harris asked what he intended to do with the shotgun which he placed in the back seat of the Nissan, defendant Gaines

replied he was going to kill the officer, using an obscenity to refer to him. Defendant Coleman then told defendant Gaines several times that he had better leave "that Cop" alone.

Approximately twenty minutes after their first encounter with Officer Griffin, the defendants returned to the Red Roof Inn and parked the Nissan in a lot behind the Inn. They exited the vehicle, and Gaines placed a nylon stocking over his face and headed alone toward the motel with the shotgun. Gaines approached and started into the lobby front doors, which were opened for fresh air. Officer Griffin was seated on a sofa directly in front of the opened doors. At the entrance, defendant Gaines fired the shotgun at Officer Griffin. The night auditor was standing behind the counter between two computers and observed Officer Griffin attempt to stand, facing the door with a look of horror on his face just as the shotgun spray hit him in the right side of his chest and knocked him back against the wall. Simultaneously, Officer Griffin attempted to draw his service revolver. After the shotgun blast, Officer Griffin grabbed his chest and moaned "I've been shot."

Officer Griffin immediately called police communications with his portable radio and asked for immediate assistance, giving his location. At approximately the same time, the night auditor dialed 911 emergency for assistance. Charlotte Police Officers were dispatched and upon arrival found Officer Griffin lying beside the desk bleeding from the chest wound but still conscious. He was able to provide the officers with the suspects' car license tag number and also information regarding their identity. He told the officers present that: "It was the same guys I had trouble with earlier." Officer Griffin was mortally wounded and later died at Carolina's Medical Center.

II.

[1] In any pretrial hearing in a first-degree murder case to determine the capital or non-capital nature of the trial pursuant to the procedure approved in *Watson*, the trial court must determine upon the record and facts before it, as submitted by the parties, whether there is sufficient evidence to support a submission of an aggravating circumstance to the jury. In the instant case, the only aggravating circumstance contended as appropriate by the State is within subdivision (8) of N.C.G.S. § 15A-2000(e), which relates to the murder of a law enforcement officer. Thus, the essence of the question now before this Court is one of statutory construc-

tion and application of the facts before the trial court as reflected in the record. N.C.G.S. § 15A-2000(e)(8) in its entirety states:

> The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

We have held it to be a cardinal principle that in the construction of statutes courts should always seek to give effect to the legislative intent, which may be discerned by consideration of the *purpose* of the statute, "the evils it was designed to remedy, the effect of proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *State v. Tew*, 326 N.C. 732, 738, 392 S.E.2d 603, 607 (1990). It is, of course, a fundamental principle of criminal jurisprudence that courts shall interpret penal statutes narrowly. *State v. Glidden*, 317 N.C. 557, 346 S.E.2d 470 (1986); *State v. Jordan*, 227 N.C. 579, 42 S.E.2d 674 (1947). We have further held that when "it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant. When 'a person's life is at stake . . . the jury should not be instructed upon one of the [aggravating] statutory circumstances in a doubtful case.' " *State v. Oliver*, 302 N.C. 28, 61, 274 S.E.2d 183, 204 (1981) (*quoting State v. Goodman*, 298 N.C. 1, 30, 257 S.E.2d 569, 588 (1979)). However, it is also fundamental in statutory construction that a reviewing Court must give a statute its plain or ordinary meaning, and that strict construction of statutes requires only that their application be limited to their express terms, as those terms are naturally and ordinarily defined. *Turlington v. McLeod*, 323 N.C. 591, 374 S.E.2d 394 (1988).

[2] In ruling on whether or not an aggravating circumstance set forth in the statute should be submitted, the trial court must use the same standard applied in determining the appropriateness of a motion to dismiss at the end of the evidence. In *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984), this Court stated:

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom;

> contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered . . . .

310 N.C. at 339, 312 S.E.2d at 397. *See also State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated in light of McKoy*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), *new sentencing ordered*, 329 N.C. 679, 406 S.E.2d 827 (1991).

We have previously held that when an "on-duty" or on-shift law enforcement officer in uniform is murdered during the performance of his employment, the evidence supports submission of the aggravating circumstance set out in N.C.G.S. § 15A-2000(e)(8). *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence reinstated*, 331 N.C. 746, 417 S.E.2d 227 (1992); *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *sentence vacated*, 494 U.S. 433, 108 L. Ed. 2d 369, *on remand*, 327 N.C. 31, 394 S.E.2d 426 (1990); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). The critical distinction in the case *sub judice* is the murder of an officer while engaged in a secondary, supplemental job for a private enterprise. The essence of subdivision (8) of the statute requires that the State *first* produce evidence that the victim was "a law enforcement officer" and *second* the State must meet one or the other of a disjunctive, two-pronged test: (1) that the officer was murdered "while engaged in the performance of his official duties" or (2) "because of the exercise of his official duty." N.C.G.S. § 15A-2000(e)(8).

With regard to the first requirement of subdivision (8) of the statute, it is clear from the stipulation, record and briefs submitted that the evidence fully supports that Officer Griffin was a duly sworn law enforcement officer when he was killed. Thus, we will address the latter alternative phrases of the statute concerning whether the officer was "engaged in the performance of his official duties" *or* was killed "because of the exercise" thereof.

[3] With respect to the first of these two phrases the trial court concluded, and the defendants here contend, the officer was not engaged in his official duties within the meaning of this statutory language because of his "off-duty" secondary employment. Defendants contend that the record shows Officer Griffin, in the course of his two confrontations with the defendants, was performing no "official duties" of law enforcement, but rather was acting solely

as a security officer for the Red Roof Inn. We disagree and hold that the determination of this circumstance requires in each case an examination of the particular nature, extent and circumstances of the secondary employment by a private enterprise, the way in which such employment is routinely regarded by the employer and employee, and the nature of the actions taken by the officer at the time in question.

[4] With regard to the question of whether the officer was engaged in the performance of his official duties when he was murdered, it appears the trial court ruled the officer was not so engaged because he elected to eject the defendants from the premises of the Red Roof Inn instead of making an arrest. We find this to be an unduly narrow and an unrealistically restrictive interpretation of the term "official duties" as it relates in actual practice to law enforcement officers. Such an interpretation would seem to require that a law enforcement officer be actively and aggressively focused upon a particular criminal suspect, as in the case of actually drawing or firing his weapon or engaging in hot pursuit, in order for his public service to fall within the realm of "official duties." We find this to be an inordinately strained and unnatural application of this term as it is normally used with respect to the official duties of all law enforcement officers, which includes such duties as investigative work (including stakeouts), crowd or traffic control, and routine patrol by automobile.

The power of arrest is unique to law enforcement officers. N.C.G.S. § 15A-404(a) (1988). However, for the reasons hereinabove set forth with respect to the primary and secondary duties of a duly sworn law enforcement officer whether serving on or off duty, the act of making an arrest does not define the point at which a uniformed officer, either on duty or off duty, begins to act officially, as opposed to acting merely for private purposes. We note that our statutory law, as well as public policy considerations and the usual training afforded law enforcement officers, dictates that the act of making an arrest is the last and not the first act of intervention on the part of an on-duty or off-duty law enforcement officer in undertaking to handle appropriately instances of disturbance of the public peace. The lowest level of intervention on the part of our police officers is virtually a universally accepted practice in this country in terms of preservation of our civil liberties. This policy is specifically codified in North Carolina's

juvenile code which requires the least restrictive course of action appropriate to handle the situation. N.C.G.S. § 7A-594 (1989).

With respect to Officer Griffin's first encounter with the defendants, when they refused to obey his instruction to leave the premises pursuant to his authority, particularly after he had identified himself as a police officer, they became trespassers. N.C.G.S. § 14-159.13 (Supp. 1991). Thus, we find that the election by Officer Griffin not to arrest the three defendants for trespassing cannot be considered a bar to finding he was acting pursuant to his official duties as a law enforcement officer in addition to any duties he was performing for Red Roof Inn.

In North Carolina, a municipal law enforcement officer acting within his territorial jurisdiction is considered a peace officer who possesses "all of the powers invested in law enforcement officers by statute or common law." N.C.G.S. § 160A-285 (1987). "A police officer when off duty is still an officer and a policeman having the authority, if not indeed the duty to exercise functions pertaining to his office in appropriate circumstances, without regard to departmental rules relating to hours." 18 McQuillion, *Municipal Corporations 3d*, § 53.80B at 348. At common law, a law enforcement officer had the duty to keep the peace at all times. *See* 1 William Blackstone, *Commentaries* *356; Edward C. Fisher, *Laws of Arrest*, § 21 (1967); *Sawyer v. Humphreys*, 82 Md. App. 72, 570 A.2d 341, *judgment reversed*, 322 Md. 247, 587 A.2d 467 (1990).

[5] With regard to our laws dealing with a law enforcement officer's duties as to arrest or search, there is no distinction between on-duty and off-duty status. *See* N.C.G.S. §§ 15A-247 and 15A-401 (1988). N.C.G.S. § 14-269 affirmatively permits off-duty police officers to carry concealed weapons. Further, our legislature has mandated that an officer employed by a private security firm to act *solely* as a security guard is prohibited from wearing his official police uniform. N.C.G.S. § 74C-21 (1989). These legislative expressions appear to unerringly point to the proposition that a police officer retains his official law enforcement officer status even while "off duty" unless it is clear from the nature of his activities that he is acting *solely* on behalf of a private entity, or is engaged in some frolic or private business of his own.

Precedent from other jurisdictions appears to support this view, both on the issue of the applicability of an aggravating circumstance such as the one now under review or upon the issue of assault

on an officer. In *State v. Berry*, 391 So.2d 406 (La. 1980), an off-duty sheriff's deputy in his official uniform working as a bank guard was killed during a bank robbery while he was drawing his weapon. The court held he was acting in a law enforcement capacity for the purpose of the aggravating circumstance for capital murder. In *Revene v. Charles County Commissioners*, 882 F.2d 870 (4th Cir. 1989), the court stated that the lack of outward indicia suggestive of state authority, i.e., being on duty, wearing a uniform, or driving a patrol car, did not alone determine whether a police officer was acting under color of state law. Rather, the nature of the act performed by the officer controls. *Id.* In *Revene*, an off-duty deputy sheriff driving his own vehicle began following an individual. He pulled into a driveway behind the individual when he reached his destination. After some type of altercation, the deputy got out of his car, drew a handgun and fired, killing the individual. The Fourth Circuit held that the deputy, although off duty and out of uniform, was acting under color of state law because the nature of his act involved official police action to enforce the law on a matter coming to his personal attention. *Id.*

The court in *Duncan v. State*, 163 Ga. App. 148, 294 S.E.2d 365 (1982), in particularly relevant language states:

> The practice of municipalities which allows law enforcement officers while off-duty and in uniform, to serve as peace-keepers in private establishments open to the public is in the public interest. The presence of uniform officers in places susceptible to breaches of the peace deters unlawful acts and conduct by patrons in those places. The public knows the uniform and the badge stand for the authority of the government. The public generally knows that law enforcement officers have the duty to serve and protect them at all times.

163 Ga. App. at 149, 294 S.E.2d at 366.

This language from the Georgia court is consistent with the opinion of this Court in *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12, wherein we stated:

> When in the performance of his duties, a law enforcement officer is the representative of the public and a symbol of the rule of law. The murder of a law enforcement officer . . . in the truest sense strikes a blow at the entire public—the

> body politic—and is a direct attack upon the rule of law which must prevail if our society as we know it is to survive.

323 N.C. at 46-47, 372 S.E.2d at 37 (*quoting State v. Hill*, 311 N.C. 465, 488, 319 S.E.2d 163, 177 (1984)).

In the instant case, looking directly at the nature and extent of the secondary employment here involved, we take particular note of the following language in General Order No. 8 of the Charlotte Police Department. This Order provides:

> Officers shall not work off duty in a police related capacity for businesses not frequented by the general public.
>
> The Department requires that officers engaged in secondary employment conform to the *same standard of conduct* as applies to their on duty activities. (This would specifically include the *requirement that they enforce the law and not let themselves be bound by rules or restrictions a private employer may wish to enforce for his own purposes*).
>
> The Department shall insure that officers engaged in secondary employment are properly supervised and that supervisors are directly responsible to the Department. . . .

(Emphasis added.)

[6] The language of this general order, applying directly to the situation here involved, and a part of the record before the trial court, clearly demonstrates that in the instant case Officer Griffin was at all times, including specifically his "off duty" secondary employment, acting as a law enforcement officer under the full supervision and control of the Charlotte Police Department for the sole purpose of "enforcing the law." We thus hold that N.C.G.S. § 15A-2000(e)(8), appropriately includes duly sworn law enforcement officers in uniform when they are performing off-duty, secondary law enforcement related duties, when it is clear that such duties and the pay therefrom are incidental and supplemental to their primary duties of law enforcement on behalf of the general public.

The duty of a duly sworn law enforcement officer, independent of any secondary, incidental employment, is to act as a peace officer who possesses "all of the powers invested in law enforcement officers by statute or common law." N.C.G.S. § 160A-285 (1987). The fact that the law enforcement officer receives supplemental compensation from a private employer, along with his continuing salary

from public employment, is of no consequence. His or her primary duty is always to enforce the law and insure the safety of the public at large. Officer Griffin was hired by the Red Roof Inn primarily on the basis of his official, governmental status with all the advantages which this status would bring to any secondary employment, including particularly in the realm of security. His uniformed presence alone is a visible symbol of the rule of law. A uniformed law enforcement officer is expected under his duty to use the powers a private security guard does not possess, i.e., the power to enforce the law and to arrest where necessary. *See* N.C.G.S. §§ 15A-401 and 15A-404. He was placed in that position by the private business to deter crime and enforce our system of law especially in an area where it was needed. While he also served to benefit the Red Roof Inn, his ultimate or primary purpose was to keep the peace at all times without regard to his "off-duty" or "off-shift" status.

[7] With respect to the second encounter between the defendants and Officer Griffin, at the moment he was shot, we find there is sufficient evidence in the record to enable the State to carry its burden of proof that the officer was working as a law enforcement officer within the course and scope of his official duties. Officer Griffin was suddenly confronted with a common armed robbery scenario of a stocking-hooded male with a pointed firearm, and he was rising and drawing his weapon in response thereto. Further, it is a crime to conceal one's identity by mask or hood and then enter or come upon the premises or enclosure of another, particularly with a drawn weapon. N.C.G.S. § 14-12.9 (1983). While the State conceded at the pretrial hearing that it was not asserting that Officer Griffin was engaged in law enforcement duties when he was killed, this concession by the State cannot prevail if the evidence before the court does in fact support that aggravating circumstance. *State v. Case*, 330 N.C. 161, 410 S.E.2d 57 (1991).

We further find it relevant that pursuant to N.C.G.S. § 143-166.1, both on-duty and off-duty law enforcement officers are covered under our death benefits statute when they are killed during the performance of their official duty. In the civil component of this matter, the Industrial Commission ruled that for the purpose of civil benefits, Officer Griffin "came to his death as a result of an injury or accident arising out of and in the course of his official duties in his employment as a full-time law enforcement officer." Decision and Award, I.C. No. LH-0223, *In the Matter of: Hilda*

M. Griffin, Widow. While we certainly recognize that a decision of the Industrial Commission on compensation is not controlling on the issue before us, and further that there is a different standard of proof between civil and criminal actions, we find, for purposes of statutory construction, there is no rational basis to distinguish between the criminal and civil definition and usage of the essential and defining term and the issue involved in both of these actions, i.e., whether the term "official duties" includes enforcement activity of the type in which Officer Griffin was engaged when he was murdered. We therefore hold that there is sufficient evidence for a jury to find that Officer Griffin was engaged in the performance of his official duties at the time he was killed.

With respect to the second prong of this portion of the statute, whether Officer Griffin was killed "because of the exercise of his official duty," we conclude that there was substantial evidence before the court that the entire motivation for the killing of Officer Griffin was "because of" his actions as a police officer, so identified, during his first encounter with the defendants. Indeed, there can be no other reasonable interpretation of the dialogue between the defendants and their course of conduct during the ten to twenty minutes which expired between their first and second encounter with Officer Griffin than that the sole purpose of their second visit to the Red Roof Inn was to kill a "cop" because of his earlier law enforcement actions involving them. We therefore conclude that there is substantial evidence from which a jury could find that the killing of Officer Griffin was because of his earlier exercise of his official duties as a law enforcement officer.

All of the officials enumerated in, and whose official status aggravates a murder pursuant to N.C.G.S. § 15A-2000(e)(8), are visible symbols of the rule of law and civil authority. Of all those listed—justices, judges, prosecutors, jurors, witnesses, correctional officers, firemen and law enforcement officers—the most visible symbol of law and order through the rule of law are the law enforcement officers. It is self-evident that the intent of N.C.G.S. § 15A-2000(e)(8) is to recognize that the integrity and authority of the criminal justice system itself is attacked when a defendant murders a judge, prosecutor, law enforcement officer or other person integral to the system because of their role or duty within the system. A uniformed police officer is both a representative and the most visible symbol of the American system of criminal justice. The evidence is sufficient for a jury to find that Officer

Griffin was shot and killed because he was attempting to preserve the peace and because he wore a police uniform and badge and was the symbol of the rule of law.

Thus, with regard to the two-pronged, alternative test of whether Officer Griffin was at the time "engaged in the performance of his official duties" or was killed "because of the exercise of his official duty," we conclude there was sufficient evidence before the trial court to hold the State had carried its burden of showing both aspects of this test. We therefore hold that the State presented to the trial court sufficient evidence to establish all aspects of the requirements for presenting N.C.G.S. § 15A-2000(e)(8) to the jury for its consideration as an aggravating circumstance. Accordingly, the decision and the order of the trial court is reversed and this case is remanded to the trial court for entry of an order consistent with this opinion.

Reversed and remanded.

GRAIN DEALERS MUTUAL INSURANCE COMPANY v. THELMA ARNOLD LONG

No. 516PA91

(Filed 1 October 1992)

Insurance § 528 (NCI4th)— wife of owner-insured—injury in own car—separate policy without UIM coverage—UIM coverage under husband's policy

The wife of the owner-insured of an automobile policy is entitled as a Class I insured to underinsured motorist (UIM) coverage under the husband's policy when the wife was injured while riding in another car owned by her and insured by another carrier under a separate policy not containing UIM coverage.

Am Jur 2d, Automobile Insurance § 322.

Justice MEYER dissenting.

ON discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished opinion of the Court of Appeals, 104 N.C. App. 310, 409 S.E.2d 765 (1992), affirming the judgment entered by *Allen*

(W. Steven), *J.*, on 2 October 1990 in Superior Court, GUILFORD County. Heard in the Supreme Court 9 September 1992.

Valentine, Adams, Lamar, Etheridge & Sykes, by Raymond M. Sykes, Jr., for defendant appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for plaintiff appellant.

WHICHARD, Justice.

The sole issue is whether the Court of Appeals erred in holding that the wife of the owner-insured of a policy issued by plaintiff is entitled as a Class I insured to underinsured motorist (UIM) coverage, when the wife was injured while riding in another car owned by her and insured by another carrier under a separate policy not containing UIM coverage.

Plaintiff issued a policy containing UIM coverage to John Long, defendant's husband. The policy listed one 1986 Ford pickup truck as the only automobile on the policy. On 20 February 1988, defendant was a passenger in the 1978 Cadillac owned by her and driven by Tony Prigden Radford with her permission, when the Cadillac was hit by an auto driven by James David Parker, which had minimum limits coverage. The Cadillac was insured by an Allstate Insurance Company policy that did not contain UIM coverage. Defendant filed suit against Parker for damages and against plaintiff for UIM benefits under her husband's policy. Defendant alleges that her damages exceed the $25,000 tendered by Parker's insurance company, Interstate Casualty Insurance Company.

Under the husband's policy issued by plaintiff, UIM coverage is available to a Class I "insured" person, which is defined as "1. You or any family member." "Family member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household." Under this definition, defendant is a Class I insured person. The Declarations page of plaintiff's policy also explicitly lists defendant as an insured by reference to her birth date and the indication "MF"—married female—under the section "DRIVERS."

These facts differ in only one pertinent respect from the facts in the Court's recent opinion in *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992). In that case, the injured insured was an owner-insured, while defendant is the

wife of an owner-insured. In both cases, however, the injured parties are Class I insured persons. As a result, we hold that the reasoning of *Bass*, 332 N.C. at 112, 418 S.E.2d at 223, and *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 150, 400 S.E.2d 44, 51, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991) controls this case. For the reasons stated in those cases, the decision of the Court of Appeals is affirmed.

Affirmed.

Justice MEYER dissenting.

I respectfully dissent for the reasons stated in my dissenting opinions in *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 113, 418 S.E.2d 221, 223 (1992), and *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 153, 400 S.E.2d 44, 53, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

WEST AMERICAN INSURANCE COMPANY v. TUFCO FLOORING EAST, INC., TUFCO FLOORING SALES & SERVICE, INC. AND PERDUE FARMS INCORPORATED

No. 542PA91

(Filed 1 October 1992)

ON discretionary review, pursuant to N.C.G.S. § 7A-31, of a unanimous opinion by the Court of Appeals, 104 N.C. App. 312, 409 S.E.2d 692 (1991), affirming the judgment of *Allen (W. Steven), J.*, at the 2 July 1990 Civil Session of Superior Court, GUILFORD County. Heard in the Supreme Court 8 September 1992.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Douglas E. Wright, for plaintiff-appellant.

Tuggle, Duggins & Meschan, by Robert C. Cone, for defendant-appellees Tufco Flooring East and Tufco Flooring Sales & Service; Brooks, Pierce, McLendon, Humphrey & Leonard, by George W. House, and Piper & Marbury, by Jeffrey F. Liss, for defendant-appellee Perdue Farms.

Elrod & Lawing, P.A., by Frederick K. Sharpless, on behalf of the Insurance Environmental Litigation Association, amicus curiae.

Harold W. Berry, Jr., on behalf of the North Carolina Petroleum Marketers Association, Inc., amicus curiae.

PER CURIAM.

Discretionary review improvidently allowed.

PEARLIE COGGINS DOZIER v. ANNETTE CRANDALL

No. 54PA92

(Filed 1 October 1992)

ON discretionary review of a decision of the Court of Appeals, 105 N.C. App. 74, 411 S.E.2d 635 (1992), pursuant to N.C.G.S. § 7A-31, affirming a judgment entered by *Reid, J.*, on 10 December 1990, in Superior Court, PITT County. Heard in the Supreme Court 10 September 1992.

Evans & Lawrence, by Robert A. Evans, for plaintiff-appellant.

Gaylord, Singleton, McNally, Strickland & Snyder, by Danny D. McNally, for defendant-appellee.

Bailey & Dixon, by David M. Britt and Gary S. Parsons, for the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

Discretionary review improvidently allowed.

ALBERT A. McNEIL, ADMINISTRATOR OF THE ESTATE OF CLEMENTINE SMITH McNEIL v. DEREK KENNETH GARDNER

No. 30A92

(Filed 1 October 1992)

APPEAL 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. 692, 411 S.E.2d 174 (1992), reversing the judgment of *Johnson, J.*, at the 1 October 1990 Civil Session of Superior Court, NEW HANOVER County. Heard in the Supreme Court on 11 September 1992.

Yow, Culbreth & Fox, by Stephen E. Culbreth and Jerry A. Mannen, Jr., for the plaintiff-appellee.

Smith & Smith, by Walter M. Smith, for the defendant-appellant.

PER CURIAM.

Affirmed.

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

BAILEY v. NATIONWIDE MUTUAL INS. CO.

No. 218PA92

Case below: 106 N.C.App. 225

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 30 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed only for second issue 30 September 1992.

BRANCH BANKING AND TRUST CO. v. THOMPSON

No. 313P92

Case below: 107 N.C.App. 53

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

CAPRICORN EQUITY CORP. v.
TOWN OF CHAPEL HILL BD. OF ADJUST.

No. 187PA92

Case below: 106 N.C.App. 134

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1992.

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

No. 343P92

Case below: 107 N.C.App. 278

Petition by defendant for temporary stay allowed 24 September 1992.

COUNTY OF LANCASTER v. MECKLENBURG COUNTY

No. 293PA92

Case below: 106 N.C.App. 646

Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question denied 30 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1992.

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

FORSYTH MEMORIAL HOSPITAL v.
ARMSTRONG WORLD INDUSTRIES

No. 319PA92

Case below: 107 N.C.App. 110

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1992.

GREENE v. TRUSTEES OF LIVINGSTONE COLLEGE

No. 322P92

Case below: 106 N.C.App. 90

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

IN RE QUEVEDO

No. 298A92

Case below: 106 N.C.App. 574

Motion by guardian ad litem to dismiss appeal allowed 30 September 1992.

JERNIGAN v. BEASLEY

No. 320P92

Case below: 107 N.C.App. 118

Petition by defendant (Madie B. Beasley) for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

KOHN v. MUG-A-BUG

No. 308P92

Case below: 106 N.C.App. 705

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

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

LOWDER v. ALL STAR MILLS

No. 325P92

Case below: 103 N.C.App. 500

Petition by W. Horace Lowder for writ of certiorari to the North Carolina Court of Appeals denied 28 September 1992.

MAJEBE v. NORTH CAROLINA
BOARD OF MEDICAL EXAMINERS

No. 233P92

Case below: 106 N.C.App. 253

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 30 September 1992. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

MOO-CHIC FARM, INC. v. BUIE

No. 337P92

Case below: 107 N.C.App. 302

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 2 September 1992.

REVELS v. THOMAS

No. 301P92

Case below: 106 N.C.App. 705

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

ROSE'S STORES, INC. v. BOYLES

No. 224PA92

Case below: 106 N.C.App. 263

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1992.

SCOTT v. SCOTT

No. 306PA92

Case below: 106 N.C.App. 606

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 30 September 1992.

STATE v. BAXLEY

No. 241P92

Case below: 106 N.C.App. 394

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

STATE v. HORTON

No. 229P92

Case below: 106 N.C.App. 393

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 September 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

STATE v. PHIPPS

No. 295P92

Case below: 106 N.C.App. 706

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

STATE v. SAUNDERS

No. 221PA92

Case below: 106 N.C.App. 395

Petition by Attorney General for discretionary review of the decision of the Court of Appeals is allowed for the sole purpose of entering the following order which is hereby certified to the Court of Appeals:

In its decision in this case arresting judgment against defendants on the charges of possession with intent to sell and deliver cocaine on 10 November 1988, the Court of Appeals relied on *State v. Mebane*, 101 N.C.App. 119, 398 S.E.2d 672 (1990) rather than the decisions of this Court in *State v. Steward*, 330 N.C. 607, 411 S.E.2d 376 (1992) and *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

The decision of the Court of Appeals arresting judgment on the charges of possession with intent to sell and deliver cocaine is vacated and the case is remanded to that court for reconsideration in light of our decision in *State v. Steward.*

By order of the Court in Conference, this the 30 day of September 1992.

STATE v. TAYLOR

No. 294P92

Case below: 106 N.C.App. 534

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 30 September 1992.

WATSON v. AMERICAN NATIONAL FIRE INSURANCE CO.

No. 281PA92

Case below: 106 N.C.App. 681

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 30 September 1992.

STATE OF NORTH CAROLINA v. EDWARD LEE CUMMINGS

No. 48A88

(Filed 19 November 1992)

1. **Jury § 7.11 (NCI3d)— exclusion of juror—death penalty views—sentencing phase affected**

Even if the trial judge erred under the *Witherspoon* and *Witt* decisions by improperly excluding a prospective juror in a capital trial because of his death penalty views, the trial judge did not in any way unconstitutionally discriminate against the juror, and such error affects only the sentencing phase of the trial.

Am Jur 2d, Jury §§ 289, 290.

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

2. **Criminal Law § 860 (NCI4th)— question by prospective juror—time served under life sentence—failure to instruct—sentencing phase affected**

Assuming that the trial judge failed properly to instruct a prospective juror who inquired about the length of time someone sentenced to life imprisonment would actually serve, the appropriate relief would be a new sentencing proceeding, not a new trial.

Am Jur 2d, Trial § 1441.

3. **Constitutional Law § 342 (NCI4th)— capital trial—bench conferences—exclusion of defendant—right to presence at trial**

Defendant's unwaivable state constitutional right to presence at his capital trial was not violated by forty-nine bench conferences from which defendant was excluded where defendant was present in the courtroom during each of those conferences and each bench conference was attended by defendant's attorneys. N.C. Const. art. I, § 23.

Am Jur 2d, Constitutional Law § 842; Trial § 226.

4. **Criminal Law § 507 (NCI4th) — recordation of statements from bench — private bench conferences — statute inapplicable**

The statute requiring recordation of "all statements from the bench," N.C.G.S. § 15A-1241(a), does not apply to private bench conferences between the trial judge and attorneys for both sides. If, however, either party requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing, as accurately as possible, the matter discussed. N.C.G.S. § 15A-1241(c).

Am Jur 2d, Trial § 180.

5. **Constitutional Law § 342 (NCI4th) — unrecorded bench conferences — due process**

The trial judge did not violate defendant's federal due process rights by holding unrecorded bench conferences during a capital trial where the attorneys for both sides were present at the conferences and defendant did not request that the subject matter of any bench conference be reconstructed for the record.

Am Jur 2d, Trial § 0000.

6. **Homicide § 552 (NCI4th) — first degree murder — second degree instruction not required**

The trial judge in a first degree murder prosecution did not err in refusing to instruct the jury on the lesser included offense of second degree murder where there was no evidence to negate the elements of premeditation and deliberation other than defendant's denial, and the State's evidence tended to show that the victim was shot once in the back of the head at close range and once in the face; she was stripped naked, wrapped in two layers of plastic and a sheet, and buried in a shallow grave within one and one-half miles of defendant's house; the tips of her fingers were missing from both hands and the fingertips from at least one of her hands were removed prior to her burial; defendant blamed the victim for the death of his infant son less than five months prior to the victim's disappearance; and black plastic trash bags found around the victim's body were purchased on the same day the victim was reported missing.

Am Jur 2d, Trial § 1427.

7. Evidence and Witnesses § 305 (NCI4th)— another murder— admissibility to show identity and method of operation

In this prosecution for first degree murder, evidence concerning the murder of the victim's sister was admissible under Rule of Evidence 404(b) to show defendant's identity and method of operation where the evidence tended to show that both the victim and her sister were acquainted with defendant (although in different ways); both had strained relationships with defendant (although for different reasons); both died as a result of a gunshot wound to the back of the head; both were found naked, buried within one hundred yards of each other and within one and one-half miles of defendant's house; both had been methodically wrapped in two types of plastic and a cloth sheet; and both had extremities removed (the victim's fingertips and her sister's arm). Furthermore, the probative value of evidence of the sister's death was not substantially outweighed by the danger of unfair prejudice so as to require its exclusion under Rule of Evidence 403.

Am Jur 2d, Evidence §§ 321, 322.

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.

8. Evidence and Witnesses § 1694 (NCI4th)— photographs of graves and autopsies of murder victims

The trial court in a first degree murder prosecution did not abuse its discretion in the admission of twenty-three photographs of the autopsies of the victim and her sister and the graves in which the bodies were found where the photographs were used to illustrate the testimony of the doctors who performed the autopsies describing the cause of death and the manner of the killing of each sister, and the evidence was crucial to the State's theory that both sisters were killed by the same person.

Am Jur 2d, Evidence § 792.

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

9. Evidence and Witnesses § 1662 (NCI4th)— photographs—admissibility to support State's theory of murders

The trial court in a first degree murder case did not abuse its discretion in the admission of photographs belonging to defendant of several women acquaintances posing nude or partially nude, including the victim's sister, where the State used the photographs to demonstrate a pattern of behavior to explain the deaths of the victim and her sister, and at the time the photographs were introduced, there had already been evidence of defendant's sexual exploits and the fact that he had asked women to pose nude for photographs.

Am Jur 2d, Evidence §§ 787, 790.

10. Evidence and Witnesses § 282 (NCI4th)— character witness—cross-examination—specific acts of misconduct

The trial court in a first degree murder prosecution did not err in allowing the State to ask three witnesses whether they were aware of an assault committed by defendant twenty-five years earlier after defendant's attorneys had elicited testimony from the witnesses that they had never known defendant to be a violent person. Any conduct that rebuts earlier reputation or opinion testimony offered by the defendant is a "relevant" specific instance of conduct admissible under N.C.G.S. § 8C-1, Rule 405(a), and this Rule contains no time limit.

Am Jur 2d, Evidence § 340.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence. 64 ALR Fed 244.

11. Criminal Law § 1347 (NCI4th)— first degree murder—course of conduct aggravating circumstance—murders of sisters—common motive and modus operandi

The trial court did not err in submitting the course of conduct aggravating circumstance to the jury in a first degree murder prosecution based on defendant's murder of the victim's sister some twenty-six months after the victim's murder where the evidence showed that the motive and *modus operandi* were similar in both murders. An inference that defendant's violent behavior toward the two sisters was motivated by an overpowering desire to somehow assert his relationship with his children was supported by evidence that defendant believed that the victim had killed defendant's infant son by

means of smothering and that defendant avenged this death by killing the victim, and that defendant killed the victim's sister to prevent her from obtaining legal custody of the couple's two children. Additionally, a common *modus operandi* was shown by evidence that both sisters were shot in the back of the head, both were naked at the time of their deaths, both were wrapped in layers of black and clear plastic and cloth sheets in similar shallow graves located only one and one-half miles from defendant's home, and extremities of both victims were removed (part of an arm in one case and fingertips in the other), apparently in an effort to prevent identification of the bodies. Alternatively, the jury could have inferred course of conduct on the basis of testimony by defendant's cellmate that defendant had stated that he killed the sisters because he believed that they had gotten the better of him in a cocaine deal. N.C.G.S. § 15A-2000(e)(11).

Am Jur 2d, Criminal Law § 525.

12. Criminal Law § 1352 (NCI4th)— McKoy error—new sentencing hearing

A defendant sentenced to death for first degree murder is entitled to a new sentencing hearing because of *McKoy* error in the trial court's instructions requiring unanimity for mitigating circumstances where there was evidence supporting at least some of the mitigating circumstances submitted to but not found by the jury.

Am Jur 2d, Criminal Law § 525.

Justice FRYE dissenting as to sentence.

Chief Justice EXUM joins in this dissenting opinion.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Herring, J., at the 7 November 1987 Criminal Session of Superior Court, New Hanover County. Heard in the Supreme Court 14 November 1991.

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

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

MEYER, Justice.

Defendant, Edward Lee Cummings, argues that each of seven alleged errors by the trial court entitles him to a new trial. In the alternative, defendant argues that alleged errors in the sentencing proceeding require this Court to vacate his death sentence. We find no error in the guilt-innocence phase of defendant's trial but vacate the death sentence and remand the case for a new capital sentencing proceeding because of *McKoy* error that we do not find harmless beyond a reasonable doubt.

Defendant was indicted by a Hoke County grand jury on 20 February 1986 for the murders of Teresa Annette Puryear (Teresa) and her older sister, Karen Marie Puryear (Karen).[1] This appeal concerns only defendant's conviction for Teresa's murder. After a change of venue, granted by Judge Herring because of extensive media coverage, defendant was tried capitally before a New Hanover County jury. Defendant was convicted of first-degree murder, and the jury recommended that he be sentenced to death. Judge Herring imposed the death sentence, and defendant appeals to this Court as of right.

Evidence presented at defendant's trial shows the following. On 13 January 1986, workers baling pine straw in a wooded area of Hoke County near McCain discovered a female body in a shallow grave. Sheriff's officials were notified, and upon further investigation, a second female body was discovered buried within 125 feet of the first. The property where the bodies were found is owned by the State of North Carolina and is approximately 1.5 miles from a house owned by defendant. The bodies were removed from the site under the supervision of the Office of the Chief Medical Examiner in Chapel Hill and were later identified as Karen and Teresa Puryear.

Autopsies performed by forensic pathologists Page Hudson and Michael Sullivan revealed that both victims had been shot in the back of the head, both were naked, and both were wrapped in layers of black and clear plastic and cloth sheets.

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1. The trial court granted defendant's motion to sever. *State v. Cummings*, 326 N.C. 298, 303, 389 S.E.2d 66, 69 (1990). Defendant was convicted and sentenced to death for the first-degree murder of Karen Puryear at the 6 April 1987 Criminal Session of Superior Court, Hoke County. *Id.* at 303, 389 S.E.2d at 69-70. This Court found no error in the guilt phase of that trial but remanded for a new sentencing proceeding. *Id.* at 325, 389 S.E.2d at 81.

The autopsy of Teresa also revealed that her body was in an advanced state of decomposition, she had a second gunshot wound to the face, and the tips of her fingers were missing. When Teresa's body was discovered, her right hand and arm were exposed, and Dr. Sullivan testified that this exposure could explain the absence of her fingertips on that hand. However, because Teresa's left hand and arm were wrapped in plastic, Dr. Sullivan opined that her fingertips on this hand had been removed prior to her burial. The cause of death, according to Dr. Sullivan, was the gunshot wound to the back of her head.

The autopsy of Karen also revealed that her body was somewhat decomposed, that the lower portion of her right arm was missing, and that there was a three and one-half inch cut-like wound on her lower left abdomen. Dr. Hudson testified that this cut was likely inflicted after Karen's death. The cause of death, according to Dr. Hudson, was the gunshot wound to the back of her head.

Defendant was born in Hoke County in May 1941, completed the ninth grade, and worked in tobacco and construction most of his life. He also owned two nightclubs. Although he lived in Willow Springs, defendant also owned property and a house in Hoke County. In May 1974, defendant met Faye Puryear, mother of Teresa and Karen, at a Raleigh nightspot. Defendant met Karen later that year when she returned to her mother's custody from a foster home. Early in 1981, defendant and Karen became involved romantically. Defendant, who was already married with children, was about forty years old when he became involved with Karen; she was around seventeen. During their relationship, Karen bore defendant three children. One of the children, Clifford Allen, died on 29 April 1983 of sudden infant death syndrome at the age of five weeks. Although the baby's death certificate stated that he died from natural causes, three witnesses testified for the State that defendant blamed Teresa for the child's death. Defendant believed Teresa may have smothered the baby.

Less than five months after the baby's death, on 16 September 1983, Teresa disappeared. She was fifteen years old. There was speculation that Teresa had left home with Mexican migrant workers.

In late 1985, Karen took out a nonsupport warrant against defendant; a hearing was scheduled for 20 November. Also, on 22 October 1985, Karen talked with officials at legal aid in Wake County about gaining legal custody of her and defendant's two

children. Celia Mansaray, a paralegal at legal aid, testified that Karen said defendant had taken their two children away from her on 15 October 1985 and refused to return them. Defendant said he would shoot Karen if she tried to come and get them. After discussing the procedure for gaining legal custody of her children, Karen indicated that she would talk with defendant and that she would get back in touch with Ms. Mansaray. Karen never returned to legal aid. She disappeared on 14 November 1985—six days before the scheduled nonsupport hearing. She was twenty-two years old.

The State's evidence linking defendant to Teresa's murder included testimony from SBI Agent Troy Hamlin that a black plastic trash bag found wrapped around Teresa's body had come from the same box of Bes-Pak Good 'N Tuff trash bags seized during a search of defendant's Hoke County house. Hamlin, a forensic chemist with the state crime laboratory, testified that he "matched the bottom portion of one of the bags from the gravesite from Teresa Puryear . . . to an open end of another garbage bag found in the [defendant's] Hoke County home." Hamlin also testified that plastic trash bags found wrapped around Karen's body also came from the box of Bes-Pak trash bags found in defendant's house.

During their search of defendant's Hoke County house, which was unoccupied and unfinished, police also discovered a receipt from a Big Star supermarket which listed the purchase of one item for $1.09. Jerry Parsek, general manager of a Fayetteville Big Star in 1983, testified that the sales receipt had the notation NFSG printed on it, indicating that the item purchased was a nonfood staple good. Mr. Parsek testified that Bes-Pak Good 'N Tuff trash bags were categorized as nonfood staple goods and sold for $1.09 on 16 September 1983, the date printed on the receipt. Teresa Puryear disappeared the same day.

The State also presented the testimony of Fred Jacobs, who in May 1986 shared a Hoke County jail cell with defendant. Jacobs testified that defendant said he had killed two sisters and had broken the arm off one of them. Defendant, according to Mr. Jacobs, said he had killed the sisters because "they had ripped him off on the cocaine deal."

Defendant testified in his own behalf. He denied having anything to do with Teresa's disappearance. He also denied buying the Bes-Pak trash bags or ever seeing the trash bags in his Hoke County house.

Additional facts will be set forth as necessary with respect to the various issues.

I.

JURY SELECTION

[1] In his first two assignments of error, defendant argues that he is entitled to a new trial because: (1) the trial judge erred in excusing a prospective juror because of the juror's views concerning the death penalty, *see Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985); *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968); and (2) the trial judge failed to properly instruct a prospective juror who inquired about the length of time someone sentenced to life imprisonment would actually serve. While we find no error in either of these arguments, assuming, *arguendo*, that defendant is correct concerning his *Witherspoon/Witt* challenge, the appropriate relief would be a new *sentencing proceeding*, not a new trial. *See State v. Robinson*, 327 N.C. 346, 358-59, 395 S.E.2d 402, 409 (1990) (error under *Witherspoon* and *Witt* affects only the sentencing proceeding). At oral argument, defendant asked this Court to reconsider its holding in *Robinson* that error under *Witherspoon* and *Witt* affects only the sentencing phase of a capital trial. Defendant argues that the United States Supreme Court's recent decision in *Powers v. Ohio*, --- U.S. ---, 113 L. Ed. 2d 411 (1991), requires a different result. In *Powers*, the Court held that a white defendant had standing to assert an equal protection claim on behalf of a black venireperson who was excluded by the prosecution solely because of his race. *Id.* The Court held that although an individual juror does not have the right to serve "on any particular petit jury, . . . he or she does possess the right not to be excluded from one on account of race." *Id.* at ---, 113 L. Ed. 2d at 424. Furthermore, the Court held that a criminal defendant has standing to raise the equal protection rights of the excluded juror. *Id.* at ---, 113 L. Ed. 2d at 425. Defendant argues, therefore, that the excluded juror in this case also had a right to serve on defendant's jury and that he (defendant) has standing to raise the issue on appeal.

Defendant misreads *Powers*. The Court's decision was clearly predicated on the equal protection rights of a juror excluded solely on account of his race. Stated differently, it is this unconstitutional discrimination that triggers the juror's claim under the Equal Protection Clause of the Fourteenth Amendment. In fact, the Court, as quoted above, explicitly stated that a juror does not

have the right to serve on any particular jury. *Id.* at ---, 113 L. Ed. 2d at 424.

Thus, even if the trial judge in this case erred by improperly excluding a prospective juror under *Witherspoon* and *Witt*, the trial judge did not in any way unconstitutionally *discriminate* against the juror. At most, the trial judge erred in determining that the juror's beliefs concerning the death penalty would substantially impair the juror's ability to perform his duty during the sentencing phase of the trial. *See Witt*, 469 U.S. at 424, 83 L. Ed. 2d at 851-52. We thus reject defendant's argument that *Powers* mandates a different result than the one we reached in *Robinson.*

[2] Implicit in defendant's second assignment of error is his belief that a juror, laboring under misconceptions as to when a convicted felon is eligible for parole, might impose the death penalty in lieu of life imprisonment. Therefore, even assuming error, the appropriate relief would, again, be a new *sentencing proceeding*, not a new trial. We thus find it unnecessary to address the merits of this argument.

II.

GUILT-INNOCENCE PHASE

In his third assignment of error, defendant takes exception to forty-one unrecorded bench conferences held outside defendant's presence. Defendant argues that he is entitled to a new trial because the bench conferences (1) violated defendant's unwaivable right to presence in a capital case under Article I, Section 23 of the North Carolina Constitution; (2) were not recorded as required by N.C.G.S. § 15A-1241; and (3) violated defendant's federal constitutional right to due process of law given a state statutory entitlement.

[3] Since defendant filed his brief in this case, we have considered in detail the question of when a defendant's unwaivable right to presence in a capital case is violated by unrecorded bench conferences from which the defendant is excluded. *See State v. Buchanan*, 330 N.C. 202, 208-24, 410 S.E.2d 832, 835-45 (1991). We concluded in *Buchanan* that a defendant's right to presence under our state Constitution is not violated when: (1) the defendant is physically present in the courtroom, and (2) the defendant is represented at the bench conference by his attorney. *Id.* at 223, 410 S.E.2d at 844-45. The defendant's presence in the courtroom

allows him to "observe the context of each conference," while the presence of his attorney at the bench conference provides the defendant with "constructive knowledge of all that transpired." *Id.* at 223, 410 S.E.2d at 844.

In this case, a review of the transcript reveals that each of the forty-one bench conferences cited by defendant was attended by defendant's attorneys. Furthermore, defendant was present in the courtroom during each of these conferences. We therefore hold that defendant's state constitutional right to presence was not violated by these bench conferences.

[4] Next, defendant argues that these bench conferences should have been recorded pursuant to N.C.G.S. § 15A-1241 and that the failure to record implicates defendant's federal due process rights. Defendant's argument is based upon a literal reading of N.C.G.S. § 15A-1241(a), which requires recordation of "all statements from the bench." N.C.G.S. § 15A-1241(a) (1988). The State argues that the phrase "statements from the bench" was intended to include only those statements made in the presence of the jury—not routine bench conferences between trial judges and attorneys. We agree with the State, at least insofar as it argues that the phrase "statements from the bench" does not include private bench conferences between trial judges and attorneys.

N.C.G.S. § 15A-1241 reads, in pertinent part:

> (a) The trial judge must require that the reporter make a true, complete, and accurate record of all statements from the bench and all other proceedings except:
>
> (1) Selection of the jury in noncapital cases;
>
> (2) Opening statements and final arguments of counsel to the jury; and
>
> (3) Arguments of counsel on questions of law.
>
> . . . .
>
> (c) When a party makes an objection to unrecorded statements or other conduct in the presence of the jury, upon motion of either party the judge must reconstruct for the record, as accurately as possible, the matter to which objection was made.

N.C.G.S. § 15A-1241(a), (c). We do not believe the enactment of this statute by the legislature in 1977 was intended to change the time-honored practice of off-the-record bench conferences between trial judges and attorneys. If the legislature had intended to make such a radical change in trial procedure, we feel confident it would have done so explicitly. Instead, section 15A-1241(a) appears to be designed to ensure that any statement by the trial judge, in open court and within earshot of jurors or others present in the courtroom, be available for appellate review. If, however, either party requests that the subject matter of a private bench conference be put on the record for possible appellate review, the trial judge should comply by reconstructing, as accurately as possible, the matter discussed. *Cf.* N.C.G.S. § 15A-1241(c) (once objection is made, trial judge must reconstruct unrecorded statements or other conduct in the presence of the jury).

[5] In this case, defendant's trial attorneys attended each of the forty-one bench conferences cited by defendant's appellate attorney. In no instance do we find that defendant requested the subject matter of a bench conference be reconstructed for the record; in fact, defendant's attorneys requested more than half of these off-the-record conferences.

For the reasons cited above, we hold that the trial judge did not err by holding unrecorded bench conferences with attorneys for both sides.

[6] In his fourth assignment of error, defendant argues that he is entitled to a new trial because the trial judge refused his request to instruct the jury on the lesser included offense of second-degree murder. Defendant argues that, based on the evidence presented, a rational jury could have determined that defendant killed Teresa, but did so without the specific intent, premeditation, and deliberation necessary for first-degree murder. The State contends that the evidence does not support a second-degree murder instruction; thus, the trial judge did not err by instructing the jury only on first-degree murder. We agree with the State.

It is well settled that a defendant is not entitled to an instruction on second-degree murder in every case in which he is charged with first-degree murder. *State v. Robinson*, 330 N.C. 1, 409 S.E.2d 288 (1991); *State v. Annadale*, 329 N.C. 557, 406 S.E.2d 837 (1991); *State v. Stevenson*, 327 N.C. 259, 393 S.E.2d 527 (1990); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (*Cummings I*);

State v. Strickland, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Although second-degree murder is a lesser included offense of first-degree murder, a trial court does not have to submit a verdict of second-degree murder to the jury unless there is evidence to support it. *Annadale*, 329 N.C. at 567, 406 S.E.2d at 843. The test for whether a judge is required to instruct on second-degree murder was set out in *Strickland* as follows:

> The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Strickland, 307 N.C. at 293, 298 S.E.2d at 658. "If, however, there was any positive evidence tending to support the lesser included offense of second-degree murder, then it was the trial court's duty to submit a possible verdict for that lesser included offense after appropriate instructions." *Stevenson*, 327 N.C. at 263, 393 S.E.2d at 529.

In this case, there was evidence to support each and every element of first-degree murder, including premeditation and deliberation, and absolutely no evidence to negate these elements other than defendant's denial. The State's evidence showed that Teresa was shot once in the back of the head at close range and once in the face; the shot to the back of the head was the fatal shot. She was stripped naked, wrapped in two layers of plastic and a sheet, and buried in a shallow grave within one and one-half miles of defendant's house. The tips of her fingers were missing from both hands, and the forensic pathologist who conducted the autopsy testified that the fingertips from at least one of her hands were removed prior to her burial. In addition to this physical evidence, there was testimony that defendant blamed Teresa for the death of his infant son Clifford, the death occurring less than five months prior to Teresa's disappearance. Furthermore, there was evidence suggesting that black plastic trash bags found wrapped around Teresa's body were purchased *on the same day* Teresa was reported missing.

Defendant argues that evidence of an "unstable and volatile relationship" between defendant and Teresa was sufficient to allow jurors to infer that her death was caused by an "unpremeditated or non-deliberated killing." Although there was evidence that defendant and Teresa disliked one another, we believe this evidence, when combined with all the physical evidence described above, only strengthens the State's argument that defendant was either guilty of first-degree murder by premeditation and deliberation or, as he claimed at trial, not guilty at all. We therefore hold that the trial judge did not err by refusing to instruct the jury on second-degree murder. This assignment of error is rejected.

[7] In his fifth assignment of error, defendant argues that he is entitled to a new trial because the trial judge erred in admitting testimony concerning the death of Teresa's sister, Karen. Defendant argues that this testimony should have been excluded because it was, at best, minimally relevant and because its prejudicial effect greatly outweighed any probative value it might have had. The State argues that this evidence was properly admitted under Rule of Evidence 404(b) and points out that this Court found no error in *Cummings I* when this same defendant objected to the introduction of evidence concerning Teresa's death during his trial for Karen's murder. *See Cummings I*, 326 N.C. at 311, 389 S.E.2d at 73. We agree with the State that evidence surrounding Karen's death was admissible under Rule 404(b).

Rule of Evidence 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1988). Recently, this Court emphasized that Rule 404(b) is a "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); *see also State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990); *State v. Jeter*, 326 N.C. 457, 389 S.E.2d 805 (1990). " '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), *quoted in Coffey*, 326 N.C. at 278, 389 S.E.2d at 54. Evidence surrounding Karen's relationship with defendant and her subsequent disappearance and death was therefore properly admitted if it was "relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986).

Evidence of Karen's murder, when placed side by side with evidence of Teresa's murder, tended to show that both Karen and Teresa were acquainted with defendant (although in different ways); both had strained relationships with defendant (although for different reasons); both died as a result of a gunshot wound to the back of the head; both were found naked, buried within one hundred yards of each other and within one and one-half miles of defendant's house; both had been methodically wrapped in two types of plastic and a cloth sheet; and both had extremities removed—Karen's arm and Teresa's fingertips. Given the similarities between the two murders, we hold that the evidence of Karen's murder was admissible under Rule 404(b) to show defendant's identity and method of operation. *See Cummings I*, 326 N.C. at 310-11, 389 S.E.2d at 72-73 (evidence concerning Teresa's murder admitted into evidence during defendant's trial for Karen's murder for purpose of showing identity).

Defendant also argues, however, that even if evidence surrounding Karen's death was technically admissible under Rule 404(b), it should have been excluded under Rule of Evidence 403 because its probative value was "substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (1988). Although evidence that is admissible under Rule 404(b) may be excluded under Rule 403 because of unfair prejudice to the defendant, such a determination is "a matter left to the sound discretion of the trial court." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. By definition, "[e]vidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Id.* We cannot say in this case that Judge Herring abused his discretion by allowing the jury to hear this evidence. Defendant's assignment of error is rejected.

[8] In his sixth assignment of error, defendant argues that he is entitled to a new trial because of the admission into evidence of photographs that he contends were either irrelevant or unduly prejudicial. For the reasons outlined below, we hold that the trial judge did not abuse his discretion by admitting these photographs into evidence.

The photographs can be divided into two main groupings: (1) twenty-three photographs of the graves and autopsies of Karen and Teresa Puryear,[2] and (2) photographs belonging to defendant of women acquaintances posing nude or partially nude. We will address each grouping in turn.

The following photographs were admitted into evidence concerning Teresa's murder: one photograph of Teresa's grave to illustrate the testimony of Samuel McNair, who found the grave; three photographs of Teresa's grave to illustrate the testimony of Dr. Sullivan, who supervised the removal of Teresa's body from the grave; three photographs of Teresa's body wrapped in layers of plastic and a cloth sheet to illustrate the testimony of Dr. Sullivan, who performed the autopsy; and two photographs of Teresa's body to illustrate Dr. Sullivan's testimony concerning the autopsy.

The following photographs were admitted into evidence concerning Karen's murder: five photographs of Karen's grave to illustrate the testimony of Dr. Hudson, who supervised the removal of Karen's body from the grave; five photographs of Karen's body as it was being unwrapped from its plastic and sheet covers to illustrate the testimony of Dr. Hudson, who performed the autopsy; and four photographs of Karen's body to illustrate Dr. Hudson's testimony concerning the autopsy.

The admission into evidence at a murder trial of photographs with inflammatory potential was exhaustively reviewed by this Court in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). What we said in *Hennis* is particularly instructive in this case:

> Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words,

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2. It is unclear from defendant's brief exactly which of the twenty-three photographs concerning Karen and Teresa defendant believes were improperly admitted into evidence. He appears to argue that all, or at least most, of these photographs should have been excluded. We will proceed, therefore, as if defendant has objected to each of the twenty-three photographs.

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 of the North Carolina Rules of Evidence 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.

Hennis, 323 N.C. at 283-84, 285, 372 S.E.2d at 526-27 (citations omitted).

In making its decision, the trial court must consider the totality of the circumstances, such as "[w]hat 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, [and] the scope and clarity of the testimony it accompanies." *Id.* at 285, 372 S.E.2d at 527.

Accordingly, this Court found abuse of discretion where the jury was shown thirty-five slides of the crime scene and autopsy

projected upon an unusually large screen directly over the defendant, followed by distribution of the thirty-five eight- by ten-inch glossy photographs to jurors one at a time for an hour. *Id.* at 286-87, 372 S.E.2d at 527-28. We also found abuse of discretion in *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969), *overruled in part on other grounds by State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975), where the victim, who was shot while in his bed, was shown lying in the funeral home, with "projecting probes indicating the point of entry, the course, and the point of exit[ ] of the bullet that caused his death." *Id.* at 121, 165 S.E.2d at 337. And finally, we found error in *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979), where the trial court allowed into evidence photographs of the victim's mutilated and dismembered body, which had been ravaged by animals, even though the defendant had admitted strangling the victim and there was no evidence that the defendant had mutilated or dismembered his victim. *Id.* at 375-77, 259 S.E.2d at 765-66.

Defendant argues that *Mercer* and *Johnson* support his argument that the trial judge erred by admitting the photographs in this case. We disagree. Unlike *Mercer* and *Johnson*, where the photographs had no probative value with respect to any issue before the jury, the photographs in this case were used to illustrate the testimony of Drs. Sullivan and Hudson describing not only the cause of death, but also the manner of the killing. *See Hennis*, 323 N.C. at 284, 372 S.E.2d at 526 (photographs admissible to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of first-degree murder). This evidence was crucial to the State's theory that both sisters were killed by the same person: someone who shot his victims execution-style in the back of the head, disrobed them, removed body parts (Karen's arm, Teresa's fingertips), and methodically wrapped each body before burying them in shallow graves.

Furthermore, the photographic evidence was neither excessive nor repetitious and was "not aimed solely at arousing the passions of the jury." *See id.* at 284, 372 S.E.2d at 526. In fact, Judge Herring kept from the jury two particularly "gross" photographs of Karen's face, concluding that their probative value was outweighed by their possible prejudicial effect. We conclude, therefore, that the trial judge did not abuse his discretion by allowing these photographs into evidence. *See State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170 (1991) (trial court did not err by allowing into evi-

dence twelve photographs of autopsy); *Robinson*, 327 N.C. 346, 395 S.E.2d 402 (trial court did not err by allowing into evidence twenty-three crime scene and autopsy photographs and slides).

Defendant also argues that it was prejudicial error for the trial judge to allow into evidence photographs of women acquaintances posing nude or partially nude. Defendant argues that these photographs were not relevant to any issue and were highly prejudicial. He relies on *State v. Rinaldi*, 264 N.C. 701, 142 S.E.2d 604 (1965), in which the defendant, having been convicted of murdering his wife, was awarded a new trial because the State offered evidence that the defendant had made homosexual advances to a State's witness whom defendant had sought to hire to commit the murder. This Court said it was unfair to allow a jury to be prejudiced to the detriment of the defendant "by evidence tending to prove that he is a moral degenerate." *Id.* at 705, 142 S.E.2d at 607. As explained by this Court in *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980), it is error for the State in a prosecution of one crime to offer evidence tending to show that the defendant has committed another crime or act "when the *sole* purpose of the evidence is, generally, to show that the defendant is a bad person and, therefore, predisposed to commit criminal acts generally." *Id.* at 433, 272 S.E.2d at 144. We find *Rinaldi* distinguishable from this case.

Throughout defendant's trial, prosecutors attempted to portray defendant as a sexually promiscuous married man who kept detailed records of the women with whom he had sex.[3] One of the State's witnesses testified that she and her cousin moved into defendant's home as live-in "babysitters" shortly after Karen disappeared. The witness testified that she had sex with defendant and that defendant asked both her and her cousin to pose nude for photographs.

[9] During defendant's cross-examination, the State sought to introduce into evidence photographs of several nude or partially nude women, including photographs of Karen partially nude. The photographs were discovered by police during a search of defendant's house. Defendant's attorneys objected, arguing that the photographs were irrelevant and unduly prejudicial. After sending

3. The State introduced into evidence defendant's "Believe It or Not" book, a notebook containing the names of 112 women, many of whom, according to defendant's testimony, were former sexual partners.

the jury out of the courtroom, Judge Herring heard arguments and denied defendant's motion. During questioning by the prosecutor, defendant identified the women in the photographs. When asked whether he personally took pictures of nude women, defendant said he did so occasionally.

In her closing argument to the jury, the prosecutor argued that "[t]he Defendant has been shown to have what could fairly be described as an unusual and unnatural interest in photographs of nude young women. Do you think it was just a coincidence that the bodies of both girls had been stripped naked, or was it calculation by that Defendant?" She also argued to the jury that defendant "seems to have a very warped attitude towards women. . . . Given his attitude, how do you think Edward Lee Cummings would have felt about a woman [Karen] taking him to court for child support? And who disappeared six days before the court date on that non-support charge? Coincedence [sic] or the motive for cold-blooded murder?"

Unlike *Rinaldi*, in which there was absolutely no connection between the crime for which the defendant was accused and the evidence of his homosexual tendencies, the State in this case sought to demonstrate a pattern of behavior to explain the deaths of Karen and Teresa Puryear. At the time the pictures were introduced, there had already been evidence of defendant's sexual exploits and the fact that he had asked two women to pose nude for photographs. Given the State's theory of the case, we cannot say that the trial judge abused his discretion by allowing these photographs into evidence.

[10] In his seventh assignment of error, defendant argues that the trial judge erred by allowing the State to ask three witnesses whether they knew of or were aware of an assault committed by defendant in 1963. Defendant argues that, because this assault was nearly twenty-five years old, it was not relevant under Rule of Evidence 405(a). Even if relevant, defendant argues, it should have been excluded under Rule of Evidence 403. We hold that the trial judge did not err in allowing the testimony.

Rule of Evidence 405 states, in pertinent part:

> (a) *Reputation or opinion.*—In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testi-

> mony in the form of an opinion. *On cross-examination, inquiry is allowable into relevant specific instances of conduct.*

N.C.G.S. § 8C-1, Rule 405(a) (1988) (emphasis added). One instance in which character evidence is admissible under our Rules of Evidence is when a pertinent trait of character is offered by an accused. N.C.G.S. § 8C-1, Rule 404(a)(1).

In this case, the prosecutor asked three witnesses about an assault committed by defendant in 1963 only *after* defendant's attorneys had elicited testimony from the witnesses that they had never known defendant to be a violent person. Defendant does not argue that the prosecutor did not have a good-faith basis for believing the assault took place, only that the age of the incident renders it irrelevant. We disagree. A "relevant" specific instance of conduct under Rule 405(a) would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant. Rule 405(a) contains no time limit, as does Rule of Evidence 609 (impeachment by prior conviction), and we see no reason to impose one.

That does not mean, however, that evidence of a past "instance of conduct" can never be excluded because of its age or for another reason if the trial judge determines, under Rule 403, that the probative value of the rebuttal evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." N.C.G.S. § 8C-1, Rule 403. This determination, whether evidence should be excluded under Rule 403, is a matter within the sound discretion of the trial judge. *State v. Penley*, 318 N.C. 30, 41, 347 S.E.2d 783, 789 (1986). In this case, defendant's attorney specifically mentioned Rule 403 to Judge Herring after objecting to the admission of this evidence. We do not believe the trial judge abused his discretion by allowing the evidence. We reject this assignment of error.

III.

SENTENCING PROCEEDING

[11] Defendant argues that his death sentence must be vacated because the trial judge erred by submitting the "course of conduct" aggravating circumstance to the jury. Karen's murder, the "other crime of violence" that the trial judge found to be part of a course of conduct, occurred twenty-six months after Teresa's murder, the crime for which defendant was convicted. We disagree.

N.C.G.S. § 15A-2000(e)(11) provides that jurors in a capital sentencing proceeding may deem other violent criminal conduct as part of a course of conduct, and hence an aggravating circumstance, when

> [t]he murder for which the defendant stands convicted 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 another person or persons.

N.C.G.S. § 15A-2000(e)(11) (1988). We have previously concluded that the course of conduct circumstance itself does not violate due process by reason of unconstitutional vagueness. *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983).

We have previously held that the jury's consideration of any factor relevant to the criminal conduct that is being deliberated upon may not be restricted. *State v. Brown*, 315 N.C. 40, 61, 337 S.E.2d 808, 824 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). In *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), we stated:

> In order to prevent an arbitrary or erratic imposition of the death penalty, the State must be allowed to present, by competent relevant evidence, any aspect of the defendant's character or record and any of the circumstances of the offense that will substantially support the imposition of the death penalty.

Id. at 23-24, 301 S.E.2d at 322.

In *Williams*, 305 N.C. 656, 292 S.E.2d 243, we approved the following jury instruction regarding course of conduct:

> Now, ladies and gentlemen, the murder of [the victim] by the defendant was part of such a course of conduct if it and other crimes of violence were parts of a pattern of intentional acts directed toward the perpetration of such crimes of violence which establishes that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of [the victim] and other crimes of violence.

Id. at 685, 292 S.E.2d at 261. Our pattern jury instruction, which was used by the trial court in the instant case, mirrors this instruction, relating that a murder is part of a course of conduct "if it[ ] and the other crimes of violence are part of a pattern of the same or similar acts which establish that there existed in the mind of the defendant a plan, scheme, system or design involving both the murder and those other crimes of violence." N.C.P.I.—Crim. 150.10(11) (1990). In determining whether the evidence tends to show that another crime and the crime charged were part of a course of conduct, and therefore constitute a proper basis to submit the course of conduct aggravating circumstance to the jury, the trial court must consider "a number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi*, and motivation by the same reasons." *State v. Price*, 326 N.C. 56, 81, 388 S.E.2d 84, 98, *sentence vacated*, --- U.S. ---, 112 L. Ed. 2d 7, *on remand*, 327 N.C. 479, 397 S.E.2d 233 (1990).

Our prior cases in this area have involved relatively short periods of time. *E.g.*, *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600 (woman kidnapped from car and raped immediately after man with whom she was driving was killed by defendant), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991); *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988) (child killed within hours of her mother's death after she awoke while defendant was disposing of her mother's body), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986) (immediately after killing victim, defendant fired gun at another), *overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373; *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984) (in rapid succession, defendant killed sister and father of estranged wife), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369, *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985); *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740 (woman killed and husband beaten within moments of each other), *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (service station employee and convenience store employee killed in different towns within hours of each other during back-to-back robberies). In all these cases, we found no error in the trial court's submission of the course of conduct aggravating circumstance to the jury.

In *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, the other crimes of violence, arson and hostage-taking, occurred *five days* after the

murder for which the defendant was being prosecuted. We concluded that all the crimes of violence were elements of a five-day rampage, evoking a common *modus operandi* and motivation. *Id.* at 82, 388 S.E.2d at 98. Therefore, based on the proximity in time, five days, and the common *modus operandi* and motivation, we held that it was not improper for the trial judge to submit the course of conduct aggravating circumstance to the jury. *Id.* at 83, 388 S.E.2d at 99.

Obviously, the closer the incidents of violence are connected in time, the more likely that the acts are part of a plan, scheme, system, design, or course of action. The further apart the acts are temporally, the more incumbent it is upon a court to carefully consider other factors, such as *modus operandi* and motivation, in determining whether the acts of violence are part of a course of conduct. Thus, in order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together. Conceivably, a murder could be committed as a "part of a course of conduct," although the acts occurred over a period of years, if, for instance, there was a clear pattern of systematic killing of several members of the same family or of co-conspirators of the same crime or other group, or serial killings, rapes, or other crimes of a serial nature. The course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), does not specifically employ the term "temporal proximity"; it merely provides:

> The murder for which the defendant stands convicted 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 another person or persons.

N.C.G.S. § 15A-2000(e)(11).

Ordinarily, the role of temporal proximity in assessing whether separate violent crimes are part of a violent course of conduct is properly a matter for the jury to decide and not a matter of law subject to judicial determination. Temporal remoteness usually goes to the weight of the evidence, not its admissibility. *State v. Hall*, 85 N.C. App. 447, 451, 355 S.E.2d 250, 253, *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

We have heretofore allowed the introduction of evidence of crimes interrupted by far more than the twenty-six months present here which militates in favor of the conclusion that the trial court properly submitted the course of conduct circumstance in the instant case. *See, e.g., State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990) (twenty-eight months does not render evidence impermissibly remote); *State v. Roberson*, 93 N.C. App. 83, 376 S.E.2d 486 (five years does not diminish similarities), *disc. rev. denied*, 324 N.C. 435, 379 S.E.2d 247 (1989); *State v. Hall*, 85 N.C. App. 447, 355 S.E.2d 250 (nine years does not render evidence of prior act inadmissible), *disc. rev. denied*, 320 N.C. 515, 358 S.E.2d 525 (1987).

The record here reveals markedly similar, if not identical, motivations behind the murders of Karen and Teresa Puryear. There was evidence that defendant believed that Teresa, defendant's first victim, had killed defendant's infant son by means of smothering and that defendant avenged this death by killing Teresa. Similarly, there was evidence that defendant was upset at the prospect that Karen, his second murder victim, would obtain legal custody of the couple's two children and that defendant killed Karen in order to prevent her from doing so. Indeed, testimony presented at trial indicated that defendant threatened to shoot Karen if she attempted to retrieve the children. At bottom, defendant's violent behavior toward the Puryear sisters was motivated by an overpowering desire to somehow assert his relationship with his children. Any obstacle that got in his way was violently neutralized. Moreover, the fact that the two murder victims here were sisters weighs more heavily in the balancing than if the two victims were unrelated. It stands to reason that if multiple victims are from the same family, such as here, or another associated group, it is much more likely that there exists some connection between their murders than if the victims were not so associated.

Alternatively, the jury could have inferred course of conduct on the basis of testimony provided by defendant's prison cellmate, Fred Jacobs. Jacobs testified that defendant had informed him that defendant killed the Puryear sisters because he believed that they had gotten the better of him in a cocaine deal. This evidence was before the jury and therefore was an additional basis on which the trial court could have submitted the course of conduct aggravating circumstance.

Additionally, the *modus operandi* was the same in both murders. Both sisters were shot in the back of the head, both were naked at the time of their deaths, and both were wrapped in layers of black and clear plastic and cloth sheets in similar shallow graves located only one and one-half miles from defendant's home. Moreover, extremities of both victims were removed (part of an arm in one case and fingertips in the other), apparently in an effort to prevent subsequent identification of the bodies. Taken together, the obvious similarities in motive and *modus operandi* of the crimes warranted submission of the course of conduct aggravating circumstance to the jury.

[12] Defendant contends, and the State concedes, that the instructions imposed a unanimity requirement for finding mitigating circumstances and were therefore improper under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *see also State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426 (1990) (opinion after remand).

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

State v. Sanderson, 327 N.C. 397, 402, 394 S.E.2d 803, 805-06 (1990) (quoting *McKoy v. North Carolina*, 494 U.S. at 435, 108 L. Ed. 2d at 376).

After reviewing the record, we conclude that the trial court gave the unconstitutional *McKoy* instruction. Thus, unless the State demonstrates that the error was harmless beyond a reasonable doubt, defendant must have a new sentencing proceeding. *State v. McKoy*, 327 N.C. 31, 394 S.E.2d 462; N.C.G.S. 15A-1443(b) (1988). The State, in its brief, further concedes that "[t]he record contains nothing to support a harmless error argument" and that, with regard to the *McKoy* error, this case "is indistinguishable from the other cases which have been sent back for resentencing for similar errors." We agree. The trial court submitted five possible mitigating circumstances, and the jury, operating under the unanimity instruction, found only one. There was evidence to support

at least some of the circumstances not found. 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. Thus, we vacate the sentence of death and remand the case to the Superior Court, New Hanover County, for a new capital sentencing proceeding on the first-degree murder conviction.

GUILT-INNOCENCE PHASE: NO ERROR;

SENTENCING PROCEEDING: NEW CAPITAL SENTENCING PROCEEDING.

FRYE, J., dissenting as to sentence.

Defendant argues that his death sentence must be vacated because the trial judge erred by submitting the "course of conduct" aggravating circumstance to the jury. Furthermore, because this was the only aggravating circumstance submitted and found, defendant argues a sentence of life imprisonment must be imposed by this Court. I agree.

The course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), is as follows:

> The murder for which the defendant stands convicted 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 another person or persons.

N.C.G.S. § 15A-2000(e)(11). In *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), the first case in which this Court reviewed this aggravating circumstance, we quoted with approval the following jury instruction:

> Now, ladies and gentlemen, the murder of Eric Joines by the defendant was part of such a course of conduct if it and other crimes of violence were parts of a pattern of intentional acts directed toward the perpetration of such crimes of violence which establishes that there existed in the mind of the defendant a plan, scheme, or design involving both the murder of Eric Joines and other crimes of violence.

Id. at 685, 292 S.E.2d at 261. The pattern jury instruction for this aggravating circumstance is essentially the same, stating that a murder is part of a course of conduct "if it and the other crimes of violence are part of a pattern of the same or similar acts which establish that there existed in the mind of the defendant a plan, scheme, system or design involving both the murder and those other crimes of violence." N.C.P.I.—Crim. 150.10(11) (1990). Judge Herring's instruction to the jury in this case tracked the pattern instruction. Thus, not only must there be additional acts of violence, but the State's evidence must demonstrate that there existed in the mind of the defendant a plan, scheme, system or design involving both the murder and another crime of violence.

Since the *Williams* decision in 1982, we have reviewed at least thirteen cases in which this aggravating circumstance was submitted to the jury, and in *every case except one* the "other crime of violence" occurred contemporaneously with or within hours of the murder for which the defendant was being prosecuted. *E.g.*, *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992) (defendant killed his son, and immediately thereafter assaulted his wife who tried to help her son); *State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991) (woman immediately kidnapped from car and raped after man with whom she was driving was killed by defendant); *State v. McLaughlin*, 323 N.C. 68, 372 S.E.2d 49 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 330 N.C. 66, 408 S.E.2d 732 (1991) (child killed within hours of her mother's death after she awoke while defendant was disposing of her mother's body); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988) (immediately after killing victim, defendant fired gun at another); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985) (defendant killed sister and father of estranged wife in rapid succession); *State v. Craig*, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908,

78 L. Ed. 2d 247 (1983) (woman killed and husband beaten within moments of each other); *Williams*, 305 N.C. 656, 292 S.E.2d 243 (service station employee and convenience store employee killed within hours of each other during back-to-back robberies). In all these cases, we found no error in the trial court's submission of the course of conduct aggravating circumstance to the jury.

The one case which does not fit this pattern is *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *sentence vacated*, --- U.S. ---, 112 L. Ed. 2d 7 (1990). In *Price*, the other crimes of violence, arson and hostage taking, occurred *five days* after the murder for which the defendant was being prosecuted. In order to determine whether these subsequent crimes of violence were part of a course of conduct, we said that it was necessary to consider a "number of factors, among them the temporal proximity of the events to one another, a recurrent *modus operandi* and motivation by the same reasons." *Id.* at 81, 388 S.E.2d at 98. We concluded that all the crimes of violence were "elements of a five-day rampage," evoking a common *modus operandi* and motivation. *Id.* at 82, 388 S.E.2d at 98. Therefore, based on the proximity in time, five days, and the common *modus operandi* and motivation, we held that it was not improper for the trial judge to submit the course of conduct aggravating circumstance to the jury. *Id.* at 83, 388 S.E.2d at 99.

An overview of our cases reflects this Court's realization that the closer the incidents of violence are connected in time, the more likely that the violent acts are part of a plan, scheme, system or design which existed in the mind of the defendant. Conversely, the further apart the violent acts are temporally, the more unlikely it is that the crimes are somehow related, and the more incumbent it is upon a court to carefully consider other factors, such as *modus operandi* and motivation, in determining whether the acts of violence are part of a course of conduct. Thus, in order to find course of conduct a court must consider the circumstances surrounding the acts of violence and discern some transactional connection, common scheme or psychological thread which ties them together. *See e.g.*, *Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (defendant immediately shoots at his intended victim after killing wrong person by mistake); *Noland*, 312 N.C. 1, 320 S.E.2d 642 (defendant, angry at his estranged wife, kills his father-in-law and sister-in-law in rapid succession); *Williams*, 305 N.C. 656, 292 S.E.2d 243 (defendant kills two clerks during armed robbery spree).

The State asks this Court to reject the approach we have followed since *Williams* and find that *neither* a common scheme nor plan *nor* temporal proximity is required for the course of conduct aggravating circumstance. All that needs to be shown, argues the State, is a "pattern or course of violence overtime." To support its position, the State cites *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985), a *noncapital* case involving a *nonstatutory* aggravating factor. In *Avery*, we approved the trial judge's finding of a nonstatutory aggravator that defendant engaged in a pattern or course of violent conduct which included the commission of other crimes of violence against other persons. *Id.* at 35-36, 137 S.E.2d at 805-06. We said that, in addition to the violent conduct for which the defendant was on trial, "there was evidence that prior to that date defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights." *Id.* at 35, 337 S.E.2d at 806. We did not set out a time frame for these other acts of violence.

The precise issue in *Avery* was not whether it was appropriate for the trial judge to find this factor based on the evidence before him; instead, the issue was whether the trial court ran afoul of N.C.G.S. § 15A-1340.4(a)(1) by basing two aggravating factors upon the same evidence. The defendant argued that the course of violent conduct factor and another factor—that the defendant was a dangerous and mentally abnormal person—were both predicated upon the fact that the defendant suffered from a mental illness at the time he committed the crimes for which he was convicted. *Id.* at 34, 337 S.E.2d at 805. We held that the two factors were based on different evidence, citing the defendant's other acts of violence to support the course of violent conduct factor. Thus, our attention in *Avery* was not squarely focused on the exact issue before us today. Furthermore, in *Avery*, we were dealing with a *nonstatutory* aggravating factor under the *Fair Sentencing Act* which the trial judge found on the particular facts of the case before him. Our capital cases interpreting N.C.G.S. § 15A-2000(e)(11) were neither considered nor relied upon in reaching our decision on this issue in *Avery*. I therefore believe *Avery* should be restricted to its own facts, and that we should reject the State's invitation to alter the way we have been analyzing death cases under N.C.G.S. § 15A-2000(e)(11) for the past decade.

After a careful review of the record in this case, I find only one of three factors discussed in *Price* to be present. Furthermore, there is no credible evidence that the two murders were part of a connected series of circumstances; there appears no transactional connection between them. Karen's murder, the "other crime of violence" which the trial judge found to be part of a course of conduct, occurred *twenty-six months* after Teresa's murder, the crime for which defendant was convicted. During this period of more than two years, there was no pattern of violence by defendant, such as the "five-day rampage" in *Price*. *See Price*, 326 N.C. at 82, 388 S.E.2d at 98. While defendant's *modus operandi* was the same in both murders, I agree with defendant's appellate attorney that there is no credible evidence to suggest that at the time defendant killed Teresa, he had in mind a plan, scheme, or design which involved the death of Karen more than two years later.[1] Even the prosecutor did not suggest that defendant's motivations for the two murders were the same. During her closing argument, prosecutor Powell suggested to jurors that defendant killed Teresa out of anger for the death of his son Clifford; she suggested that defendant killed Karen out of concern that she would take custody of their children and out of anger for Karen having sworn out a nonsupport warrant against him.

The ugly reality is this defendant brutally murdered two sisters two years apart for reasons we may never know. As much as we deplore his actions, the State has not demonstrated that these acts of violence were tied together in such a way as to permit the trial judge to submit the course of conduct aggravating circumstance for the jury's consideration. I would therefore hold that the trial judge erred by allowing the jury to consider N.C.G.S. § 15A-2000(e)(11) in aggravation of the murder for which defendant was convicted.

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1. Although former prison inmate Fred Jacobs testified that he was told by defendant that defendant killed the sisters because they "had ripped him off on a cocaine deal," the prosecution did not actively pursue that theory. During her closing argument to the jury, prosecutor Powell did not even mention Jacobs' testimony concerning the alleged drug deal. Furthermore, the State on appeal does not argue that the sisters were killed because of a drug deal gone bad. Finally, had the drug deal been the motivation behind both murders, why were they committed twenty-six months apart? Common sense dictates that both murders would have been committed around the same time had they both been motivated by anger over the same botched drug deal.

My conclusion that the course of conduct circumstance was erroneously submitted to the jury finds support in Judge Farmer's decision in *Cummings I* to sever defendant's trials for the murders of Karen and Teresa. Judge Farmer ruled that, because of the two-year span between the murders, the "transactional connection" between the two murders was not sufficient to allow the cases to be tried together. *Cummings I*, 326 N.C. at 310, 389 S.E.2d at 73.

Finally, given the majority opinion, I feel compelled to emphasize the well-settled maxim of capital punishment jurisprudence that aggravating circumstances must be narrowly construed to limit discretion " 'so as to minimize the risk of wholly arbitrary and capricious action.' " *See Zant v. Stephens*, 462 U.S. 862, 874, 77 L.Ed. 2d 235, 248 (1983) (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 49 L.Ed. 2d 859, 883 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *see also State v. Oliver*, 302 N.C. 28, 61, 274 S.E.2d 183, 204 (1981) ("Where it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant."); *State v. Goodman*, 298 N.C. 1, 30, 257 S.E.2d 569, 588 (1979) (when considering the submission of aggravating circumstances, "[w]e believe that error in cases in which a person's life is at stake, if there be any, should be made in the defendant's favor"). Thus, even assuming this to be a "close call," we must interpret our death penalty statute narrowly to stay within the boundaries of the Eighth Amendment to the United States Constitution and Article I, Section 27 of the North Carolina Constitution.

Because this was the only aggravating circumstance found by the jury, defendant's death sentence must be vacated and a sentence of life imprisonment imposed. N.C.G.S. § 15A-2000(d)(2) (1988) (Supreme Court *shall* vacate death sentence and impose life sentence "upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death"); *see State v. McDowell*, 329 N.C. 363, 407 S.E.2d 200 (1991); *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984); *State v. Beal*, 311 N.C. 555, 319 S.E.2d 557 (1984).

Although not argued by counsel for either side, I feel compelled to address an apparent conflict in our cases dealing with the proper resolution of situations such as this in which the *sole* aggravating circumstance found by the jury is subsequently found by this Court

to have been improperly submitted.[2] As noted above, we have held on at least three occasions that N.C.G.S. § 15A-2000(d)(2) requires this Court to impose a sentence of life imprisonment in lieu of the death penalty when we determine that the sole aggravating circumstance found by the juror was improperly submitted by the trial court. *McDowell*, 329 N.C. at 390, 407 S.E.2d at 215; *Hamlet*, 312 N.C. at 162, 321 S.E.2d at 847; *Beal*, 311 N.C. at 566, 319 S.E.2d at 563. These cases are in contrast to *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), where we remanded for a new sentencing proceeding after concluding that the sole aggravating circumstance had been improperly submitted. *Id.* at 271, 275 S.E.2d at 483.

In *Silhan*, our analysis centered on the double jeopardy implications of remanding for a new sentencing proceeding after finding that the sole aggravating circumstance had been improperly submitted. *Id.* at 266-70, 275 S.E.2d at 480-83. We concluded that double jeopardy considerations would not preclude a new sentencing proceeding and that this Court should remand "if there are aggravating circumstances which would not be constitutionally or legally proscribed at the new hearing." *Id.* at 270, 275 S.E.2d at 482. We then held that an aggravating circumstance would not be so proscribed at the new hearing if "(1) there was evidence to support it at the hearing appealed from; and (2) it was not submitted to the jury [during the first hearing] or, if submitted, the jury found it to have existed; and (3) there is no other legal impediment (such as the felony murder merger rule) to its use." *Id.* at 270-71, 275 S.E.2d at 482-83. In contrast to our later cases, however, we did not in *Silhan* consider the effect of N.C.G.S. § 15A-2000(d)(2) in our analysis. *See also, State v. Stanley*, 310 N.C. 332, 346, 312 S.E.2d 393, 401 (1984) (although citing N.C.G.S. § 15A-2000(d)(2), we also cited *Silhan* and held that a sentence of life imprisonment must be imposed only because "there is no evidence in the case to support any aggravating circumstance").

I conclude that, notwithstanding the double jeopardy analysis in *Silhan*, N.C.G.S. § 15A-2000(d)(2) requires this Court to impose

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2. The same situation would be presented were we to find that both of two aggravating circumstances or all of three or more aggravating circumstances presented to the jury had been improperly submitted. Stated differently, where every aggravating circumstance found by the jury is subsequently found by this Court to have been improperly submitted, N.C.G.S. § 15A-2000(d)(2) requires that a sentence of life imprisonment be imposed in lieu of the death penalty.

a sentence of life imprisonment in lieu of the death penalty in any case in which the sole aggravating circumstance found by the jury is subsequently found by this Court to have been improperly submitted. As noted in footnote two, the same result would follow when the jury finds two or more aggravating circumstances and this Court finds that the trial court erred in submitting each and every one.[3]

In conclusion, I agree with the majority in finding no error in defendant's conviction for first-degree murder and in concluding that defendant's death sentence must be vacated due to *McKoy* error. However, I disagree with the majority's conclusion that the § 15A-2000(e)(11) "course of conduct" aggravating circumstance was properly submitted to the jury. I conclude that this aggravating circumstance was improperly submitted to the jury and, since this was the sole aggravating circumstance found by the jury, N.C.G.S. § 15A-2000(d)(2) requires this Court to vacate the death sentence and sentence defendant to imprisonment in the State's prison for the remainder of his natural life. That is my vote.

Chief Justice Exum joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. TONY ALLEN WALKER

No. 163A91

(Filed 19 November 1992)

1. Homicide § 200 (NCI4th)— first degree murder—possible suicide—sufficiency of evidence

The trial court properly denied defendant's motions to dismiss a charge of first degree murder for insufficient evidence where the evidence suggested two possibilities: that the victim was either shot by her lover in cold blood or that she took her own life in his presence. Setting aside defendant's evidence

3. Thus, N.C.G.S. § 15A-2000(d)(2) would *not* require this Court to impose a life sentence in lieu of the death penalty where, for example, two aggravating circumstances are found by the jury, and this Court finds that only one was improperly submitted.

and taking the facts established at trial by the State in the light most favorable to the prosecution, the facts constitute substantial evidence of defendant's guilt.

Am Jur 2d, Homicide § 297.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted. 56 ALR2d 1447.

2. Homicide § 245 (NCI4th)— murder—possible suicide—premeditation or deliberation—circumstantial evidence sufficient

The circumstantial evidence of premeditation and deliberation was sufficient to submit a first degree murder case to the jury where defendant contended that the victim committed suicide in her lover's presence, that there was no direct evidence of premeditation or deliberation, and that the circumstantial evidence in no way shows premeditation or deliberation. However, witnesses for the State testified that defendant had physically abused the victim on occasions prior to her death while defendant denied ever striking the victim; the State's evidence tended to show that up to an hour elapsed before defendant dialed 911 for assistance after the shooting occurred, contrary to defendant's claim that he reported the shooting immediately; and the nature of the killing indicates a premeditated and deliberate act of homicide. These facts, among others, support a reasonable inference that there was a conflict between defendant and the victim prior to her death; that he mercilessly waited for an hour after the shooting before seeking medical care for the victim; and that defendant was avoiding the truth in his rendition of the facts.

Am Jur 2d, Homicide §§ 438-440.

Modern status of the rules requiring malice aforethought, deliberation or premeditation, as elements of murder in the first degree. 18 ALR4th 961.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435, supp. sec. 1.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656, supp. sec. 1.

3. Evidence and Witnesses § 875 (NCI4th)— murder—statements of victim—prior assaults by defendant—state of mind exception

The trial court did not err by admitting in a murder prosecution hearsay statements by the victim concerning defendant's prior physical assaults against her because the challenged testimony was indicative of the declarant's state of mind. The victim's state of mind was relevant to the question of whether she was murdered or committed suicide. N.C.G.S. § 8C-1, Rule 803(3).

Am Jur 2d, Evidence §§ 650, 652.

4. Criminal Law § 838 (NCI4th); Homicide § 407 (NCI4th)— murder—defendant's false, contradictory or conflicting statements—instructions

The trial court did not err in a murder prosecution by giving an instruction on false, contradictory or conflicting statements where the jury was not left to roam at will in search of contradictions to use against defendant and the instruction made it clear to the jury that evidence of falsehood is never sufficient to establish guilt standing alone, does not create a presumption of guilt, and may not be considered as tending to show premeditation or deliberation. This instruction is proper not only where defendant's statements contradict each other but also where defendant's own statements flatly contradict the relevant evidence; here the inconsistencies brought to light by the comparison between certain statements of defendant and the evidence at trial were not completely irrelevant and had substantial probative force, tending to show consciousness of guilt.

Am Jur 2d, Trial § 415; Witnesses § 1045.

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus." 4 ALR2d 1077.

5. Constitutional Law § 226 (NCI4th)— mistrial—failure to comply with discovery—no prosecutorial misconduct—retrial not a double jeopardy violation

There was no double jeopardy violation in the second trial of a murder defendant following a mistrial for the State's failure to comply with discovery where the first trial court found that there had been a breakdown in communication but

no prosecutorial misconduct and the defense attorneys did not object after being invited to do so. Given that finding, and an absence of anything in the record to imply that it was erroneous, there is no basis for the assertion that the mistrial was the result of prosecutorial misconduct, and thus the secondary question of whether the misconduct was intended to provoke a mistrial does not arise.

Am Jur 2d, Criminal Law §§ 285, 286.

Double jeopardy as bar to retrial after grant of defendant's motion for mistrial. 98 ALR3d 997.

Former jeopardy as bar to retrial of criminal defendant after original trial court's sua sponte declaration of a mistrial—state cases. 40 ALR4th 741, sec. 1.

6. Criminal Law § 518 (NCI4th)— murder—failure to provide discovery—no prejudice to defendant—no mistrial

The trial court did not abuse its discretion by denying a murder defendant a mistrial based upon the State's failure to provide discovery material regarding two separate tests performed by the State's investigators where one test was inconclusive and provided little in the way of damaging testimony for either the State or defendant, and any advantage which may have been gained for defendant through greater exposition of the second could have been countered by the State.

Am Jur 2d, Criminal Law §§ 286, 770.

7. Criminal Law § 518 (NCI4th)— murder—failure of State to provide evidence—no prejudice—mistrial denied

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial based upon the State's failure to make defense counsel aware of an SBI finding that the belt buckle worn by defendant on the night of the murder had two small drops of blood on it. The trial court found that the prosecutor was not aware of the existence of the blood on the belt buckle until the investigator testified at trial, that defense counsel had access to the investigator, and that defense counsel possessed a copy of his report. The existence of blood on defendant's belt buckle added little to the previous evidence, was inconsequential standing alone, and defendant was not substantially and irreparably prejudiced by being denied the information prior to trial.

Am Jur 2d, Criminal Law §§ 286, 770; Depositions and Discovery §§ 420-428, 447-449.

Right of accused in state courts to have expert inspect, examine or test physical evidence in possession of prosecution—modern cases. 27 ALR4th 1188, sec. 1.

Justice WEBB dissenting.

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

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Greeson, J., at the 8 October 1990 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 13 April 1992.

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

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

LAKE, Justice.

The defendant was indicted on 17 July 1989 for the first-degree murder of his girlfriend, Mary Sue Whitaker. He was tried non-capitally during the 7 May 1990 Criminal Session of Superior Court, Guilford County.

In the course of the trial, during presentation of testimony, defendant moved for a mistrial, and upon a hearing, the trial court declared a mistrial. The State's chief investigator and assistant district attorney advised defense counsel prior to trial that no test other than a visual inspection had been performed on the weapon from which the fatal shot was fired. However, the police department's evidence specialist testified for the State that the weapon had been tested for fingerprints and that the test result was negative. The court found defendant was prejudiced and declared a mistrial by order dated 10 May 1990. The court further specifically found as a fact no intentional failure of the prosecution to comply with discovery and concluded as a matter of law that there had been no prosecutorial misconduct.

Retrial of defendant began at the 8 October 1990 session of Superior Court, Guilford County, with Judge Greeson again presiding. Again, during the trial defendant moved for a mistrial upon learning through testimony that a trace metal test had been performed on defendant's hand which was negative and that a test for blood had been conducted on defendant's belt buckle, showing two small drops of blood. The court found no prejudice to defendant and no prosecutorial misconduct and denied the motion. On 17 October 1990 the jury returned a verdict of guilty of first-degree murder. Defendant was sentenced to imprisonment for life, and gave notice of direct appeal to this Court.

The evidence showed that the victim, a waitress, and defendant, who worked for a garage door company, had been romantically involved since the previous summer. Defendant's wife was aware of the relationship between them. In January and February 1989, the victim began asking defendant to choose between her and his wife, and the couple discussed living together on a trial basis. On the evening of the shooting, the victim and defendant had checked into a Motel 6 to spend the night and discuss their relationship. According to defendant, after some discussion, defendant told the victim he had decided to leave her and go back to his wife. Subsequently, Mary Sue Whitaker was shot with defendant's .38 caliber handgun and died from her wounds.

The evidence further showed that Officer Sandra Jenkins of the Greensboro Police Department responded to a radio call placed at 9:45 p.m. on Friday, 10 February 1989 concerning a shooting and injury in Room 229 of the Motel 6 on Greenhaven Drive in Greensboro. Upon her arrival at the motel, Officer Jenkins saw defendant standing on the balcony in front of Room 229. As she approached, defendant said, "She's dead. She shot herself." Officer Jenkins asked what happened and defendant told her he and his girlfriend had gotten into an argument and she had picked up his gun and shot herself. On entering the room, Officer Jenkins saw the victim lying on her stomach with her left arm stretched out, the right side of her head up, and her face covered with blood. A large puddle of blood was beside the victim's head. A .38 caliber gun was on the floor at the right side of the victim, near her feet. The victim was still breathing and Officer Jenkins requested that EMS "rush it up." The Guilford County EMS had been called at 9:44 p.m. Emergency paramedic Joe Powell testified that he arrived at the motel at 9:52 p.m. and found Whitaker

breathing with difficulty. He administered CPR and took Whitaker to a hospital shortly thereafter.

Officer Frank Noah arrived at 10:02 p.m. and made note of the following items in the motel room: two cups and a liquor bottle on a bedside shelf, a receipt from an ABC store in Greensboro dated 10 February at 8:27 p.m., and a gun holster on a chair near the door. Greensboro Police Detective Ed Hill testified that he saw a holster in a chair and observed it was snapped shut. He further testified that defendant related the following sequence to him during the course of defendant's statement made at the police station:

> He told the victim he was going back to his wife; they concluded they would be friends; he sat down on the bed and heard a click; he saw the gun in her hand with the barrel to the right side of her head; she pulled the trigger and he could not stop her.

Later, when defendant undressed at the police station, a large amount of blood was observed on his socks and inside his boots. There was no blood on the outside of his boots, or elsewhere on the outside of his clothing.

One spent casing and four live rounds were collected from the gun, which belonged to defendant and had the capacity to hold five rounds. There were rubber grips which covered the handle of the gun. These serve to stabilize the weapon in the hand, but make it difficult to pick up identifiable fingerprints. The gun was tested for latent fingerprints but insufficient detail was found to make any identification. A trace metal test on 11 February to determine whether defendant had recently held a metal object also proved negative, although trace elements of a gun cartridge were detected on him.

The testimony of State's witnesses Charles McCoy and Samuel Kimbrough placed the time of the shooting at between 8:00 and 9:00 p.m. McCoy testified that on 10 February 1989, he was staying in a room on the first floor of the Motel 6 on Interstate 85. He got to his room at the motel at approximately 7:00 p.m. and he began to watch television. While he was watching "Father Dowling Mysteries," which aired from 8:00 to 9:00 p.m., there was a disturbing noise coming from the room directly above him, as if people were fighting or throwing furniture around. The noise went on

for about fifteen or twenty minutes. He ascertained the room number from which the noise came. He then called the desk clerk and asked him to call the people in Room 229 and tell them to be quiet. McCoy testified that just before he called the front desk he heard a noise that sounded like someone "had picked the bed up and dropped it on the ceiling." After he called the front desk, it became very quiet upstairs, except for what sounded like someone pacing back and forth the length of the room. McCoy stated that the disturbance had continued up until the time he heard the very loud noise.

Samuel Michael Kimbrough testified that on 10 February 1989 he was working as a desk clerk at the Motel 6 on Greenhaven Road. He arrived at work at 8:30 p.m. Almost immediately after his arrival, he received a phone call from a man who said that he could not hear his television, because "somebody [was] throwing something around, [and there was] a big disturbance in the room up above [him]" and asked Kimbrough to call Room 229. Kimbrough made the call and a man answered the phone. The desk clerk told him that he had received a complaint that the persons in Room 229 were making too much noise, and the man who answered said that "[he would] take care of it" and hung up the phone.

Jan Bruner, defendant's sister-in-law, testified that defendant called her by telephone between 9:30 and 10:00 p.m. on the evening of 10 February 1989 and asked if his wife, Cathy, was there. After being told his wife was not with Bruner, defendant asked Bruner to find his wife and informed Bruner that he might be charged with murder.

There was considerable disagreement among the several physicians who gave testimony as to the probability of Ms. Whitaker's surviving for as much as an hour after the shooting. Dr. Deborah L. Radisch, associate chief medical examiner of the State of North Carolina, who performed the autopsy, opined that Ms. Whitaker would most likely have lived only five to ten minutes after infliction of the wound, but could not rule out the possibility of her surviving for up to an hour. Dr. George Podgorny of Moses H. Cone Memorial Hospital testified that patients with such wounds to their frontal brain lobes often survive for well over an hour. Dr. Page Hudson, professor of pathology at the East Carolina University School of Medicine, testified that pneumonia would set in within an hour

or two of a shooting such as that suffered by the victim; however, the autopsy revealed no pneumonia in the victim's lungs.

An autopsy of the victim revealed that she died from a contact gunshot wound to her right temple. The presence of an area of abrasion, an area of scorching, and gunpowder in the wound indicated that at the moment the gun was fired, its muzzle was in contact with the victim's skin. The force of the shot under such circumstances typically causes the scalp around the entrance hole to be blown back and torn, a result which was found here. It is also typical for tissue or blood to be blown back into the muzzle of the gun, but police detectives found an absolute lack of any blood or tissue on or inside the weapon, and concluded that the weapon had probably been wiped clean. The autopsy further indicated that the blood alcohol content of the victim was equivalent to a .17 on the breathalyzer scale.

Several of the State's witnesses testified to defendant's previous physical abuse of the victim. An employee of Terry's Curb Market testified that on 5 February 1989, the Sunday before the shooting, he saw defendant outside the market arguing with the victim and choking her. He called the sheriff's department; deputies confirmed at trial that they came and intervened and the couple left in separate vehicles.

A friend of the victim's, Carl Sidney Amos, testified over defendant's objection, on hearsay grounds, that one time he observed a cut under the victim's nostril, which was swollen. When he asked the victim about it she said defendant had shoved her into a door. This episode was corroborated by testimony from the victim's sister-in-law, Bonnie Whitaker. Amos also said he had questioned the victim about some small marks on her face and bruises on her arm. She had confided that defendant had hit her on one occasion and grabbed and shaken her on another, causing those injuries. Another friend, Clyde W. Billings, whom the victim had previously dated, testified that Mary Sue Whitaker had told him she wished defendant would leave her alone. Billings testified to seeing bruises on the victim, asking her about them, and having her reply that defendant had grabbed and kicked her. Bonnie Whitaker further testified that she had seen bruises on the victim; Mary Sue explained these by saying defendant had "grabbed" her and held on "real tight." On the evening of 10 February, hours before her death, Bonnie overheard the victim on the telephone telling defend-

ant that he would have to choose between her and his wife. Bonnie also observed that the victim's arm had no bruise on it at that time; when she saw her sister-in-law's body at the funeral home, Bonnie Whitaker saw a new bruise on Mary Sue Whitaker's arm.

David Lee McKinney testified that defendant and the victim had lived with him for approximately three weeks. One night when McKinney came home he saw the victim holding a gun to her head, threatening to kill herself. Defendant was pleading with her to put the gun down, which she finally did. McKinney testified that the victim did not want defendant to leave her. Another friend of the victim's, Linda Locklear, told the court that in early February 1989 the victim had cried to her and told her she would kill herself before she would live without defendant.

Medical records were admitted which showed that the victim had been diagnosed as "chronically dysfunctional," with "depressive neurosis," "suicide ideation" and depression. A psychologist testified that Mary Sue Whitaker suffered from a "borderline personality disorder" and presented a high risk of suicide, having seen her stepfather commit suicide by shooting himself when she was fourteen years old, after she had reported to her mother his physical and sexual abuse of her.

I.

[1] Defendant first contends his conviction must be vacated because there was insufficient evidence that he killed the victim and that *all* the evidence established that she committed suicide. Defendant moved to dismiss the charge of first-degree murder both at the end of the State's case-in-chief and again at the close of all the evidence on these grounds. We conclude that both motions were properly denied.

While we disagree with defendant's assessment of the evidence, he correctly sets forth in his brief, from a defense perspective, the parameters of consideration by a trial court on motions to dismiss for insufficiency of the evidence. This Court has held:

> To warrant a conviction on circumstantial evidence, the facts and circumstances must be sufficient to constitute *substantial* evidence of every essential element of the crime charged. Guilt must be a legitimate inference from facts established by the evidence. When the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt,

they are insufficient to make out a case and a motion to dismiss should be allowed.

State v. Daniels, 300 N.C. 105, 114, 265 S.E.2d 217, 222 (1980) (emphasis added) (citation omitted) (quoting *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E.2d 851, 854 (1971)). In this regard, our law provides that the trial court's duty in ruling upon a criminal defendant's motion to dismiss is limited to the function of determining "whether a reasonable inference of the defendant's guilt . . . *may* be drawn from the evidence. If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 78-79, 252 S.E.2d 535, 539-40 (1979), *citing State v. Thomas*, 296 N.C. 236, 250 S.E.2d 204 (1978). This Court has also held that the substantial evidence required to be shown as to each element is "that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

In addressing the issue of the sufficiency of the evidence we are therefore compelled to ask whether the facts support a reasonable or legitimate inference of guilt, which must be based on substantial evidence of every element and raise more than a mere suspicion of guilt, but which need not necessarily exclude the possibility of innocence. The instant case indeed falls within the narrow corridors of this standard, notwithstanding the haunting questions raised by the victim's suicidal tendencies and the inference of suicide. Our analysis of the evidence before the trial court is made easier by three legal principles: (1) the evidence is to be considered in the light most favorable to the State, which is entitled to every reasonable inference which may be drawn from it, *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983); (2) defendant's evidence rebutting the inference of guilt is not to be considered except to the extent that it explains, clarifies or is not inconsistent with the State's evidence, *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193, *cert. denied*, 434 U.S. 924, 54 L. Ed. 2d 281 (1977); and (3) in considering a motion to dismiss, the trial court is concerned "only with the sufficiency of the evidence to carry the case to the jury . . . not . . . with the weight of the evidence." *State v. Gonzalez*, 311 N.C. 80, 85, 316 S.E.2d 229, 232 (1984).

The facts of this case suggest two diametrically opposite, but equally tragic, possibilities: Mary Sue Whitaker was either shot by her lover in cold blood or she took her own life in his presence. Defendant contends that all the undisputed evidence shows that the victim committed suicide. She had a documented history of presenting a risk of suicide; she had previously threatened suicide with the same gun used in her death; and scarcely a week earlier she had said she "would kill herself before she would live without defendant." However, leaving defendant's evidence aside and taking the facts established at trial by the State in the light most favorable to the prosecution, the facts constitute substantial evidence of defendant's guilt. The timing of the shooting between 8:30 and 9:00 p.m. was established by two witnesses, Samuel Kimbrough, the desk clerk and Charles McCoy, the occupant of the room directly below Room 229. McCoy heard loud noises coming from the room during that period, then a very loud sound and then silence, except for the pacing of one individual. Kimbrough testified that he arrived at work at 8:30 p.m. and placed the call to Room 229 almost immediately thereafter. Even defendant asserted that the desk clerk's call came just at the time of the shooting. Yet emergency personnel were not contacted until 9:44 p.m. When the clerk called, defendant did not take the opportunity to ask for assistance; his only response to the clerk's request was "okay." One may infer that defendant did not seek help for the victim for approximately an hour after the shooting, an inference consistent with his guilt.

Although the lethal wound to the victim was indisputably a contact wound, the weapon bore no trace of blood or flesh and appeared to the police to have been wiped clean. Tests on the hands of both parties for firearm residue were inconclusive, but traces of elements which make up the primer composition of a cartridge were found on defendant's hands, which is inconsistent with his assertion that he was several feet away from the weapon when it was fired. Another inconsistency appeared in defendant's statement that he held the victim in his arms after she shot herself, an assertion at odds with the fact that while she was bleeding profusely he had no blood on the outside of his clothes. Officer Hill found the gun holster snapped shut which would be inconsistent with the victim suddenly grabbing a gun and shooting herself. Defendant's lack of candor about his previous physical assaults on the victim further implicates his story concerning these events.

Defendant's dispassionate and self-interested behavior in passing up the chance to get help from the desk clerk, waiting to report the shooting, and, in a telephone call to his wife, between 9:30 and 10:00 p.m., expressing concern not with Whitaker's death but with the possibility that he might be charged with murder, all add to the composite picture of guilt. We therefore conclude that the State adduced sufficient evidence at trial to establish a reasonable inference of defendant's guilt and we uphold the trial court's denial of his motions to dismiss the charge. Our decision on this issue is supported by our decisions and the rationales given for them in *State v. Turnage*, 328 N.C. 524, 402 S.E.2d 568 (1991); *State v. Hankerson*, 288 N.C. 632, 220 S.E.2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977); and *State v. Bright*, 237 N.C. 475, 75 S.E.2d 407 (1953).

II.

[2] Defendant next argues that there was insufficient evidence of premeditation and deliberation to submit the charge of first-degree murder to the jury. First, defendant asserts that there was no direct evidence of premeditation or deliberation. This Court has often stated that "[p]remeditation and deliberation relate to mental processes and ordinarily are not readily susceptible to proof by direct evidence. Instead, they usually must be proved by circumstantial evidence." *State v. Brown*, 315 N.C. 40, 59, 337 S.E.2d 808, 823 (1985), *rev'd on other grounds*, *State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Consequently, a complete lack of direct evidence showing premeditation and deliberation does not in and of itself lead to the conclusion that there was insufficient evidence of these elements of first-degree murder to allow submission of this charge to the jury.

Defendant contends secondly that the circumstantial evidence in no way shows premeditation or deliberation on his part. As with the sufficiency issue discussed above, in order for the court to properly find sufficient evidence of premeditation and deliberation, it is not necessary that the evidence require a guilty verdict but only that the circumstantial evidence on premeditation and deliberation support a reasonable inference of the existence of these factors.

> If the evidence presented is circumstantial, 'the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for

> the jury to decide whether the facts, *taken singularly or in combination*, satisfy them beyond a reasonable doubt that the defendant is actually guilty.'

State v. Thomas, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (citation omitted). "Substantial evidence must be existing and real but need not exclude every reasonable hypothesis of innocence." *Brown*, 315 N.C. at 58, 337 S.E.2d at 822.

The State's evidence was generally in conflict with that presented by defendant. When considering a motion to dismiss, the court "must examine the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom. . . . Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *Id.* "If the evidence adduced at trial gives rise to a reasonable inference of guilt, it is for the members of the jury to decide whether the facts shown satisfy them beyond a reasonable doubt of defendant's guilt." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

"Premeditation is defined as thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a 'cool state of blood' in furtherance of a fixed design or to accomplish some unlawful purpose." *Id.* at 505, 279 S.E.2d at 838. This Court has stated that "[s]ome of the circumstances which give rise to an inference of premeditation and deliberation are ill will or previous difficulty between the parties, . . . [and] the conduct of defendant before and after the killing . . . ." *Id.* at 505, 279 S.E.2d at 839 (citations omitted). Witnesses for the State testified that defendant had physically abused the victim on occasions prior to her death. Defendant denied having ever struck the victim. Contrary to defendant's claim that he reported the shooting immediately, the State's evidence tended to show that up to an hour elapsed before defendant dialed 911 for assistance after the shooting occurred. Moreover, the nature of the killing, a contact shot to the temple, indicates a premeditated and deliberate act of homicide, if the State's theory that defendant was holding the weapon in such a position against the victim's head is to be believed. These facts, among others, support a reasonable inference that there was a conflict between defendant and the victim prior to her death; that he mercilessly waited for an hour after the

shooting before seeking medical care for the victim; and that defendant was avoiding the truth in his rendition of the facts.

Thus, giving the State every reasonable inference from the evidence presented, the circumstantial evidence on premeditation and deliberation was sufficient to submit the case to the jury. It was for the jury to resolve the conflicts in the evidence in its capacity as the trier of fact. No error was committed in denying defendant's motion to dismiss for lack of sufficient evidence of premeditation and deliberation.

III.

[3] Defendant next assigns as error the trial court's admission into evidence of certain hearsay statements concerning defendant's prior physical assaults on the victim. These statements, along with at least one eyewitness account, were introduced by the State through friends and family of the victim who repeated statements made by the victim to them indicating that defendant had hit, grabbed, kicked, shaken and shoved her, causing the injuries they observed. Defendant contends this evidence was hearsay, not within any exception to the rule against hearsay evidence, and prejudicial to him.

We agree with defendant that the statements in question were hearsay. We further find that the trial court erroneously allowed the statements into evidence as being the victim's statement relating to her existing physical condition, as opposed to her then existing state of mind. N.C.G.S. § 8C-1, Rule 803(3) (1988). However, the statements were admissible under N.C.G.S. § 8C-1, Rule 803(3), the state-of-mind exception to the hearsay rule. The rule states:

> 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).

In recent years this Court has defined the state of mind exception to include statements made by the victim which may indicate the victim's mental condition by showing the victim's fears, feelings, impressions or experiences. *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); *State v. Meekins*, 326 N.C. 689, 392 S.E.2d 346 (1990); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). "Evidence tending to show the state of mind of the victim is admissible as long as the declarant's state of mind is relevant to the case," *State v. Meekins*, 326 N.C. at 695, 392 S.E.2d at 349, and "the possible prejudicial effect of the evidence does not outweigh its probative value." *State v. Cummings*, 326 N.C. at 313, 389 S.E.2d at 74 (quoting *Griffin v. Griffin*, 81 N.C. App. 665, 669, 344 S.E.2d 828, 831 (1986)).

In the *Holder* case, for example, we held testimony concerning statements made by the victim prior to her murder could all be allowed into evidence under Rule 803(3). The testimony consisted of evidence that the victim had seen a small handgun in defendant's pocket, that defendant had threatened her with physical harm, and that defendant had refused to leave her alone after she had tried to end the relationship. The testimony 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." *Holder*, 331 N.C. at 485, 418 S.E.2d at 210. The statements at issue in the present case were admitted for the same purpose. Moreover, as in *Holder*, the probative value of the evidence outweighed any potential prejudice to defendant.

In *Cummings* this Court upheld the admission of statements by the victim to a community service organization's paralegal that defendant had beaten the victim on several occasions in the past, and threatened to kill her if she tried to take back her children from him. These statements were held to be admissible under the state of mind exception to the hearsay rule as they related directly to the declarant's state of mind and emotional condition. Moreover, the Court in *Cummings* also admitted into evidence certain statements made by the victim to her mother to the effect that the victim had taken out a child support warrant against defendant and sought an attorney's advice about obtaining custody of her and defendant's children. The Court found this evidence, though less explicitly descriptive of her mental condition, relevant to the victim's state of mind, specifically her likely inclination not to leave the children with defendant. Similarly, in the case *sub judice*, the

statements about prior abuse of the victim by defendant are highly relevant, although not determinative in any clear way, to the victim's state of mind at the time of the killing. In this case, the victim's state of mind is obviously extremely relevant to the question of whether the victim was murdered or committed suicide.

Finally, in *Stager*, this Court permitted the jury to hear an audiotape of the victim relating his thoughts and descriptions of certain actions by defendant because it showed the victim's fears and suspicions and tended to disprove the normal, loving relationship between them that defendant contended existed. In the case *sub judice* the victim's explanation of the origin of her cuts and bruises likewise tended to disprove the nonabusive relationship defendant described.

We find the challenged evidence indicative of the declarant's state of mind as defined by our jurisprudence, and we thus conclude there was no error in its admission into evidence.

IV.

[4] Defendant next contends that the trial court erred in instructing the jury that if it found defendant made false, contradictory, or conflicting statements, the same could be considered as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience. The trial court gave the following instruction:

> The State contends and the defendant denies that the defendant made false, contradictory or conflicting statements to the investigating officers in this case. If you find that the defendant made such statements, they may be considered by you as a circumstance tending to reflect the mental process of a person possessed of a guilty conscience, seeking to divert suspicion or to exculpate himself. If you find that the defendant made such statements, you should consider that evidence, along with all the other believable evidence in this case. However, if you find that the defendant made such statements, they do not create a presumption of guilt, and such evidence standing alone is not sufficient to establish guilt. I further charge that such evidence may not be considered as tending to show premeditation and deliberation.

Defendant contends that he made no false or contradictory statements, that if he did make any such statements, they were

on immaterial points, and that the instruction therefore allowed the jury to "roam at will" in search of contradictions to use against him. As noted above, this position is without merit.

This challenged instruction to the jury is an accurate paraphrase of decisions of this Court. "It is established by our decisions that false, contradictory or conflicting statements made by an accused concerning the commission of a crime may be considered as a circumstance tending to reflect the mental processes of 'a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [himself].' " *State v. Myers*, 309 N.C. 78, 86, 305 S.E.2d 506, 511 (1983), *citing State v. Redfern*, 246 N.C. 293, 297-298, 98 S.E.2d 322, 326 (1957). In *Myers* this Court likened evidence of falsehoods to evidence of flight as a circumstance tending to show consciousness of guilt. The Court then applied three rules of law governing flight evidence to falsehood evidence as well. In effect, the Court held that evidence of falsehood may be considered with other facts and circumstances in determining guilt, but that (1) it is never, standing alone, sufficient to establish guilt; (2) it does not create a presumption of guilt; and (3) it may not be considered as tending to show premeditation or deliberation. *Myers*, 309 N.C. 78, 305 S.E.2d 506. The instruction given in the instant case made all three of these principles clear to the jury. Thus, the jury was not left to "roam at will" as was the case in *Myers* before these limitations were enunciated by the Court.

There were a number of areas where defendant's statements to the police or his testimony were contradictory to highly relevant facts proven at trial. For instance, defendant stated that he embraced the victim just after the shooting, but little or no blood was found on the outside of his clothing. Also, defendant stated that he had been sitting on the bed four or five feet away from the victim when she shot herself, but there were traces of cartridge residue on his hands and expert testimony that such residue was not consistent with his having been at such a distance from the blast.

The heart of defendant's argument is that the trial judge should not instruct on false, contradictory or conflicting statements if the statements under scrutiny are, as he contends these were, "completely irrelevant" and without "substantial probative force, tending to show consciousness of guilt." *See State v. Myers*, 309 N.C. at 87-88, 305 S.E.2d at 511-512. We agree with defendant's reading of the *Myers* case for this rule. However, we also agree with the

State that the challenged instruction is proper not only where defendant's own statements contradict each other but also where defendant's statements flatly contradict the relevant evidence. *Id.; State v. Yearwood*, 178 N.C. 813, 101 S.E. 513 (1919). We hold that the inconsistencies brought to light by this comparison between certain statements of defendant and the evidence at trial were not "completely irrelevant" and in fact had "substantial probative force, tending to show consciousness of guilt." Therefore, the trial judge did not err in giving the instruction on false, contradictory or conflicting statements.

V.

[5] In defendant's next assignment of error, he argues that the mistrial which occurred the first time this case was tried was the result of "flagrant prosecutorial misconduct" intended to provoke defendant's motion for a mistrial. Defendant contends that, due to this provocative misconduct, the retrial violated the double jeopardy principles of both the North Carolina and United States Constitutions.

"Article I, Section 19 of the North Carolina Constitution, the 'law of the land' clause, prohibits reprosecution for the same offense." *State v. White*, 322 N.C. 506, 510, 369 S.E.2d 813, 815 (1988). In determining whether a case may be retried after a defendant's successful motion for a mistrial, this Court in *White* accepted as the appropriate standard under our State Constitution the standard set forth by the majority in *Oregon v. Kennedy*, 456 U.S. 667, 72 L. Ed. 2d 416 (1982). As stated in *White*:

> If a defendant moves for a mistrial, he or she normally should be held to have waived the right not to be tried a second time for the same offense. Where the defendant makes such a motion because of prosecutorial misconduct, and the court grants the motion, retrial is not barred by Article I, Section 19 unless the *defendant shows* that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant.

White, 322 N.C. at 511, 369 S.E.2d at 815 (emphasis added).

On application of this test to the facts of the instant case it is clear that defendant's position and assertions on this assignment of error are without merit. The trial court, when granting the motion for a mistrial in the first case, stated:

> There is not a scintilla of evidence to indicate that anybody on behalf of the State has deliberately misled anyone representing the defendant.
>
> This court finds that there has been no misconduct on the part of the State of North Carolina, its assistant district attorney, its chief investigating officer, or Special Investigator Noah, but that there was a breakdown in communication . . . .
>
> . . . .
>
> . . . But I want to make sure that the order is replete that this court finds as a matter of law that this mistrial is declared not due to any misconduct on behalf of the State of North Carolina, and this case is not prohibited from being retried due to the misconduct by the State. This court finds as a fact that there was no misconduct by the State.

After this statement the court asked the defense attorneys if they objected to these findings to which they replied that they did not, and added that neither of them contended that defendant had been misled by the detective.

Given the above finding by the trial court, entered without objection, and an absence in the record of anything that would imply that the finding was erroneous, there is no basis for defendant's assertion that the mistrial which occurred in the first trial was the result of prosecutorial misconduct. Since defendant has failed to show misconduct on behalf of the State, the secondary question of whether the misconduct was motivated by the intent to provoke a mistrial does not arise. Thus, the constitutional standard set forth in *White* to establish that a retrial has effected a double jeopardy prosecution, has not been met. Therefore, as to this assignment, we find no error.

VI.

[6] Defendant's final assignment of error concerns the trial court's denial of his motion for mistrial in his second trial based upon the State's failure to provide discovery material regarding two separate tests performed by the State's investigators. As stated under our appropriate statutory law: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, . . . resulting in substantial and irreparable prejudice to the defendant's case."

N.C.G.S. § 15A-1061 (1988). In a criminal case where the defendant is not subject to capital punishment, "ruling on a motion for mistrial . . . rests largely in the discretion of the trial court." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E.2d 173, 179 (1980), *citing State v. Battle*, 267 N.C. 513, 148 S.E.2d 599 (1966). "The scope of appellate review, then, is limited to whether in denying the motions for a mistrial, there has been an abuse of judicial discretion." *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988).

Defendant directs our attention to two instances where he claims there was sufficient prejudice to constitute an abuse of discretion by the trial court in denying his motion for mistrial. First, he points to the fact that defense counsel was not made aware prior to trial of the trace metal test performed on defendant's hands on the night of the victim's death. Defendant argues that he could have gained greater exculpatory value from this information had he known it sooner. In our view, the finding regarding the trace metal test was inconclusive and provided little in the way of damaging testimony for either the State or defendant. The results of the test did not indicate that defendant had recently held a metal object. Witnesses also indicated that there was a rubber or heavy plastic "Pachmayr" grip on the weapon which could have prevented the test from returning a positive reading. Any advantage which may have been gained for defendant through greater exposition of this evidence could have been countered by the State. We see no substantial prejudice to defendant resulting from this defect in the discovery process. We therefore, as to this ground, find no abuse of discretion in the trial court's denial of defendant's motion for mistrial.

[7] Defendant's second basis for his claim to mistrial is that the State failed to make his counsel aware of a finding by the State Bureau of Investigation that the belt buckle worn by defendant on the night of Whitaker's death had two small drops of blood on it. Again defendant argues that had he known earlier about the existence of this evidence he would have been better able to counter it. The trial court found that the prosecutor was not aware of the existence of blood on the belt buckle until the investigator, the State's final witness, testified to it at trial. The court also found that the defense had access to the investigator and possessed a copy of his report. Upon these facts the judge concluded that defendant had suffered no substantial and irreparable prejudice from the State's failure to provide this evidence prior

to trial. We hold this conclusion to be supported by the facts presented.

Undisputed evidence established that defendant had a large amount of blood on his socks and the inside of his boots and that he was within *at least* four or five feet of the victim when she was shot. The small amount of blood on defendant's belt buckle, too insufficient an amount to type, does not prove that he had to be in greater proximity. The S.B.I. investigator opined that the location of the drops of blood on the inside of the belt buckle indicated that the buckle was open or the pants were off. It is undisputed that defendant's boots were off at some time during the episode. In light of all this evidence, the fact that his belt was loosened or off is of little consequence.

In summary, the existence of blood on defendant's belt buckle added little to the evidence that went before it and was inconsequential standing alone. Defendant was not substantially and irreparably prejudiced by being denied this information prior to trial. We therefore find no abuse of discretion in the trial court's denial of defendant's motion for mistrial on this basis.

We note in passing that by our holding here, upon this particular assignment of error, we do not undermine this Court's prior position that a defect in discovery can result in irreparable prejudice. Rather, we simply find that in this case it did not.

For the foregoing reasons, we conclude that the defendant's trial was free of prejudicial error.

NO ERROR.

Justice WEBB dissenting.

I dissent because I believe inadmissible hearsay testimony was admitted which was prejudicial to the defendant.

Carl Sydney Amos testified that when he asked Mary Sue Whitaker how she had acquired a cut under her nostril, she told him the defendant had pushed her into a door. Bonnie Whitaker testified to the same effect. Carl Amos also testified that Mary Sue Whitaker told him the defendant had hit her on one occasion and grabbed and choked her on another, causing bruises on her arms and small marks on her face. Clyde W. Billings testified Mary Sue Whitaker told him the defendant had grabbed her and kicked her.

I believe these statements were introduced for the purpose of proving the defendant had assaulted Mary Sue Whitaker on several previous occasions. This was hearsay testimony and should have been excluded.

The majority says this testimony was admissible under N.C.G.S. § 8C-1, Rule 803 which provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind . . . (such as intent, plan, motive, design . . .), but not including a statement of memory or belief to prove the fact remembered or believed . . . .

I do not believe this section should have any application to this case. The majority says the disputed testimony can prove the state of mind of the deceased. I do not see how it could do so. The hearsay statements of the deceased do not say what state of mind she was in as a result of the assaults by the defendant. Apparently, we are supposed to infer her state of mind from the fact that she was assaulted.

We could infer from the fact that the deceased was assaulted by the defendant that she was afraid of the defendant. We could just as easily infer that she was outraged by the assaults, or that she hated the defendant and was determined to seek revenge. There are other possibilities. I do not believe we can say what inference can be drawn as to the deceased's state of mind at the time of each assault.

If we can conclude that the state of mind of the deceased can be inferred from her statements, the statements should have been excluded because her state of mind at the time of the assaults is irrelevant to the matters that the State had to prove in this case. Whatever the feelings of the deceased at the time she was assaulted, it did not keep her from going into a motel room with the defendant. What she felt some time before did not bear on what the defendant or the deceased did in the motel room. On the other hand, it was highly prejudicial to the defendant to allow testimony that he had on several occasions assaulted the deceased.

The majority relies on several cases. *State v. Holder*, 331 N.C. 462, 418 S.E.2d 197 (1992); *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991); *State v. Meekins*, 326 N.C. 689, 392 S.E.2d 346 (1990); *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). I must admit that in these cases this Court has been liberal in admitting testimony in regard to statements of deceased persons under the state of mind exception to the hearsay rule. I do not believe in any of those cases we have gone as far as the majority does today.

In *Holder*, we held it was not error to admit testimony that the deceased had told persons that she had seen a gun in the defendant's pocket, that defendant had threatened her with harm and that she was scared, and that the defendant refused to leave her alone after she had tried to end the relationship. I concurred in the result in that case, saying that although these hearsay statements should have been excluded it was harmless error because of the strong evidence against the defendant. I believe the strength of the evidence in *Holder* distinguishes that case from this one.

In *Stager*, we held that a tape recording made by the decedent a few days before his death in which he expressed a fear that his wife would try to kill him was admissible. The widow of the deceased contended there had been a loving relationship between her and her husband and we said the tape recording was relevant to show the state of mind of the decedent, which showed there was not a loving relationship. There is no such consideration in this case. All the evidence is that the deceased and the defendant had a stormy relationship.

In *Meekins*, we held that testimony by a witness that the deceased had told her she was afraid of the defendant is admissible to rebut testimony by the defendant that the deceased had always been a sweet lady to him who would lend him money. There is no such evidence to rebut in this case.

In *Cummings*, we held that testimony was admissible that the deceased had said the defendant had beaten her and threatened to kill her, that she had to go to a doctor because of a place on her chest caused by the defendant's hitting her with a gun, and that she had consulted an attorney and had a warrant issued for the defendant for nonsupport of his children. The defendant contended in that case that the deceased had left their children with him. We held that the state of mind of the deceased was

relevant to show she would not have abandoned her children. There is no such contention to rebut in this case.

The contention of the State in this case is that the defendant shot and killed Mary Sue Whitaker in a motel room. The contention of the defendant is that Mary Sue Whitaker shot herself. I do not believe the state of mind of Mary Sue Whitaker, whatever it may have been, several weeks before the incident is relevant to this issue. Hearsay testimony was allowed to prove several instances of bad acts by the defendant. I do not believe this testimony is admissible under N.C.G.S. § 8C-1, Rule 803(3). I believe it is excluded by N.C.G.S. § 8C-1, Rule 404(b).

The evidence against the defendant was not strong. I believe the erroneous admission of hearsay testimony of bad acts by the defendant creates a reasonable possibility that a different result would have been reached if the error had not been made. N.C.G.S. § 15A-1443(a) (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

I vote for a new trial.

Chief Justice Exum and Justice Frye join in this dissenting opinion.

STATE OF NORTH CAROLINA v. RONALD SHELDON THOMAS

No. 501A91

(Filed 19 November 1992)

1. Appeal and Error § 443 (NCI4th)— issues reviewed— assignments of error

The scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal. Where no assignment of error corresponds to an issue presented, that issue is not properly presented for review by the appellate court. N.C. R. App. P. 10(a).

Am Jur 2d, Appeal and Error §§ 491, 493.

2. Rape and Allied Offenses § 5 (NCI3d)— first degree sexual offense—fatal injury—other serious personal injury

The State presented sufficient evidence of serious personal injury other than the fatal one to support defendant's conviction of first degree sexual offense where the evidence tended to show that the victim suffered serious external injuries from a savage beating by defendant, that none of the victim's serious external injuries, as testified to by the pathologist and another witness, were the cause of her death, and that all of the external injuries were inflicted upon the victim immediately prior to and during a sexual assault upon her by defendant.

Am Jur 2d, Assault and Battery § 41.

What constitutes offense of "sexual battery." 87 ALR3d 1250.

3. Homicide § 253 (NCI4th)— first degree murder—sufficient evidence of premeditation and deliberation

The State's evidence was sufficient to support the jury's verdict finding that defendant killed the victim with premeditation and deliberation where it tended to show that, while in defendant's truck, defendant grabbed the victim's breast, at which time the victim "backhanded" defendant; defendant knocked the victim back into the sleeper portion of the truck and began beating the victim about the head and face; when he saw the victim's blood, he became more enraged and continued to beat her; fearing that she was going to be raped, the victim removed her clothing; defendant bit the victim's breasts until they were bleeding and then inserted his fingers into her vagina; the entire time the assault was occurring, the victim was fighting, kicking, and screaming; defendant reached for a hand cleaner on the floorboard and, after lubricating his hands with it, penetrated the victim with his entire hand to a point past his wrist at least twice; defendant tore out the wall between the victim's vaginal and anal openings and proceeded to tear out part of the victim's colon and right kidney; when the victim attempted to crawl from the truck and fell to the ground, defendant dragged her into the woods some 120 feet on her back and left her helpless and

bleeding to death; defendant made no attempt to obtain assistance for the victim; the victim was conscious for some amount of time after being left to die; and defendant thereafter cleaned up his truck, resumed his delivery route, and slept before his next delivery. The victim's act of slapping defendant did not constitute provocation because the mere repelling of a sexual assault does not constitute provocation.

Am Jur 2d, Homicide § 439.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

4. Homicide § 552 (NCI4th)— first degree murder—instruction on second degree not required

There was no evidence in a first degree murder prosecution showing a lack of premeditation, deliberation, and intent to kill so as to require the trial court to instruct the jury on second degree murder where the evidence tended to show that, while in defendant's truck, defendant grabbed the victim's breast, at which time the victim "backhanded" defendant; defendant began beating the victim about the head and face; fearing that she was going to be raped, the victim removed her clothing; defendant bit the victim's breasts until they were bleeding; defendant placed four fingers into the victim's vagina, then lubricated his hands with a hand cleaner, and inserted his hand past his wrist into the victim's vagina at least twice, tearing out a part of the victim's colon and right kidney; defendant later dragged the victim 120 feet into the woods and left her helpless and bleeding to death; and defendant thereafter cleaned up his truck, resumed his delivery route, and slept before his next delivery. Even if defendant had not formed an intent to kill at the time the assault began, no rational juror could have reasonably found that defendant, having beaten the victim into submission, inserted his hand into the victim's vagina and pulled out the victim's organs, did not act with premeditation and deliberation when he later dragged her into the woods and left her helpless and bleeding to death.

Am Jur 2d, Trial §§ 1430, 1431.

5. Homicide § 552 (NCI4th)— first degree murder—mitigating circumstances—emotional disturbance and impaired capacity—premeditation and deliberation not negated

The jury's findings as mitigating circumstances for first degree murder that defendant was under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired did not negate premeditation and deliberation so as to require an instruction on second degree murder where there was no evidence that defendant's emotions overcame his ability to reason.

Am Jur 2d, Homicide § 552.

6. Homicide § 489 (NCI4th)— premeditation and deliberation—lack of provocation—propriety of instruction

The trial court did not err in instructing the jury in a first degree murder case that it could infer premeditation and deliberation from lack of provocation by the victim because all of the evidence at trial revealed no provocation on the part of the victim where it tended to show that defendant began his assault on the victim by an unsolicited and nonconsensual fondling of her breasts; the victim responded by slapping the defendant; and defendant then proceeded to beat the victim into submission and sexually abused her to the point that she died. The victim's act of slapping defendant did not constitute provocation since the act of repelling a sexual assault does not constitute provocation under North Carolina law.

Am Jur 2d, Homicide §§ 263, 264.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435, sec. 1.

7. Homicide § 43 (NCI4th)— felony murder rule—due process and equal protection

The felony murder rule set out in N.C.G.S. § 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection because premeditation and deliberation are not elements of felony

murder, and thus the statute involves no presumption of such.

Am Jur 2d, Homicide § 269.

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 Fullwood, J., at the 25 February 1992 Criminal Session of Superior Court, New Hanover County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to his first-degree sexual offense conviction, for which he received a consecutive sentence of life imprisonment, was allowed by this Court on 7 February 1992. Heard in the Supreme Court 8 September 1992.

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

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

MEYER, Justice.

On 12 March 1990, defendant was indicted for the first-degree sexual offense and first-degree murder of Talana Quay Kreeger. Defendant was tried capitally in Superior Court, New Hanover County, in February and March 1991 and was found guilty of all charges. The jury returned verdicts finding defendant guilty of first-degree sexual offense, as well as first-degree murder based on the theories of premeditated and deliberated murder and felony murder. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury determined that the fourteen mitigating circumstances found were sufficient to outweigh the two aggravating circumstances found and accordingly recommended a sentence of life imprisonment. In accordance with the jury's recommendation, the trial court sentenced defendant to life imprisonment for murder, as well as a consecutive life sentence for the first-degree sexual offense conviction.

On appeal, defendant brings forward numerous assignments of error. After a thorough review of the transcript of the proceedings, record on appeal, briefs, and oral arguments, we conclude

that defendant received a fair trial, free of prejudicial error, and we therefore affirm his convictions and sentences.

The evidence presented by the State tended to show the following facts and circumstances. On the evening of 21 February 1990 at approximately 11:00 or 11:30 p.m., defendant, a long-distance truck driver, stopped at the Park View Grill, a bar in Wilmington. Wanda Whitley, the owner of the Park View Grill, and Talana Kreeger, the victim, were sitting at the bar discussing plans for the next day to remodel the back room of the bar. Kreeger was a carpenter who worked for Laney Builders and worked odd jobs on the side. Heidi Crossley, Whitley's roommate, was also at the bar. Defendant was seated two seats away from Crossley, and during the evening, they began to converse. At some point, defendant and Crossley went into the back room to shoot pool. Later in the evening, Whitley and the victim went to the back room, and Whitley commented on defendant's truck. Defendant offered Whitley and the victim his keys to go look at his truck. After looking at the truck, Whitley and the victim returned to the bar.

When the bar closed that evening, the victim, Whitley, Crossley, and defendant discussed going to get something to eat. Whitley suggested they go to Hardee's on Carolina Beach Road, which was roughly one and a half to two miles away. At approximately 1:30 a.m., the victim and defendant left in his truck. The victim went with defendant because she had never ridden in a tractor-trailer truck before. Crossley left immediately after defendant and the victim and stopped at her house briefly before going to Hardee's. When she did not see anyone at Hardee's, she went home and went to sleep.

Whitley left Park View Grill approximately ten or fifteen minutes after the victim and defendant. When Whitley got to Hardee's, she found no one there. Whitley immediately began looking for the truck defendant was driving. After searching during the early morning hours of 22 February 1990, without success, she called Hoggard High School because she recalled that defendant had said he had a fruit delivery to make to the school. While on the phone, Whitley spoke to a man who was identified to her as a trucker making a delivery at Hoggard High School and who said his name was Ron. Ron denied knowing her friend Talana Kreeger or having been in the Park View Grill the previous night. Whitley eventually went to Hoggard High School and spoke with

Jerry Cribbs, who showed her a bill of lading that had the name of defendant and the company for which he worked.

On 22 February 1990 at approximately 10:30 a.m., Kenneth Spivey, a minister who lives in Dunn, North Carolina, received a telephone call from a man he later learned was defendant. Defendant told him, "I need some help" because "I've done something terrible." Spivey responded that the Lord could forgive him. Upon further inquiry, defendant informed Spivey that the Lord could not forgive him because he had beaten a woman. Spivey then asked defendant if he had killed her, and defendant said "Yes." Spivey told defendant that he would meet him but that he was bringing along a deputy sheriff.

Spivey and Deputy Lymon McLean met defendant at Robinhood Truck Stop off of Interstate 95. Defendant got into the patrol car and proceeded to tell McLean and Spivey that he had beaten a woman and that when he left her, she was conscious. Defendant stated that he beat the woman because she started "mouthing" and "reminded him of his ex-wife." Once defendant admitted that he had killed a woman, McLean asked him if he knew her name. In response, defendant pulled a check out of his shirt pocket and gave it to McLean. The check was made out to Carolina Builders and was signed by Wanda Whitley. Later, McLean asked defendant what the woman was wearing, and defendant said that her clothes were in the truck. At McLean's request, defendant retrieved the victim's clothing and gave it to McLean. A search of the victim's pocketbook revealed multiple driver's licenses belonging to Talana Kreeger. McLean called the Wilmington Police Department and reported the victim's name. Defendant also told McLean the location of the victim, which McLean relayed to the Wilmington police. As they were waiting for the Wilmington police to call back, defendant told McLean that he had been in Wilmington at the Park View Grill and that three women who were there had become engaged in an argument about homosexuality. Further, he said, to avoid the argument, defendant and the victim had left the bar to go eat. Defendant stated that, while en route to the restaurant, he and the victim had continued the argument and that he had pulled into a parking lot off Shipyard Boulevard. Defendant told McLean that he began to beat the victim with his hand and that when he saw blood, he became more enraged and continued to beat her. He said he then took the victim from his truck, pulled her into the woods, and left the scene.

At approximately 2:00 p.m. the same day, pursuant to the directions relayed by McLean and the defendant to the Wilmington police, searchers discovered the victim's body in an area consistent with the location given. Dennis Pridgen, a detective with the Wilmington Police Department, found the body of the victim. Pridgen described the area as a trailer drop with adjacent woods. The area was heavily wooded, with a lot of trees, briars, and thick bushes. As Pridgen approached the body of the victim, he noted that she was lying face down; her back side was covered with blood and leaves; and she was very, very pale. Within a few feet of the body, there were two places where there were indentations in the leaves and blood spots. One spot was approximately four feet from the body, and the other, two feet. Pridgen noted that there appeared to be some type of internal organ hanging out of her body and over her right thigh. Once the body was turned over, Pridgen noted that the victim had her hands curled up, gripping pine straw and leaves.

At approximately 4:20 p.m. on 22 February 1990, Detective Jerry Lamm of the Harnett County Sheriff's Department spoke to defendant at length in the law enforcement center in Lillington. Before conducting the interview, Lamm advised defendant of his constitutional rights, and defendant replied that he understood his rights. Defendant then signed a rights waiver form. Defendant related the events of 21 February and 22 February basically as follows: Defendant stated that he went to the bar, drank beer, and shot pool with three women, including Wanda, the owner. Defendant claimed that he and the three women were all drunk and that he consumed about ten beers in an hour's time. He also said that he could tell that the three women were lesbians by the way they were acting. At about 2:00 a.m., he asked if there was some place they could go eat, and Whitley informed him that there was a place just around the corner. Whitley and one of the women said they would meet defendant and the victim at the restaurant. The victim said she was going to ride with defendant because she wanted to ride in a big truck. The victim got into the sleeper portion of the truck because defendant had a television and tools in the passenger seat and floor. While trying to find the restaurant, defendant and the victim got into an argument. They started to discuss why the victim and the other women were lesbians. Defendant then pulled into a parking lot in a warehouse to relieve himself. He got out, went to the bathroom beside the

truck, and then got back inside. The victim was still in the sleeper. Defendant and the victim again started talking about her being a lesbian, and he asked, "didn't a man satisfy her and [he] reached over and touched her breast." The victim "backhanded" defendant. Defendant then "backhanded" the victim, and she fell back in the sleeper. When defendant went after the victim, she said, "You're going to rape me, I have been raped before," and she started taking her clothes off. Before she did this, defendant stated that he "lost it" and "hit her a few more times in the head." The victim was bleeding from the mouth and side of the head. After the victim took her clothes off, defendant "started kissing her and biting her, biting on her [breasts]." The victim was fighting, kicking, and screaming, and defendant knew he was getting too rough because the victim's breasts were bleeding. Defendant started playing with the victim's vagina and put four fingers inside of her. Defendant said to her, "My little [penis] ain't going to do anything for you," so he got some cream (waterless hand cleaner) from the floorboard and put it on his hands. He then stuck his hand "up her vagina past [his] wrist in and out a couple of times." When defendant put his hand in a second time, he felt it getting sticky and pulled it out. He turned on the light in his truck and saw blood on his hand, on the victim, and on the bed. Defendant jumped back to the front seat. He then heard the victim say that she needed to urinate. He put the truck in gear and pulled around to some trees. The victim started crawling out, and defendant got out to help her. By the time defendant got around to the passenger door, the door was open, and the victim fell to the ground. Defendant grabbed the victim by her arms and dragged her into the woods on her back and left her lying on her back. The victim was still conscious because she said, "Leave me alone, let me die." Defendant left her lying in the woods and drove to Hoggard High School, where he was to make his first morning delivery.

Upon arriving at the school at approximately 4:30 a.m., defendant cleaned up the truck and wiped up the blood with a towel. He then got into the sleeper and went to sleep. At approximately 8:15 a.m., he was awakened and told that he could unload in an hour. While defendant was at the school, a woman called and asked him if he was the truck driver from Alabama who had been at the bar the previous night and was driving a white truck. Defendant told the woman that he was not. After unloading, defendant got in his truck and headed for New Jersey. Upon arriving in Dunn,

North Carolina, defendant stopped at Robinhood Truck Stop on Interstate 95, where he telephoned a minister. The minister and Deputy McLean met defendant at the truck stop, and eventually McLean took defendant to Lillington.

During defendant's statement to Detective Lamm, he further related that he and his wife had separated in September 1989. He had been having financial problems, and he had just started work three weeks prior to the assault and murder.

An autopsy of the victim's body revealed multiple bruises and lacerations to the victim's jaw, eyes, right cheek, lip, right hand, left upper arm, and breasts. The peritoneal wall between the victim's vagina and rectum was torn, revealing an opening of approximately four to five inches in diameter. Approximately twenty inches of the victim's small intestine was hanging from between the victim's legs. The victim's right kidney, instead of resting in what is known as the kidney bed, had been pulled and torn, brought forward, and the blood vessels supplying it had been partially torn. The pathologist who performed the autopsy opined that the tearing between the vaginal and anal openings occurred either by the use of fingers or hands grasping tissue and tearing downward, causing a hole through the top of the vagina into the rectum, and ultimately tearing out the rectovaginal septum, or by putting part of the hand or fingers into the rectum and some fingers in the vagina and tearing it out, going upward from the outside in. The pathologist also testified that it would not have been possible for a hand to reach inside the victim and grab, at one time, the right kidney and the portion of the colon that was torn loose. Based upon the examination and the autopsy, the pathologist testified that the victim bled to death from the lacerated blood vessels leading to the kidney and to the colon. It was also determined that the victim would have remained conscious for ten to twenty minutes, during which time she would have experienced considerable pain.

Defendant presented no evidence at the guilt phase.

[1] By his first assignment of error, defendant contends that to be punished for both first-degree sexual offense and first-degree murder violates the double jeopardy clause prohibition against multiple punishments for the same offense. Defendant argues that a first-degree sexual offense conviction based solely upon the theory that the victim was seriously injured merges with the first-degree murder offense, where the serious injury committed during the

sexual offense results in the victim's death. The scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal. N.C. R. App. P. 10(a); *Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991). No assignment of error corresponds to the issue presented, and therefore, this matter is not properly presented for our consideration.

[2] Defendant next assigns as error the failure of the trial judge to dismiss the charge of first-degree sexual offense because the State failed to present substantial evidence of "serious personal injury" as that phrase is used in the definition of first-degree sexual offense under N.C.G.S. § 14-27.4. It is defendant's position that because there was no "serious personal injury" to the victim other than the fatal one, his conviction for first-degree sexual offense cannot stand, and his conviction must be either set aside or reduced to second-degree sexual offense. We do not agree.

The pertinent portion of the sexual offense statute is as follows:

> **§ 14-27.4. First-degree sexual offense.**
>
> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> . . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> . . . .
>
> b. Inflicts serious personal injury upon the victim or another person[.]

N.C.G.S. § 14-27.4 (1986).

In determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case. *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988). The element of infliction of serious personal injury is satisfied

> when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim

or another for the purpose of concealing the crimes or to aid in the assailant's escape.

State v. Blackstock, 314 N.C. 232, 242, 333 S.E.2d 245, 252 (1985). The injury must fall short of causing death. *State v. Boone*, 307 N.C. 198, 203, 297 S.E.2d 585, 588 (1982).

In the case *sub judice*, Dr. Charles Garrett, the regional pathologist, performed the autopsy on the victim and testified on behalf of the State. Dr. Garrett first performed an external examination of the body, noting any injuries or damage to the exterior. He noted, in part, a large area of reddish purple bruising along the jaw line and a linear one-half inch abrasion or scraping of the skin on the right side of the victim's face and jaw. There was a three-quarter inch laceration or tearing on the outer portion of the right eyelid and a one-half inch laceration or tearing above the eyebrow on the forehead. The victim's right upper lip had two, three-eighths-inch lacerations all the way through the lip. On the left occipital scalp, there was a one and a half inch bursting type laceration. On the back of the right hand, there was a five-by three-inch reddish purple bruise with blood under the skin. There were bruises on the outside portion of the left breast, and in a linear line, there was a scrape below the breast, with multiple small lacerations or tears; this covered an area of five by two and a half inches. There were deep lacerations or tears into the nipple. Dr. Garrett, as a result of both the external and internal autopsy, concluded that the cause of death was loss of blood from the lacerated blood vessels in the area of the victim's pelvis, kidney, and colon caused by the internal injuries.

Heidi Crossley testified that she was unable to recognize the victim when asked to identify the body because she had been so badly beaten. She eventually identified the victim solely because of a uniquely shaped mole on her face.

In addition, the statement given by defendant to Detective Lamm supports the conclusion that the victim suffered serious injury. Defendant stated that not only did he hit the victim in the head to the point that she was bleeding from the mouth and the side of the head, but he bit her breasts until they were bleeding. At this point, defendant stated that the victim told him that she knew that she was going to be raped and then began to disrobe. After defendant put his hand in the victim's vagina "a couple of

times," the victim tried to crawl out of the truck, and defendant then dragged her 120 feet into the woods.

When the evidence in this case is viewed in the light most favorable to the State, it clearly shows a savage beating that can only be characterized as being substantial evidence of "serious personal injury." *See generally State v. Herring*, 322 N.C. at 739, 370 S.E.2d at 367. None of the serious external injuries, as testified to by the pathologist and Crossley, were the cause of the victim's death. All of the external injuries were inflicted upon the victim immediately prior to and during the sexual assault by the defendant. This conclusion is consistent with defendant's own statement. The trial court thus properly denied defendant's motion to dismiss the charge of first-degree sexual offense.

[3] Defendant next contends that the first-degree murder charge should have been dismissed because the evidence was insufficient to permit the jury reasonably to infer that defendant intended to kill the victim after premeditation and deliberation. Defendant argues that all of the evidence showed that defendant was in a state of sudden passion when he injured the victim, that he sexually assaulted her when he became enraged and sexually aroused by the victim. We find that the evidence, when viewed in the light most favorable to the State, was sufficient to support a jury's finding that the defendant killed the victim with premeditation and deliberation.

Premeditation and deliberation are usually proved by circumstantial evidence because they are mental processes that are not readily susceptible to proof by direct evidence. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Some of the circumstances from which an inference of premeditation and deliberation can be drawn are:

> (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. Six of the seven above circumstances were met in the case at bar. As a result, there was more than sufficient evidence that the killing was premeditated and deliberated.

According to defendant's own statement, he began his sexual assault of Ms. Kreeger by reaching over and touching the victim's breast. The victim, who was five feet two inches and weighed 140 pounds, responded to this unsolicited and unconsented-to fondling by slapping the six-foot one-inch, 265-pound defendant. Defendant then knocked the victim back into the sleeper and hit her a few more times on the head. There is no evidence of provocation by the victim in this case. Merely repelling a sexual assault does not constitute provocation. *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983).

Furthermore, evidence of defendant's conduct and statements before and after the killing may be considered in determining whether premeditation and deliberation existed. Before the defendant assaulted the victim, he knocked her back into the sleeper. Defendant then hit the victim on the head numerous times, bit her breasts until they were bleeding, and then proceeded to insert his fingers into her vagina. The entire time the assault was occurring, the victim was fighting, kicking, and screaming. After putting his fingers into the victim's vagina, defendant took the time to reach for the waterless hand cleaner on the front seat floorboard, lubricated his hands with it, and then penetrated the victim again with his entire hand to a point past his wrist "a couple of times." Upon tearing out part of the victim's large intestine, defendant drove the truck around closer to the woods. When the victim began to crawl out of the truck, defendant went around to the passenger door. The victim fell to the ground, and defendant dragged her into the woods, approximately 120 feet, on her back. Defendant knew that the victim was still conscious because she begged him to "[l]eave me alone, let me die."

Defendant also dealt lethal blows to the victim after she was rendered helpless. Defendant admitted in his statement that he beat the victim about the head and face and bit her breasts until they bled, all while the victim was conscious. After the victim succumbed to defendant's beating, she removed her clothes, and he then began penetrating the victim with his fingers. Because the victim was in the sleeper portion of the truck, which was

approximately three feet by six feet by five feet, she was basically imprisoned and unable to escape the defendant's brutal assault. After applying hand cleaner to his hands, defendant then inserted his hand approximately ten inches into the victim's vagina and into the peritoneal cavity which holds the intestines. Defendant then tore out the rectovaginal septum, the wall between the vaginal and the anal openings. He proceeded to tear out part of the victim's colon and her right kidney. The pathologist testified that the victim would have remained conscious for ten to twenty minutes and that up until the time she lost consciousness, the victim would have been able to feel and experience pain. In fact, defendant dragged the victim on her back 120 feet into the woods, and the detectives found the victim lying on her stomach, grasping leaves and pine straw. The victim was obviously conscious for some amount of time after being left to die. There is no question in this case that the killing was done in a vicious manner.

In addition, the nature and number of the victim's wounds clearly provide substantial evidence that the killer premeditated and deliberated. In *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), this Court found that there was sufficient evidence from which the jury could properly have inferred premeditation and deliberation, where a pathologist testified that the killing was accomplished by a person stabbing the victim through the neck, partially removing the knife, and then plunging it home again. In the case at bar, defendant inserted his hand past his wrist into the victim's vagina a "couple of times." He not only tore her kidney out of the kidney bed, but also pulled twenty inches of her colon out of her body. As the pathologist stated, this could only be accomplished through multiple penetrations.

Following the incident, defendant left the victim to die without attempting to obtain assistance for her. In fact, defendant went to a convenience store and asked for directions so that he could find Hoggard High School. Once at Hoggard, he cleaned up the truck and then went to sleep for approximately four hours. While at Hoggard High School, defendant talked with Wanda Whitley and denied ever having been at Park View Grill. After the truck was unloaded, defendant left Wilmington and began driving to New Jersey. Defendant's actions in disposing of the body and cleaning up his truck indicate his careful thought and planning to hide the killing. Actions taken to hide or cover the commission of a murder

can be considered as evidence of premeditation and deliberation. *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987). This evidence is another circumstance from which premeditation and deliberation can be inferred.

The overwhelming weight of the evidence supports the conclusion that the trial court did not err in denying defendant's motion to dismiss the murder charge to the extent it was based on the theory of premeditation and deliberation.

[4] In defendant's fourth argument, he contends that the trial court erred in refusing to instruct the jury on second-degree murder. Defendant argues that his statements show that he was provoked, not in the sense of reducing his crime to manslaughter, but sufficient to negate premeditation and deliberation. Defendant contends that although he had a general intent to hurt the victim, he had no specific intent to kill her.

The State contends that there was no evidence showing a lack of premeditation, deliberation, and intent to kill, and therefore, the trial court was not required to submit a second-degree murder verdict. We agree. Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Phipps*, 331 N.C. 427, 457-58, 418 S.E.2d 178, 194 (1992). Although second-degree murder is a lesser included offense of first-degree, premeditated and deliberated murder, the trial court does not have to charge the jury on second-degree murder unless it is supported by the evidence. *State v. Stevenson*, 327 N.C. 259, 263, 393 S.E.2d 527, 529 (1990). In *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986), this Court set out the procedure to follow in determining whether the evidence of defendant's premeditation and deliberation was such as to require an instruction on second-degree murder.

> We emphasize again that although it is for the jury to determine, from the evidence, whether a killing was done with premeditation and deliberation, the mere possibility of a negative finding does not, in every case, assume that defendant could be guilty of a lesser offense. Where the evidence belies anything other than a premeditated and deliberate killing, a jury's failure to find all the elements to support a verdict of guilty of first degree murder must inevitably lead to the conclusion that the jury disbelieved the State's evidence and that defendant

> is not guilty. The determinative factor is what the State's evidence tends to prove. If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is *no* evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder.

Strickland, 307 N.C. at 293, 298 S.E.2d at 657-58. An instruction on the lesser offense of second-degree murder is not required where there is not a scintilla of evidence to support the lesser verdicts. *Id.* at 286, 298 S.E.2d at 653.

In the case *sub judice*, the State's evidence supports only a first-degree murder instruction. First-degree murder is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1989); *State v. Brown*, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation; it is sufficient if the process of premeditation occurred at any point prior to the killing. *Brown*, 315 N.C. at 58, 337 S.E.2d at 822. Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose, and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *Id.* A specific intent to kill is a necessary constituent of the elements of premeditation and deliberation, and therefore, proof of premeditation and deliberation is also proof of intent to kill. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983).

An unlawful killing is deliberated and premeditated if done as part of a fixed design to kill, notwithstanding the fact that the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986). The requirement of a "cool state of blood" does not require that the defendant be calm or tranquil. *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980). The phrase "cool state of

blood" means that the defendant's anger or emotion must not have been such as to overcome the defendant's reason. *State v. Brown*, 315 N.C. at 58, 337 S.E.2d at 822.

As previously stated, while in the defendant's truck, defendant grabbed the victim's breast, at which time the victim "backhanded" the defendant. By his own admission, defendant stated that he began beating the victim about the head and face. As defendant told Deputy McLean, when he saw the victim's blood, he became more enraged and continued to beat her. Fearing that she was going to be raped, the victim removed her clothing. At this point, defendant states:

> After she took her clothes off, I started kissing her and biting her, biting on her [breasts]. She didn't do anything. She was moaning, so I knew she was conscious. She was fighting, kicking and screaming. I was getting rougher, biting her [breasts]. I knew I was too rough because they were bleeding. I was lying beside her. I was playing with her vagina. I put four fingers inside her. I said, "My little [penis] ain't going to do anything for you," so I got some cream from the floorboard and creamed by [sic] hand. I stuck my hand up her vagina past my wrist in and out a couple of times. She grunted and I thought she was getting into it. When I put my hand in a second time and went back and forth, I felt it getting sticky, so I pulled my hand out and saw blood on it. I turned the light on and saw blood on her and on the bed.

The sequence of events outlined above, in addition to the circumstances necessary to infer premeditation and deliberation as set out in our discussion of defendant's third assignment of error above, clearly show that the State has met its burden of proving each and every element of first-degree premeditated and deliberated murder. The statement by defendant raises no question as to premeditation and deliberation. Defendant has presented no evidence to negate any of these elements. It is clear that defendant's intent to kill the victim could have developed at any time prior to the beating, during the beating, or after the beating. Even assuming that defendant had not formed an intent to kill at the time the assault began, no rational juror could have reasonably found that defendant, having beaten the victim into submission and having inserted his hand past his wrist into the victim's vagina at least twice, pulling out the victim's organs, did not act with premedita-

tion and deliberation when he later dragged her 120 feet into the woods, leaving her helpless and bleeding to death. We conclude that the evidence showing that the offense was committed over such a long period of time, with so many conscious decisions by the defendant, clearly supports the trial court's finding that the defendant possessed the requisite premeditation and deliberation.

[5] Defendant further relies on the fact that the jury found that he was under the influence of a mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. Although the jury found these mitigating circumstances, no evidence exists that the defendant's emotions overcame his reason. After the brutal beating and sexual assault, defendant dragged the victim 120 feet into the woods to avoid her discovery. In defendant's own statement, he admits that the victim was conscious while he was dragging her deep into the woods, and in fact, the victim was begging the defendant to leave her alone and let her die. Defendant then cleaned up his truck, resumed his delivery route, and slept before his next delivery.

The State established all of the elements of first-degree murder, including premeditation and deliberation, and defendant did not produce any evidence sufficient to negate these elements. The trial judge properly excluded from jury consideration the possibility of second-degree murder because the evidence presented at trial did not raise a genuine issue as to whether the defendant acted with premeditation and deliberation in the killing.

[6] We find defendant's fifth assignment of error, that the trial court erred in instructing the jury that it could infer premeditation and deliberation from lack of provocation by the victim, to be without merit.

In the case *sub judice*, the trial judge instructed the jury that it could infer the first-degree murder elements of premeditation and deliberation from the following circumstances:

> Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the *lack of provocation* by the victim or conduct of the defendant before, during and after the killing, or by the use of grossly excessive force or brutal or vicious circumstances of the killing,

or by the manner in which or means by which the killing was done.

(Emphasis added.) Defendant argues that this instruction was erroneous because (1) the instruction implied a judicial opinion on the evidence, (2) the instruction placed the burden on defendant to show a lack of provocation, (3) the instruction allowed the jury to find premeditation and deliberation on a theory not supported by the evidence, and (4) the instruction relieved the State of its constitutional burden of proving every element of the crime beyond a reasonable doubt. Because defendant did not object to the trial court's instructions at trial, we review the defendant's assignment of error only for plain error. Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991). This exact assignment of error has recently been reviewed and rejected by this Court in a case where a virtually identical instruction was given over defendant's objection. *State v. Handy*, 331 N.C. 515, 419 S.E.2d 545 (1992). In *Handy*, this Court, after concluding that the evidence of provocation was not contradicted, found that the "lack of provocation" instruction was not erroneous.

The examples listed in the above instruction, which is taken directly from the North Carolina Pattern Jury Instructions, N.C.P.I.—Crim. 206.13 (1989), "are merely examples of circumstances which, if found, the jury could use to infer premeditation and deliberation. It is not required that each of the listed elements be proven beyond a reasonable doubt before the jury may infer premeditation and deliberation." *State v. Cummings*, 326 N.C. 298, 315, 389 S.E.2d 66, 76 (1990). However, when the trial judge focuses his instruction upon one or more of such elements as circumstantial proof of premeditation and deliberation, those focused upon must be supported by competent evidence. *State v. McDowell*, 329 N.C. 363, 388, 407 S.E.2d 200, 214 (1991).

In this case, the challenged portion of the instruction was clearly justified because all of the evidence at trial, including defendant's own statement, revealed no provocation on behalf of the victim. In his statement, defendant admits that he began his assault of the victim by an unsolicited and unconsented-to fondling of her breasts. The victim responded by slapping the defendant. Defendant then proceeded to beat the victim into submission and sexually

abused her to the point that she died. The victim's act of slapping the defendant did not constitute provocation, as the act of repelling a sexual assault does not constitute provocation under North Carolina law. *See State v. Williams*, 308 N.C. 47, 301 S.E.2d 335 (throwing of salt at an intruder did not constitute provocation on the part of the deceased); *State v. Hunter*, 305 N.C. 106, 115, 286 S.E.2d 535, 540 (1982) (defendant entitled to use reasonable force to protect himself from possibility of sexual assault).

We conclude that there was competent evidence to support the instruction. Thus, we find no error and, consequently, no plain error.

[7] As his final argument, defendant contends that the felony murder statute in North Carolina offends both the state and federal constitutions because it relieves the State of proving any criminal state of mind. It is well established that proof of the elements of premeditation, deliberation, and specific intent to kill is not necessary to sustain a first-degree murder conviction based on the theory that the homicide was committed during the perpetration or attempted perpetration of a felony. *State v. Evangelista*, 319 N.C. 152, 157, 353 S.E.2d 375, 380 (1987). The felony murder rule, as set out in N.C.G.S. § 14-17, does not establish a presumption of premeditation and deliberation in violation of due process and equal protection because premeditation and deliberation are not elements of felony murder, and thus the statute involves no presumption of such. *State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982). Under the felony murder rule, a homicide that is committed in the perpetration of one of the statutorily specified felonies is first-degree murder. A homicide committed in the perpetration or attempted perpetration of a sexual offense is murder in the first degree, as set out in N.C.G.S. § 14-17, and because premeditation and deliberation are not elements of felony murder, the State is not relieved from proving criminal *mens rea*.

For the reasons stated above, we find that defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. KARL NOEL GREENE

No. 218A91

(Filed 19 November 1992)

1. **Constitutional Law § 309 (NCI4th)— murder—closing argument—defense counsel—guilty of involuntary manslaughter if guilty at all—not ineffective assistance of counsel**

A murder defendant was not deprived of effective assistance of counsel where the Supreme Court believed that defense counsel's closing argument had been that defendant was innocent of all charges but, if he were to be found guilty of any of the charges, it would be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged.

Am Jur 2d, Criminal Law §§ 748, 749, 751, 752.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

2. **Constitutional Law § 309 (NCI4th)— murder of child—closing argument—defense argument not an admission of guilt**

Defense counsel in a murder prosecution did not, as defendant contended, tell the jury that he believed defendant was guilty of involuntary manslaughter but that defendant wanted him to argue that he should go free. The clear and unequivocal argument was that defendant had slapped the victim but was innocent of all charges.

Am Jur 2d, Criminal Law §§ 748, 749, 751, 752.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

3. **Homicide § 253 (NCI4th)— murder of child—hard blows to the head—evidence of premeditation and deliberation**

The trial court did not err by submitting to the jury the charge of first degree murder on the theory of premeditation and deliberation were there was evidence that the victim, a five-year-old child, was brutally beaten during which time the defendant delivered several hard blows to the victim's

head. A reasonable man would know that this would very likely cause the death of the child.

Am Jur 2d, Homicide §§ 52, 439.

4. **Evidence and Witnesses § 3172 (NCI4th)— murder—statements of defendant to inmate—corroboration by officer—new material—not prejudicial**

There was no prejudice in a prosecution for the murder of a child in the admission of testimony from an SBI agent corroborating the testimony of an inmate to whom defendant had made incriminating remarks. Assuming *arguendo* that the agent's testimony concerned matters about which the inmate did not testify and which did not corroborate the inmate's testimony, there was no reasonable possibility of a different result had the error not occurred because there was properly admitted testimony of the same kind of feelings by defendant.

Am Jur 2d, Appeal and Error §§ 778, 798, 800.

5. **Evidence and Witnesses § 1240 (NCI4th)— murder—exculpatory statement—taken while in custody—no Miranda warnings—not prejudicial**

There was no prejudicial error in a prosecution for the murder of a child in the admission of defendant's first statement to officers where defendant was taken from the hospital to the sheriff's office; defendant was not told that he was under any restraint, but a detective was told to go into the room with defendant and not to allow him to leave; the detective handcuffed defendant and told him not to leave; the handcuffs were removed approximately ten minutes later; the detective removed defendant's socks so that they could be examined for evidence; defendant was examined by SBI agents after he had been at the sheriff's office for about forty-five minutes; and the agents did not advise defendant of his *Miranda* rights. However, this first statement was exculpatory, a second statement was virtually the same and was properly admitted, and two inculpatory statements by defendant were properly admitted. The erroneous admission of the first statement was harmless beyond a reasonable doubt.

Am Jur 2d, Appeal and Error §§ 778, 798, 800.

6. Evidence and Witnesses § 1240 (NCI4th)— murder—statements at sheriff's office—not custodial—properly admitted

A defendant in a murder prosecution was not in custody when he made his second and third statements where, immediately after his first statement, two SBI agents told defendant that he was not under arrest and was free to leave; they also told defendant that they wanted to go to his home and he consented to their searching his home; defendant accompanied the officers to his home; the officers stopped at a convenience store on the way and bought defendant a drink; they left defendant outside the store and unattended for about five minutes while they were inside; they also stopped and tried to start defendant's truck so that he could drive it home; defendant went into the house alone to change clothes; the officers asked defendant to return to the sheriff's office to clarify his previous statement after they had finished searching; they told defendant at that time that he was not in custody and did not have to return to the sheriff's office; and the officers again told defendant that he was not under arrest and was free to leave before they resumed the interrogation.

Am Jur 2d, Criminal Law §§ 793, 794.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

7. Evidence and Witnesses § 1227 (NCI4th)— murder—statements by defendant—prior statement inadmissible—second and third statements admissible

Although a murder defendant's first statement should have been suppressed under the presumption of involuntariness rule of *Miranda*, his second and third statements were properly admitted because there was no evidence that the first statement had been induced by promises or threats. The rule that a presumption arises from an involuntary confession which imputes the same prior influence to any subsequent confession predates *Miranda* and the reason for the rule does not exist where no threats or promises were used to extract the first confession.

Am Jur 2d, Evidence § 537.

8. Evidence and Witnesses § 1218 (NCI4th)— murder—statement to officers—not the result of psychological coercion

A murder defendant's third statement to officers was not coerced and was voluntary where a reasonable person in defendant's position would not have believed that he was in custody, so that his contention that his will was overcome by prolonged questioning, the continuous presence of law enforcement officers, or his isolation from the outside world was not persuasive since defendant could have terminated these allegedly coercive influences by exercising his freedom to leave; it could not be held under the circumstances that defendant was held incommunicado or that he was deprived of food and drink; defendant was not deprived of his free will when he was confronted by the officers with apparent inconsistencies in his statements; and, although officers told defendant that they were his only friends and that they would help him with any problems he had, they did not intimate that by confessing that he could avoid prosecution or that any sentence imposed would be lessened.

Am Jur 2d, Evidence §§ 529, 550, 565.

9. Evidence and Witnesses § 1218 (NCI4th)— murder—incriminating statement—totality of circumstances—voluntary

A murder defendant's fourth statement was not involuntary based on the totality of the circumstances where defendant contended that the statement was involuntary because he was in custody; he had been jailed overnight; he had spent the night reviewing his third statement; he had had suicidal thoughts; his only contact with other persons for the previous nineteen hours had been with police officers; and he had just encountered members of the media. The trial court's findings that defendant was advised of his rights pursuant to the *Miranda* decision, that he understood each right and waived the same, and that he was alert, sober and coherent were supported by competent evidence.

Am Jur 2d, Evidence §§ 545, 613.

10. Evidence and Witnesses § 1240 (NCI4th)— murder—incriminating statement—not the result of an unlawful seizure

A murder defendant's statements to officers were not the result of an unlawful seizure where defendant was not

in custody when two of the statements were made and the third statement was made after defendant was lawfully arrested.

Am Jur 2d, Evidence §§ 545, 546, 613.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Wilson, J., at the 26 November 1990 Criminal Session of Superior Court, Lincoln County, upon a verdict of guilty of first degree murder. Heard in the Supreme Court 16 April 1992.

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 tended to show that the defendant had been living with his girlfriend, Tina Duncan, for approximately one and one-half years. Duncan's two children Shawn Wayne Duncan, the victim, and Amber Michelle Duncan also lived with the couple.

On 29 August 1989, the victim's mother and his sister left the house at 6:30 a.m. The defendant and the victim were still asleep. At approximately 2:00 p.m., the defendant left his home in his truck to take the unconscious victim to the hospital. The defendant's truck broke down before reaching the highway. The defendant then stood on the highway and flagged down an approaching vehicle. When the vehicle stopped, the defendant took the victim from the defendant's truck and carried him to the car. The defendant asked the vehicle's occupants to drive to the hospital. He then attempted to resuscitate the child. The driver of the automobile stopped in order to call an ambulance, and the defendant left the car, went back to the highway and flagged down another vehicle which took the defendant and the victim to the hospital.

At the hospital the defendant was met by officers from the Sheriff's Department who had been dispatched to investigate the child's death. The officers learned that the child had apparently been beaten to death and that he had been brought to the hospital by the defendant. The officers briefly spoke with the defendant and asked him if he would accompany them to the Sheriff's office in order to give a statement. The defendant agreed to do so. During the following hours, the defendant made three statements to the investigating officers. After making the third statement the defendant was arrested. The following morning the defendant gave a fourth statement. Additional facts regarding the circumstances surrounding these statements will be set forth later in this opinion.

The medical evidence tended to show that the victim's death was caused by the swelling of his brain and that the brain swelling was caused either by his being beaten about the head, his being severely shaken, or his head being beaten against a stationary object.

At trial, the defendant testified that he had slapped the child's face, but that he had not intended to harm him. He further testified that he had thereafter slept for approximately one and one-half hours and that when he awoke he found the victim unconscious on the kitchen floor.

The defendant was convicted as charged and was sentenced to life in prison.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

Heidi G. Chapman, for the defendant appellant.

WEBB, Justice.

[1] The defendant's first assignment of error deals with his trial counsel's final argument to the jury. The defendant contends that his trial counsel, without the defendant's consent or authorization, argued that the jury should find the defendant guilty of involuntary manslaughter, thus depriving the defendant of his constitutional right to the effective assistance of counsel. Trial counsel argued, in part, as follows:

> Karl Greene didn't have anything to do with me being here. Don't use what I've said and done against him. Wouldn't be right. I've done my best. I've plowed the field. And in my opinion, you probably won't turn him free—find him not guilty. And you very easily, I can see, that that slap was negligent and harder than it ought to have been and at that time, it was reckless disregard, and the judge will charge you on that at the end of those four—involuntary manslaughter. I don't say you should find that, but I concede—sitting on this jury—but I contend, ladies and gentlemen, there's no premeditation and deliberation.

At the close of trial counsel's argument, the district attorney approached the bench and expressed his concern that defense counsel's argument may have been improper. Although the trial judge expressed a similar concern, he stated that it was his recollec-

tion that "[defense counsel] argued that they might find the lesser offense of involuntary manslaughter or voluntary manslaughter, but that he didn't think they would find that." The judge then asked the defendant if he would like for defense counsel to be given "the opportunity to argue further on—that you're innocent of all charges." The defendant said that he would like for the court to allow his counsel to so argue. The defendant contends that his counsel's additional argument was similarly improper. Counsel argued as follows:

> Now, again, coming to the close, the defendant contends there is no evidence to find him guilty of first degree murder—that is, got to find all six or five—no premeditation, nobody—nothing showing he even, for a blink of a minute, thought about killing somebody. No deliberation going through his mind. Now is the time to kill him. No malice. No hatred. No deliberately, like a baseball bat as they illustrated in other things. No malice. In fact, all love before and after. All love.
>
> As to voluntary manslaughter, no intent down there. No intent to murder. No reckless disregard of life. Again, all love except the blows and the reflex motion, and it was too hard.
>
> But we don't contend—he didn't know it was going to be too hard. I argue and contend that he didn't know it was going to be too hard. He didn't know what he was doing.
>
> Most of us, up before this, didn't know that a slap on the face could kill anybody. I mean, even a young child. Busted his lip, he may.
>
> Now, it's been some people with nursing training and all, I'm sure. Those are not supposed to be a lot of training, but even involuntary manslaughter.
>
> We contend that Karl ought to leave here a free man. . . .

The defendant contends that his attorney argued to the jury, without the defendant's consent, that the jury should find him guilty of involuntary manslaughter and this was ineffective assistance of counsel, requiring a new trial pursuant to *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). We cannot hold that the defendant's attorney so argued. In his first argument the attorney said that in his opinion the jury would not find the defendant not guilty

and that it could easily find that the "slap was negligent," "harder than it ought to have been," and "it was reckless disregard." Nevertheless, he further argued that, "I don't say you should find that." We believe the argument was that the defendant was innocent of all charges but if he were to be found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged. This is not the equivalent of asking the jury to find the defendant guilty of involuntary manslaughter and the rule of *Harbison* does not apply.

[2] As to the second argument, the defendant contends that his counsel in one breath argued that the defendant was guilty of involuntary manslaughter and in the next breath asked the jury to find the defendant not guilty. The defendant also says that in his second argument the defendant's counsel appeared to be telling the jury that he believed that the defendant was guilty of involuntary manslaughter, but the defendant wanted him to argue that he should go free.

We disagree with the defendant's characterizations of the second argument. We do not find anything in it that approaches an admission of guilt. The clear and unequivocal argument was that the defendant was innocent of all charges. Although the defendant's counsel admitted, as did the defendant in his testimony, that the defendant slapped the victim, he argued that this was not a sufficient basis upon which to find the defendant guilty of any charge.

This assignment of error is overruled.

[3] The defendant next contends it was error to submit to the jury the charge of first degree murder on the theory of premeditation and deliberation. He says there is no evidence that he planned to kill the child. Premeditation and deliberation are often not provable by direct evidence and must be proved by circumstantial evidence. *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). In this case, there was evidence that the victim, a five year old child, was brutally beaten during which time the defendant delivered several hard blows to the victim's head. A reasonable man would know that this would very likely cause the death of the child.

In the light most favorable to the State, the jury could have found that, knowing what these hard blows to the head would likely do to the child, the defendant intended the natural result

of his action. They could have found that the defendant intended to kill the child. When they found the defendant intended to kill the child they could have found he formed this intent some period of time, however short, before delivering the lethal blows. The jury could have found there was not a sufficient legal provocation to cause the defendant to be under the influence of a violent passion which would keep him from being in a cool state of blood. This would satisfy the State's burden to prove that the defendant killed the child intentionally with premeditation and deliberation. *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1987). This assignment of error is overruled.

[4] The defendant's third assignment of error deals with testimony elicited to corroborate the testimony of a witness for the State. Kenneth Wayne Gardner testified for the State that he was an inmate in the Taylorsville Correctional Facility. He testified further that he was at one time in the Dorothea Dix Hospital with the defendant and discussed the defendant's case with him.

Gardner testified that the defendant told him that he "smacked the kid" and the child hit a table "across the forehead." He then "hit the kid a couple of times in the face." Gardner testified further that the defendant told him that he hated the child and the child's father and that he would have killed the child's sister if she had been there.

The State called William C. Lane, an agent of the State Bureau of Investigation, who testified to corroborate the testimony of Gardner. Mr. Lane testified that Gardner told him the defendant told Gardner that he "just hauled off and slapped the boy." The child fell into a table and he hit the child a few more times. Mr. Lane testified further that Gardner said the defendant told him he hated the child and he hated the child's father and would have killed the little girl if she had been there. Mr. Lane also testified that Gardner told him that the defendant said he wanted to kill the child's father and that if he was released from incarceration he would kill the little girl.

The defendant contends that it was error to admit the testimony of Mr. Lane that Gardner told him the defendant said he wanted to kill the father and that he would kill the little girl if he was released from prison because it did not corroborate any of Gardner's testimony. Gardner testified that the defendant said he hated the child's father, but did not say he wanted to kill the father. Gardner

also testified that the defendant said he would have killed the little girl if she had been at the scene when he killed the little boy, but Gardner did not testify the defendant said he would kill her if he were released from prison.

The defendant contends this testimony by Mr. Lane concerned matters to which Gardner did not testify and did not corroborate Gardner's testimony. We have held that corroborative testimony may contain new or additional information when it tends to strengthen and add credibility to the testimony it corroborates. *State v. Burton*, 322 N.C. 447, 368 S.E.2d 630 (1988); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987); *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986). Assuming arguendo that this testimony did not corroborate any testimony by Gardner and should have been excluded, its admission was not prejudicial error.

In light of the testimony properly admitted that the defendant said he would have killed the victim's sister if she had been present and he hated the child's father, there was evidence of the defendant's hatred of the members of the child's family to the extent he would kill them. If the jury believed this testimony, we cannot hold that additional testimony of the same kind of feelings by the defendant shows there is a reasonable possibility that had this error not occurred a different result would have been reached at the trial. We hold that any error was harmless. N.C.G.S. § 15A-1443 (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981).

[5] The defendant next assigns error to the admission into evidence of four statements he made to law enforcement officers. The defendant made a motion to suppress the statements and a *voir dire* hearing out of the presence of the jury was held prior to the trial to determine the questions raised by the defendant's motion. He contended the statements were made while he was in custody without warning him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and that the statements were not voluntary.

The State's evidence at the *voir dire* hearing showed that Ronnie Matthews, a detective with the Lincoln County Sheriff's Department, and a Mr. Keener, a deputy sheriff, were at the hospital at approximately 2:45 p.m., as was the defendant. Mr. Matthews was informed by a doctor that the child had been beaten to death and he asked the defendant to go with him to the sheriff's office and give him a statement as to what had happened. The defendant

agreed to do this and he rode in Mr. Keener's automobile to the sheriff's office.

The defendant arrived at the sheriff's office at approximately 3:00 p.m. He was not told he was under any restraint at that time. Andy Hoyle, a detective in the Sheriff's Department, was told by one of his superiors to go into the room with the defendant and not to allow the defendant to leave. Mr. Hoyle entered the room with the defendant and handcuffed him. Mr. Hoyle told the defendant he could not leave the room. This occurred between 3:30 and 4:00 p.m. The handcuffs were removed approximately ten minutes after they were placed on the defendant. Mr. Hoyle removed the defendant's socks in order for them to be examined for the presence of evidence.

After the defendant had been at the sheriff's office for approximately forty-five minutes he was questioned by William C. Lane and Steven C. Cabe, who were special agents with the State Bureau of Investigation. They were not aware that the defendant had been handcuffed. They did not advise the defendant of his rights under *Miranda* but asked him what had happened to the dead child. The defendant told them that he had been at home with the child that morning at which time the child was outside the house playing on a trampoline. A short while later he saw the child lying on the ground. He went to the child and found him unconscious.

After taking this statement, the two SBI agents learned that the defendant had been handcuffed. They immediately informed the defendant that he was not under arrest and that he was free to leave. After so informing the defendant, the agents told him that they wanted to go to the defendant's home in order to further investigate the victim's death. The defendant executed a document by which he consented to the agent's search of the home. The defendant also agreed to accompany them to his home. Between 5:00 and 5:30 p.m. the defendant, Detective Matthews and the two SBI agents left the station to go to the defendant's home.

En route to the defendant's home, the men stopped at a convenience store where one of the agents bought the defendant a drink. The defendant was allowed to exit the store and wait for the other men to return to the car. The defendant could not be seen by the officers and was left unattended for as long as five minutes until he was rejoined by the officers. Continuing towards the defendant's home, the men stopped and tried unsuccessfully to start

the defendant's truck so that he would have his own transportation. The defendant executed a document by which he consented to the officers searching his truck. They then proceeded to the house.

Upon arrival at the defendant's home, the defendant entered the house alone in order to obtain some clothes. The defendant was alone in the house for five minutes before being joined by the officers. The officers then searched the house and the areas outside of the house. They asked the defendant to show them where he had been during the occurrence of the events that he had described in his earlier statement. The defendant agreed to do so. Shortly thereafter, the officers asked the defendant if he would go back to the station and again talk to the officers so that they could try to get a better understanding of what had occurred that morning. They told him he was not under arrest and he did not have to accompany them. The defendant agreed to return to the station and to ride there with the officers.

After arriving at the Sheriff's Department at approximately 6:45 p.m., the defendant was again informed that he was not under arrest and that he was free to leave. He was left unattended for approximately ten minutes prior to giving his second statement which began at 6:55 p.m. The defendant was not given the warnings prescribed by *Miranda* prior to his giving the statement nor had he been so advised at any earlier time.

The defendant then gave another statement similar to his first account of what had occurred that morning. He then left the room to go to the restroom. When the defendant returned to the room, the officers explained to him that there were some discrepancies in what the defendant had just told the officers and what they had observed at the defendant's house. The officers continued to talk to the defendant for 30 to 45 minutes about the defendant, his friends and his background. The defendant then interjected that, "[i]t is something I can't control. It is there, and then it's gone. It is anger, and I don't know why or where it comes from." The officers then asked the defendant to tell them the truth about what happened.

The defendant then gave another statement to the officers. In this third statement, he described how he had gotten out of bed shortly after noon. The defendant stated that as soon as he got up, "[i]t hit him." He told the victim to get dressed and to go outside and play. When the child put on dirty clothes, the defend-

ant became very angry and began to yell at the child. The defendant was angered by everything that the child did or the manner in which it was done. He began to strike the child repeatedly. He was unable to control himself and could not stop until the child lost consciousness. At that point the defendant attempted to resuscitate the child. He then took the child to his truck and tried to drive to the hospital but the truck broke down. The defendant then flagged down the first of the two vehicles which carried him and the victim to the hospital.

After giving this statement, the defendant was arrested and placed in the Lincoln County jail. The following morning, the defendant was advised of his *Miranda* rights. This was the first occasion that the defendant had been so advised. After waiving those rights, the defendant gave his fourth statement to the investigating officers. In this statement, he again admitted that he had beaten the child until the child lost consciousness.

The court made findings of fact consistent with this testimony and concluded that the first three statements were given during non-custodial interrogations and were freely and voluntarily made. It held that "even if it should be determined" that the first three statements were involuntary, the fourth statement was "made after the defendant had occasion to reflect upon it and that it was made after his rights had been fully advised him, and the same was freely, voluntarily and understandably made without coercion, without threat or the perception of threat." The court ordered that all four statements be admitted into evidence.

The defendant assigns error to the admission into evidence of the four statements. As to the first statement made by the defendant, we hold that the defendant's assignment of error has merit. The determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law. While this conclusion may rest upon factual findings, it is a legal conclusion, fully reviewable, and not a finding of fact. *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). The test for determining whether a person is in custody is an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way. *Oregon v. Mathiason*, 429 U.S. 492, 50 L. Ed. 2d 714 (1977); *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The defendant had been handcuffed and told

he could not leave the room within an hour of the time he made his first statement. The two SBI agents did not tell him he was not in custody at that time. We hold that a reasonable person in the defendant's position would have believed he was in custody. It was error to admit into evidence the defendant's first statement which was taken while the defendant was in custody without the warnings required by *Miranda*. However, we hold, for reasons which will be shown in this opinion, that this error was harmless beyond a reasonable doubt.

[6] We hold that the defendant was not in custody when he made his second and third statements. Immediately after the defendant made his first statement, the two SBI agents learned the defendant had been handcuffed. They told him at that time that he was not under arrest and was free to leave. They then told the defendant they wanted to go to his home and he consented to their searching his home. The defendant accompanied the officers to his home. On the way to the defendant's home they stopped at a convenience store and the officers bought a drink for the defendant. The officers left the defendant outside the store and unattended for approximately five minutes while they were inside. They also stopped and tried to start the defendant's truck so that he could drive it to his home. While they were at the defendant's home, the defendant went into the house alone to change clothes. After they had finished searching the defendant's home, the officers asked him to return to the sheriff's office in order to clarify his previous statement. At that time they told him he was not in custody and did not have to return to the sheriff's office with them. The defendant agreed to return to the sheriff's office. Before they resumed the interrogation, the officers again told the defendant he was not under arrest and was free to leave. In light of this testimony, we hold that a reasonable man would not have believed he was in custody when the second and third statements were given. *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988).

[7] We must now determine what effect, if any, the defendant's first statement, which was taken in violation of *Miranda*, has on the admissibility of his subsequent, unwarned, non-custodial statements. It is well-settled in this jurisdiction that "where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in

evidence." *State v. Siler*, 292 N.C. 543, 551, 234 S.E.2d 733, 739 (1977) (quoting *State v. Silver*, 286 N.C. at 718, 213 S.E.2d at 253 (1975)).

This rule predates the decision in *Miranda* and arose out of a concern that where the first confession was induced by promises or threats rendering it involuntary, those influences may continue to operate so as to deprive a suspect of his free will during subsequent interrogations. *Id.* The *Miranda* rule, which we have determined required suppression of the defendant's first statement, is based upon a presumption of involuntariness and no actual compulsion need be shown. *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985). In this case, the trial court found that at no time had the defendant been threatened or promised anything in order to obtain his statements. "[W]here no threats or promises were used to extract the first confession, as in this case, the reason for the rule giving rise to the presumption [that subsequent confessions are tainted by the same influences that rendered the earlier confessions involuntary] does not exist." *State v. Siler*, 292 N.C. at 552, 234 S.E.2d at 739. There being no evidence that the defendant's first statement was induced by promises or threats, the trial court properly admitted the defendant's subsequent statements, despite the inadmissibility of his first statement. *See State v. Barlow*, 330 N.C. 133, 409 S.E.2d 906 (1991); *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222.

[8] The defendant next contends that his third and fourth statements were involuntary. He argues that based on the totality of the circumstances, these statements were the product of psychological coercion. In the alternative, he contends that if his fourth statement was not itself involuntary, it was tainted by the involuntariness of his third statement and thus inadmissible.

Whether a confession was voluntarily given is to be determined from the totality of the circumstances surrounding the confession. *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823 (1986). Among the factors to be considered in determining the voluntariness of a confession are: the defendant's mental capacity; whether the defendant was in custody at the time the confession was made; and the presence of psychological coercion, physical torture, threats, or promises. *State v. Gray*, 268 N.C. 69, 150 S.E.2d 1 (1966). The presence or absence of one or more of these factors is not determinative. *Richardson*, 316 N.C. at 601, 342 S.E.2d at 829. Whether

a confession is voluntary is a question of law and is fully reviewable on appeal. *State v. Barlow*, 330 N.C. 133, 409 S.E.2d 906.

The defendant contends that there are several factors that when taken together show, that at the time he made his third statement, his ability to exercise his free will had been undermined. These factors are that he was: (1) in custody; (2) questioned for prolonged periods of time; (3) deprived of food and drink; (4) continuously in the uninterrupted presence of law enforcement officers; (5) isolated from the outside world; (6) confronted with inconsistencies in his previous statements; and (7) subjected to psychologically coercive interrogation techniques.

We consider the defendant's contentions in light of the foregoing principles. After the defendant and the SBI agents returned from the defendant's home to the sheriff's office, a second session of interrogation began shortly before 7:00 p.m. and ended between 10:30 p.m. and 11:00 p.m. It was during this time that the defendant made his third statement in which he confessed to killing the victim. We have already determined that at the time the defendant made his third statement a reasonable person in his position would not have believed he was in custody. Because the defendant was not in custody and was free to leave, we are not persuaded by his contention that his will was overcome by "prolonged questioning," the continuous presence of law enforcement officers, or his "isolation" from the outside world. By exercising his freedom to leave, the defendant could have terminated these allegedly coercive influences. Additionally, this Court has held that interrogations of longer duration than the one at hand are not so protracted as to render them coercive. *See State v. Morgan*, 299 N.C. 191, 261 S.E.2d 827, *cert. denied*, 446 U.S. 986, 64 L. Ed. 2d 844 (1980); *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982).

There was no evidence that the defendant ever expressed a desire to talk with anyone other than the officers or that he would have been prevented from doing so. The defendant never indicated that he did not want to talk with the officers. Likewise, there was no evidence that the defendant ever requested food or drink or that officers would have refused to honor such a request. To the contrary, when the officers stopped at a store on their way to the defendant's house, they bought him a drink and offered to buy him cigarettes. Under the circumstances of this case, we

cannot hold that the defendant was held incommunicado or that he was deprived of food and drink.

Nor do we agree with the defendant that he was deprived of his free will when he was confronted by the officers with apparent inconsistencies in his statements. This Court has held that a confession is not rendered involuntary by the fact that it is made after a defendant is confronted with circumstances normally calling for an explanation, *State v. Mitchell*, 265 N.C. 584, 144 S.E.2d 646 (1965), *cert. denied*, 384 U.S. 1024, 16 L. Ed. 2d 1029 (1966), or by the fact that a defendant is confronted with evidence recovered from the crime scene. *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78. Confronting the defendant with inconsistencies in his statements is no more coercive than confronting a murder suspect with a knife that was allegedly recovered from the crime scene and which allegedly bore the suspect's bloody fingerprint. *See State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983).

Finally, the defendant contends that the following portion of his testimony, which was corroborated in part by a State's witness, shows that the interrogating officers utilized psychologically coercive techniques to obtain the defendant's confession. The defendant testified:

> [Matthews] was talking about he knows how much love you can have for a little one, and he knows how much I loved mine, and he was telling me how much he loved his daughter. . . . [T]he gentlemen were leaning over towards me, no further from the front of this bench right here, holding onto my legs and arms and telling me that they were my friends and telling me that I had no other friends and that if any problems I had, that they would help me with. At the time, Detective Matthews got the picture off his wall . . . of his daughter and held it up in front of me.

This Court has consistently held that "psychologically" coerced confessions are those that are induced by hope or fear. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Schneider*, 306 N.C. 351, 293 S.E.2d 157 (1982); *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978). Taken as true, the defendant's testimony fails to reveal any statements or conduct by the officers that would engender hope or fear on the part of the defendant. Although the officers told the defendant that they were his only friends and that they would help him with any problems he had, they

did not intimate that by confessing he could avoid prosecution or that any sentence imposed would be lessened. We hold that the defendant's third statement, based on the totality of the circumstances, was not coerced and was voluntarily given. Having determined that this statement was voluntary, we need not address the defendant's contention that this statement tainted his fourth statement.

[9] We now consider whether the defendant's fourth statement was itself involuntary. The trial court found, with regard to this statement, that the defendant was advised of his rights pursuant to the *Miranda* decision, that he understood each right and waived the same and that he was alert, sober and coherent. The defendant contends that this statement was involuntary based on the totality of the circumstances. The circumstances which the defendant contends show that the statement was involuntary are that: he was in custody; he had been jailed overnight; he had spent the night reviewing his third statement; he had had suicidal thoughts; his only contact with other persons for the previous nineteen hours had been with police officers; and he had just encountered members of the media awaiting his first appearance hearing.

We are not convinced that the factors cited by the defendant are sufficient to establish that he did not voluntarily make his fourth statement. The trial court's findings are supported by competent evidence and as such are binding on appeal. *State v. Harris*, 290 N.C. 681, 228 S.E.2d 437 (1976). This assignment of error is overruled.

[5] We must next determine whether the erroneous admission of the defendant's first statement was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988). The first statement was exculpatory. The second statement which was virtually the same as the first statement was properly admitted. Two inculpatory statements of the defendant were properly admitted. In light of the proper admission of three statements by the defendant, we hold that the erroneous admission of one exculpatory statement was harmless beyond a reasonable doubt. *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733.

[10] The defendant also contends that the defendant's statements should be suppressed because they were the result of an unlawful seizure of his person. *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497, *reh'g denied*, 448 U.S. 908, 65 L. Ed. 2d 1138

(1980); *State v. Freeman*, 307 N.C. 357, 298 S.E.2d 331 (1983). In light of our holding that the defendant was not in custody when the second and third statements were made, those two statements were not the result of an unlawful seizure. After the third statement, the defendant was lawfully arrested. The officers had probable cause to believe he had committed a felony. The officers had the authority to arrest him. N.C.G.S. § 15A-401(b)(2) (1988); *State v. Alexander*, 279 N.C. 527, 184 S.E.2d 274 (1971). Any statement the defendant made at that time was not the result of an unlawful seizure. This assignment of error is overruled.

We find no prejudicial error in the trial of the defendant.

NO ERROR.

STATE OF NORTH CAROLINA v. MARYLIN RUDD MAHALEY

No. 2A91

(Filed 19 November 1992)

1. Evidence and Witnesses § 1240 (NCI4th)— murder—incriminating statement—no Miranda warning—not in custody

The trial court did not err by concluding that a murder defendant was not in custody for *Miranda* purposes when she gave three statements at the police station where the police first spoke with defendant at her home; she agreed to accompany them to the police station, where she was interviewed; defendant was returned to her home; her home was searched for the second time and she agreed to return to the police department for another interview; and defendant was interviewed for a third time when an officer approached her in the snack room of the police station approximately two hours after the second interview and told her that he believed that she knew more than she was telling. The court's findings were amply supported by substantial evidence tending to show that defendant never indicated that she wanted to terminate an interview, that the officers continuously informed the defendant that she was free to leave at any time during the inter-

views, and that she understood that she was free to go and was not required to make a statement.

Am Jur 2d, Criminal Law §§ 793, 794.

2. **Evidence and Witnesses § 1143 (NCI4th)— murder—testimony of co-conspirator—evidence of conspiracy**

The trial court did not err in a murder prosecution by admitting testimony from a co-conspirator implicating defendant where there was sufficient independent evidence that defendant had conspired to kill her husband in that defendant and Steve Harris were involved in an affair at the time of the murder; defendant admitted that she had called Harris and told him that her husband was asleep on the living room floor; and Eric Taylor testified that defendant opened the carport door so that he and Harris could enter and kill defendant's husband.

Am Jur 2d, Homicide § 346.

3. **Evidence and Witnesses § 1151 (NCI4th)— murder—testimony of co-conspirator—statements made after conspiracy formed**

The trial court did not err by admitting the testimony of a co-conspirator regarding statements made by another co-conspirator incriminating defendant where defendant contended that the statements were made before the conspiracy was formed, but the evidence tended to show that the conspiracy was formed at least one week prior to the actual murder. Eric Taylor testified that Steve Harris aborted the plan to kill defendant's husband after defendant told Harris that she was not ready on the weekend prior to the actual murder and it was uncontroverted that all of Harris's statements to Taylor regarding the murder and about which Taylor testified were made after that weekend.

Am Jur 2d, Homicide § 346.

4. **Evidence and Witnesses § 351 (NCI4th)— murder—defendant's prior bad acts—admissible**

The trial court did not err in the prosecution of defendant for murdering her husband by admitting evidence regarding defendant's admission to two drug treatment facilities, her theft of credit cards and money, and her affair with a co-conspirator. Evidence of defendant's relationship with the co-

conspirator was highly probative of her motive for wanting her husband murdered, and evidence of defendant's theft of money and credit cards and evidence of her drug problems tended to show that she needed money which she would gain from insurance proceeds upon her husband's death.

Am Jur 2d, Evidence § 366.

5. **Evidence and Witnesses § 1694 (NCI4th)— murder—photographs of victim—location and appearance**

The trial court did not err in a murder prosecution by admitting into evidence photographs of the victim to illustrate the testimony of the medical examiner with respect to the location and condition of the body. Each photograph illustrated different testimony, none was especially gruesome or inflammatory, and the total amount of photographic evidence was not excessive.

Am Jur 2d, Homicide §§ 417-419.

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

6. **Homicide § 240 (NCI4th)— first degree murder—conspiracy—sufficiency of evidence**

The trial court did not err in submitting a charge of first degree murder to the jury where defendant told officers that she and Steve Harris were involved in an affair and that she called Harris on the night of the murder to tell him that her husband was asleep on the living room floor; there was evidence that defendant opened the carport door for the men who strangled her husband; and there was substantial evidence that defendant did so in furtherance of a conspiracy to murder her husband.

Am Jur 2d, Homicide § 529.

7. **Criminal Law § 1355 (NCI4th)— murder—capital sentencing—no significant history of prior criminal activity—failure to submit error**

The trial court erred during the capital sentencing portion of a murder prosecution by failing to submit the mitigating circumstance of no significant history of prior criminal activity where the evidence showed no record of criminal convictions and evidence of prior history of criminal activity was limited

to evidence tending to show her use of illegal drugs and her theft of money and credit cards to support her drug habit. The evidence did not establish that the defendant had such a significant history of prior criminal activity that no rational jury could find the existence of the statutory mitigating circumstance and there was prejudice even though the court submitted the nonstatutory mitigating circumstances that "the defendant has no history of violence or physical injury to others" and "the defendant has no record of criminal convictions" because the jury was not required to give any weight to such nonstatutory mitigating circumstances and would have been required to give the statutory mitigating circumstance value. Furthermore, it cannot positively be said that had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death.

Am Jur 2d, Homicide § 554.

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 (J. B.), J., in the Superior Court, Alamance County, on 17 December 1990. Heard in the Supreme Court on 9 September 1992.

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

Jonathan D. Sasser and Loni S. Caudill, for the defendant-appellant.

MITCHELL, Justice.

The defendant Marylin Rudd Mahaley was indicted for the murder of her husband Roy Mahaley and was tried capitally at the 26 November 1990 Criminal Session of the Superior Court, Alamance County. The jury found the defendant guilty of first-degree murder on the theory that she acted in concert with Steve Harris. After a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of death.

On appeal, we conclude that the defendant's trial and conviction were free from error. However, during the capital sentencing

proceeding the trial court erroneously failed to submit the statutory mitigating circumstance that the defendant has no significant history of prior criminal activity. Therefore, the sentence of death entered against the defendant must be vacated and the case remanded to the Superior Court for a new capital sentencing proceeding.

The evidence introduced at trial tended to show the following. On Monday, 19 March 1990, at approximately 8:00 a.m., Detective Phil Ayers of the Alamance County Sheriff's Department was dispatched to Map Enterprises, in Burlington, to investigate a report of a body found in the trunk of a car. The body was that of Roy Mahaley. At approximately 9:00 a.m., after examining the scene, Detective Ayers and several other officers arrived at Roy Mahaley's home. The defendant Marylin Mahaley greeted the officers and permitted them to enter the house.

After stating that she had not seen her husband since early Saturday morning, the defendant gave Detective Ayers permission to search the house. During the search, Detective Ayers noticed two insurance policies on a roll-top desk and blood on the carpet. Throughout the search, the defendant did not ask the officers why they were there, and the officers did not tell the defendant that her husband was dead. After searching the defendant's home, Detective Ayers told the defendant that her husband was dead. However, Detective Ayers noted that the defendant showed no signs of grief upon hearing this news.

After conferring with Detective Dean Batchelor of the Burlington Police Department, Detective Ayers asked the defendant if she knew either Steve Harris or a man named Eric. Initially, the defendant denied knowing either of them. However, when Detective Ayers asked again, the defendant admitted that she knew Steve Harris and that he was her boyfriend. After the search was completed, Detective Bennie Bradley asked the defendant to accompany him to the police department in order to complete the investigation. The defendant and the police officers arrived at the Burlington Police Department at approximately 11:43 a.m., and Sergeant Kevin Crowder interviewed the defendant. The interview ended at 12:52 p.m. Sergeant Crowder testified that the defendant appeared calm and coherent throughout the interview.

The officers drove the defendant home at 1:18 p.m., and she signed a written consent allowing the officers to conduct a second search of her home. During the search, the defendant gave the

officers her husband's blood-stained shirt and T-shirt, stating that he had been involved in a fight on Friday night. After the search, Sergeant Crowder asked the defendant if she would accompany them to the Police Department and she obliged.

The second interview of the defendant began at 3:27 p.m. and ended at 6:48 p.m. with the defendant providing a handwritten statement. The defendant told the officers that Steve Harris and Roy Mahaley had fought at Steve's hotel room on Friday night. The defendant stated that Steve Harris had told her that Roy had returned to his hotel room on Saturday night and that they had fought again. The defendant further stated that Steve Harris had told her that he had hurt Roy severely and then placed Roy in the trunk of Roy's car and left the car at Map Enterprises.

After the defendant's second interview ended at 6:48 p.m., she remained in the snack room at the police department while the officers continued the investigation. At approximately 9:00 p.m., Detective Steve Lynch went into the snack room to speak with the defendant. Detective Lynch told the defendant that he believed that she had more information than she had previously disclosed. In response to this statement, the defendant started crying and acknowledged that he was correct. The defendant then stated that she would talk to Detective Lynch and Agent Dave Hedgecock. They then conducted a third interview of the defendant which was taped in Lynch's office.

During the third interview, the defendant stated that Roy Mahaley went to the Knights Inn on Friday night to fight with Steve Harris. After noting that Saturday was an unremarkable day, the defendant stated that Roy was not home when she woke up on Sunday morning and that she thought that he was at work. A few hours later, Steve Harris called the defendant and asked her to come to his hotel room, and she went to visit him for approximately thirty minutes. At approximately 8:00 p.m., Steve Harris called the defendant again and told her that he had tried to convince Roy to come over to his hotel room so that the three of them could talk, but Roy refused. Harris also told the defendant that later that evening he got a ride to the Mahaley home where he found the door unlocked and Roy asleep on the floor. Harris then told the defendant that he had choked Roy with a necktie, placed Roy in the trunk of his car, and driven him to Map Enterprises and left.

After discussing Roy's death, the defendant told the officers that she met Steve Harris at Oakleigh Drug Treatment Center in Durham. The defendant also told the officers that she and Steve Harris had been dismissed from the treatment program because they were sneaking around to see each other. The defendant further noted that she had left Roy on several occasions to live with Harris. After taking the defendant home that night, Agent Hedgecock went to Eric Taylor's home and asked him some questions. As a result of Taylor's statement, Taylor and the defendant were arrested.

After she was arrested and advised of her constitutional rights, the defendant gave the following statement. The defendant stated that she called Steve Harris between 10:00 and 10:30 p.m., and he told her that he had talked to Roy regarding the three of them getting together. The defendant stated that she told Harris that she wanted to stay with Roy. At that point, Harris asked the defendant what Roy was doing, and she told him that Roy was asleep on the floor. In response to this information, Harris informed her that he and Taylor were coming over and that he did not know what was going to happen. After Harris and Taylor arrived at the Mahaley home, the defendant opened the carport door. Harris instructed her to stay in the bedroom. Approximately thirty to forty-five minutes later, Harris entered the bedroom and told her that he had strangled Roy. Harris also told her that he and Taylor were going to take Roy's body to Map Enterprises and that they were going to wipe away their fingerprints. Before the men left for Map Enterprises, the defendant saw Harris taking money out of Roy's wallet. On the following morning, Harris called her, and she helped him move into the Scottish Inn.

Eric Taylor, who had entered into a plea arrangement with the prosecution, testified that he met Steve Harris while they were working at the Innkeeper Motel in the Fall of 1989. Taylor occasionally would go to Harris' hotel room to drink, smoke marijuana and play video games. In late February 1990, Harris wrote a check payable to Taylor in the amount of $950 on the account of Roy Mahaley, and Taylor cashed this check. During this same period, Harris started talking about harming Roy Mahaley. Harris told Taylor that he would pay Taylor $25,000 from the proceeds of Roy Mahaley's life insurance if Taylor would assist him in killing Roy. During the week of the killing, Harris told Taylor that he wanted to kill Roy because the defendant had said that Roy was investigating the forged check.

On the night of the murder, Taylor called Harris. Harris told him that he and Roy Mahaley had had an altercation and that he had injured Roy severely. Harris also told Taylor that he would have to kill Roy Mahaley that night. In response to Harris' request, Taylor went to Harris' room at approximately 8:00 p.m., where they drank beer and smoked marijuana. At approximately 8:30 p.m., Harris called the defendant and told her to put out Roy's clothes so that he could dress Roy's body after killing him. Harris also told the defendant to call him back when Roy was asleep. At approximately 10:30 p.m., the defendant telephoned Harris and told him that Roy was asleep.

As Harris and Taylor approached the Mahaley carport, they observed Roy Mahaley lying on the floor in the den. At that point, the defendant opened the door for them, and Harris told her to go back into the bedroom and wait. Harris walked over to Roy and strangled him with a necktie. While Harris was choking Roy, the necktie broke, so Harris used a blanket and a cord to finish the task. After killing Roy, Harris dressed the body in work clothes and put it in the trunk of Roy's car. Harris then put the necktie, the blanket, and a copy of the forged check into a paper bag. After placing Roy's body in the trunk, Harris took money from Roy's wallet and gave $150 to Taylor and the rest to the defendant.

Harris wanted to leave Roy's car in a bad neighborhood so that the police would suspect robbery as the motive for Roy's death. However, the defendant recommended that the car be left at Map Enterprises because it would raise less suspicion. In response to the defendant's recommendation, Harris and Taylor left the car at Map Enterprises and returned to the defendant's home. Upon returning to the defendant's home, Taylor noted that the defendant seemed relieved. As Harris and Taylor prepared to leave, the defendant thanked Taylor for helping them, and she gave Harris a kiss.

Other evidence introduced at trial is discussed at other points in this opinion where pertinent to the issues raised by the defendant.

[1] By her first assignment of error, the defendant contends that her statements were obtained in violation of principles explained in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), because the officers did not advise her of her constitutional rights before she gave the statements. In *Miranda*, the Court held that "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." *Id.* at 444, 16 L. Ed. 2d at 706 (emphasis added). At issue in this case is whether the defendant was in custody when she gave the three statements in question.

It is well established that the test for whether a suspect is "in custody" for Miranda purposes is whether a reasonable person in the suspect's position would feel free to leave at will or compelled to stay. *State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992); *State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986); *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). This objective test must necessarily be applied on a case-by-case basis, taking into account the facts and circumstances surrounding each case. *Davis*, 305 N.C. at 410, 290 S.E.2d 580.

Evidence before the trial court tended to show that the police first spoke with the defendant at her home; however, she agreed to accompany them to the police station where she was interviewed. This initial interview commenced at 11:49 a.m., and the defendant was returned to her home at approximately 1:30 p.m. Based upon evidence introduced during a *voir dire* hearing where Detective Bennie Bradley testified, the trial court made findings and concluded that the defendant was not "in custody" during the initial interview for the following reasons. While at the defendant's home, Officer Bradley asked the defendant if she would be willing to go to the Burlington Police Department for an interview, and she freely and voluntarily consented to accompany him. During the drive to the police station, the defendant was not handcuffed and she was never told that she was in custody. During the interview, the officers did nothing to coerce the defendant, and she never refused to answer any questions.

Following a *voir dire* hearing where officer Crowder testified, the trial court made findings and concluded that the defendant was not "in custody" during the second interview for the following reasons. After the initial interview, the defendant consented to another search of her home. Upon completion of this search, Detective Kevin Crowder and Agent Hedgecock asked the defendant if she would return to the Burlington Police Department for a second interview. This second interview commenced at 3:27 p.m. and ended at 6:48 p.m. with the defendant giving a written statement. There were five officers present during this interview. The defendant freely and voluntarily agreed to return to the Burlington

Police Department for the second interview. She was told that she was not under arrest and that she had the option to decline the officers' request. The defendant was told on several occasions that she was free to leave at any time during the interview. At the commencement of the second interview, the investigating officers did not consider the defendant a suspect because they did not have sufficient information with respect to the cause of Roy Mahaley's death. Before giving her written statement, the defendant signed a statement indicating that she had voluntarily returned to the Burlington Police Department and that she was aware of the fact that she was free to leave at any time during the interview.

At the close of the second interview, the defendant was taken into a snack room at the police station. At approximately 9:00 p.m., Lieutenant Steve Lynch walked into the snack room and observed the defendant sitting at a table. Lynch approached the defendant and told her that he believed that she knew more about this case than she had previously disclosed. In response to Lynch's statement, the defendant started to cry and stated that she wanted to speak with Lynch and Agent Hedgecock. Lynch and Hedgecock then conducted a third interview with the defendant in Lynch's office. This third interview took approximately fifteen minutes and was tape-recorded.

Following a *voir dire* hearing where officers Lynch and Hedgecock testified, the trial court made findings and concluded that the defendant was not in custody during this third interview for the following reasons. The defendant gave the recorded statement voluntarily as evidenced by the fact that she signed a statement to that effect. Additionally, during the interview, the defendant never indicated that she did not want to give this statement, and she never stated that she wanted to go home. Furthermore, the officers continuously told the defendant during the interview that she was not in custody and that she was free to leave at any time.

The trial court's findings of fact following a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when supported by competent evidence. *Id.* The determination of whether the defendant was "in custody" at the time she confessed, however, requires the application of fixed rules of law to the facts found by the trial court and, therefore, is a conclusion of law. *Id.* at 414-15, 290 S.E.2d at 580. Such conclu-

sions are fully reviewable on appeal. *State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1987). It is true that we have often stated that such conclusions of law are binding upon us on appeal if they are supported by the trial courts' findings. *E.g., State v. Wynne*, 329 N.C. 507, 406 S.E.2d 812 (1991); *State v. Williams*, 308 N.C. 47, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). When used in this context, however, the phrase "supported by the findings" must be taken as meaning "required by the findings" or "correct in light of the findings." Only conclusions of law which are "supported" in such manner by the findings are binding on appeal.

In the present case, the trial court's findings were amply supported by substantial evidence presented on *voir dire*. Such evidence tended to show that the defendant never indicated that she wanted to terminate an interview, that the officers continuously informed the defendant that she was free to leave at any time during the interviews, and that she understood that she was free to go and not required to make any statement. The trial court's findings were consistent with that evidence. Furthermore, those findings compelled the trial court's conclusion that the defendant was not "in custody" for Miranda purposes when she gave her three statements at the Burlington Police Department. Therefore, we conclude that the trial court did not err in this regard. The defendant's first assignment of error is without merit.

[2] In her next assignment of error, the defendant contends that the trial court erred by allowing Eric Taylor to testify about statements Steve Harris had made to Taylor which implicated the defendant in the murder of Roy Mahaley. Specifically, the defendant contends that the State failed to make the required *prima facie* showing that she conspired with Steve Harris and Eric Taylor; therefore, Harris' statements to Taylor were not admissible against the defendant.

The law is well established regarding the admissibility of statements by co-conspirators. A statement by one conspirator made during the course and in furtherance of the conspiracy is admissible against his co-conspirators. N.C.G.S. § 8C-1, Rule 801(d)(E) (1988). However, for the acts or statements of a conspirator to be admissible as evidence against his co-conspirators, there must be a showing that "(1) a conspiracy existed; (2) the acts or declarations were

made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended." *E.g., State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977); *State v. Lee*, 277 N.C. 205, 213, 176 S.E.2d 765, 769-70 (1970). Moreover, the State's evidence must establish "a *prima facie* case of the conspiracy independently of the statements sought to be admitted." *State v. Nichols*, 321 N.C. 616, 630, 365 S.E.2d 561, 570 (1988); *Tilley*, 292 N.C. at 138, 232 S.E.2d at 438.

In the present case, there was sufficient evidence, apart from Steve Harris' statements to Eric Taylor, to establish a *prima facie* showing that the defendant conspired with the men to murder her husband. The defendant and Steve Harris were involved in an affair at the time of the murder. Moreover, the defendant admitted that she called Steve Harris and told him that Roy Mahaley was asleep on the living room floor. As further evidence of the defendant's involvement in a conspiracy to kill her husband, Eric Taylor testified that the defendant opened the carport door so that he and Steve Harris could enter and kill Roy Mahaley. In light of the foregoing, there was clearly sufficient evidence, independent of Harris' statements to Taylor, to establish a *prima facie* showing that the defendant conspired with Harris and Taylor to kill her husband.

[3] The defendant next argues that Harris' statements to Taylor were inadmissible because they were made before any conspiracy was formed and, therefore, not during the course of and in furtherance of a conspiracy. While a *prima facie* showing of the existence of a conspiracy must be established independently of the statements sought to be admitted, the trial court may use such statements in establishing the times when the conspiracy was entered and terminated. Therefore, in passing on this issue we consider all of the evidence introduced at trial.

This Court has recognized the inherent difficulty in proving the formation of a criminal conspiracy. *See Tilley*, 292 N.C. at 139, 232 S.E.2d at 438-39 (1977) (stating that because of the nature of the offense, courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence). In the present case, the evidence was not clear with respect to the exact moment when the conspiracy was formed. However, evidence tended to show that the conspiracy

was formed at least one week prior to the actual murder; Eric Taylor testified that Steve Harris aborted the plan to kill Roy Mahaley after the defendant told Harris that she was not ready to kill Roy on the weekend prior to the actual murder. Since it was uncontroverted that all of Harris' statements to Taylor regarding the murder of Roy Mahaley were made after that weekend, the evidence clearly tended to show that they were made after the conspiracy was formed.

There was substantial evidence that the defendant had entered a conspiracy to kill her husband and that Harris' statements to Taylor were in furtherance of and during the conspiracy. Therefore, the trial court did not err by admitting evidence of those statements of Harris through the testimony of Taylor. This assignment of error is without merit.

[4] The defendant next contends that the trial court erred by admitting evidence of her prior bad acts. Over the defendant's objection, various witnesses testified regarding her admission to two drug treatment facilities, her theft of credit cards and money, and her affair with Steve Harris. The defendant argues that this evidence was irrelevant and served only to inflame the jury.

While evidence of prior bad acts is not admissible to prove that a person acted in conformity therewith, it is admissible for other purposes such as proof of motive. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990); N.C.G.S. § 8C-1, Rule 404(b) (1988). In the present case, the defendant was tried for the first-degree murder of her husband. In order to convict the defendant of this charge, the State relied upon the theory that she conspired with Eric Taylor and her boyfriend, Steve Harris, to murder her husband.

Evidence of the defendant's relationship with Harris was highly probative of her motive for wanting her husband murdered. Similarly, evidence of the defendant's theft of money and credit cards, coupled with evidence of her drug problems, tended to show that the defendant needed money which she stood to gain from the insurance proceeds due upon her husband's death. Since the evidence admitted was relevant as tending to show the defendant's motives for conspiring to murder her husband, the trial court did not err. This assignment of error is without merit.

[5] The defendant next contends that the trial court erred by admitting photographs of the victim into evidence. In order to illustrate the testimony of the medical examiner, the trial court

admitted thirteen photographs of the victim's body into evidence. The defendant contends that the probative value of these photographs was substantially outweighed by their tendency to inflame the jury. *See* N.C.G.S. § 8C-1, Rule 403 (1988).

Photographs of a homicide victim's body may be introduced into evidence to explain or illustrate testimony. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). Moreover, photographs may be introduced into evidence even if they are gruesome so long as they are used by a witness to illustrate his testimony, and an excessive number are not used solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988).

In the present case, the photographs were used to illustrate the medical examiner's testimony with respect to the location and condition of the victim's body. Each photograph illustrated different testimony, none was especially gruesome or inflammatory, and the total amount of photographic evidence was not excessive. Since the photographs were not excessive in number and were used solely for the purpose of illustrating the medical examiner's testimony, the trial court did not err in admitting the photographs into evidence. This assignment of error is without merit.

[6] The defendant next assigns as error the trial court's denial of her motion to dismiss the first-degree murder charge. Specifically, the defendant contends that the trial court erred by submitting the first-degree murder charge to the jury because the evidence introduced at trial would not support any reasonable finding that she conspired to murder her husband.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged. *E.g., State v. McPhail*, 329 N.C. 636, 406 S.E.2d 591 (1991); *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991); *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). In making its determination, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

In the present case, the defendant told police officers that she and Steve Harris were involved in an affair and that on the night of her husband's murder, she called Harris to tell him that her husband was asleep on the living room floor. There was also evidence that the defendant opened the carport door for Steve Harris and Eric Taylor, the men who strangled her husband to death. Additionally, as previously discussed in this opinion, there was substantial evidence that the defendant did so in furtherance of a conspiracy that she had entered with Harris and Taylor to murder the victim. Therefore, the trial court did not err in submitting the charge of first-degree murder to the jury. This assignment of error is without merit.

[7] We conclude for the foregoing reasons that the guilt-innocence determination phase of the defendant's trial and her conviction of first-degree murder were free of error. Accordingly, we turn to the defendant's assignments of error relating to the separate capital sentencing proceeding. The defendant contends that the trial court erred during the capital sentencing proceeding by failing to submit the statutory mitigating circumstance that she has no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1) (1988). The trial court is required to determine whether the evidence will support a rational jury finding that a defendant has no significant history of prior criminal activity. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). If so, the trial court has no discretion; the statutory mitigating circumstance must be submitted to the jury, without regard to the wishes of the State or the defendant. *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316, *vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988).

Evidence in the present case tended to show that the defendant had no record of criminal convictions. Evidence of prior history of criminal activities was limited to that tending to show her use of illegal drugs and her theft of money and credit cards to support her drug habit.

In *Wilson*, we held that a rational jury could find that the defendant had no significant history of criminal activity even though he had a prior conviction for the second-degree kidnapping of his wife. *Wilson*, 322 N.C. at 143, 767 S.E.2d at 604. Similarly, in *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 824 (1985), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988), we held that the trial court properly submitted this statutory mitigating

circumstance to the jury even though the defendant had prior felony convictions. *See Lloyd*, 321 N.C. at 312, 364 S.E.2d at 324 (1988) (submission of this statutory mitigating circumstance to the jury required, over the defendant's objection, notwithstanding a record showing two felony convictions and convictions for seven alcohol-related misdemeanors). The evidence in this case did not establish that the defendant had such a significant history of prior criminal activity that no rational jury could find the existence of the statutory mitigating circumstance. Therefore, we must conclude that the trial court erred by failing to submit this mitigating circumstance to the jury. *Id.*

We must now determine whether this error was harmless. In *Wilson*, we held that the failure to submit the statutory mitigating circumstance of no significant history of prior criminal activity has federal constitutional implications, so the standard for determining prejudice is N.C.G.S. § 15A-1443(b) rather than N.C.G.S. § 15A-1443(a). *Wilson*, 322 N.C. at 145, 367 S.E.2d at 605. N.C.G.S. § 15A-1443(b) provides that a violation of the defendant's federal constitutional rights is prejudicial unless the appellate court determines that it was harmless beyond a reasonable doubt, and the burden in this regard is upon the State to so prove. N.C.G.S. § 15A-1443(b) (1988).

In the present case, we must determine whether the State has carried its burden of proving that the error was harmless beyond a reasonable doubt. The fact that the trial court substituted the nonstatutory mitigating circumstances that "the defendant has no history of violence or physical injury to others" and "the defendant has no record of criminal convictions" does not satisfy the State's burden. The trial court's submission of these two nonstatutory circumstances was inadequate because the trial court gave the jury the discretion, if it found either circumstance to exist, to determine "whether you deem this to have mitigating value." As a result of this instruction, the jury was not required to give any weight to such nonstatutory mitigating circumstances. By contrast, if a jury determines that a statutory mitigating circumstance exists, it *must* give that circumstance mitigating value. *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988).

In *Wilson*, we recognized that there was no way of knowing whether the failure to submit a statutory mitigating circumstance to the jury might have tipped the scales in favor of the jury deter-

mination that the aggravating circumstances outweighed the mitigating circumstances and were sufficiently substantial to call for the imposition of the death penalty. *Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. "We have also recognized that common sense, fundamental fairness, and judicial economy require that any reasonable doubt regarding the submission of a statutory or requested mitigating factor be resolved in favor of the defendant." *State v. Brown*, 315 N.C. 40, 62, 337 S.E.2d 808, 822 (1985).

The record in the present case shows that the jury knew about the defendant's history of prior criminal activity. However, the jury was not allowed to consider whether that history was insignificant because the statutory mitigating circumstance was not submitted. Here, as in *Wilson*, "[we] cannot state that had this mitigating circumstance been submitted to the jury, the jury would not have found its existence." *See Wilson*, 322 N.C. at 146, 367 S.E.2d at 606. Furthermore, we cannot state positively that had this statutory mitigating circumstance been found and balanced against the aggravating circumstances, the jury would still have returned a sentence of death. Therefore, we are unable to hold that the failure to submit this mitigating circumstance was harmless beyond a reasonable doubt.

For the reasons discussed in this opinion, we find no error in the defendant's trial for first-degree murder. However, we vacate the sentence of death and remand this case to the Superior Court, Alamance County, for a new capital sentencing proceeding.

No error in the trial; death sentence vacated and case remanded for new capital sentencing proceeding.

STATE OF NORTH CAROLINA v. CHARLES PURCELL MORRIS

No. 438A91

(Filed 19 November 1992)

Evidence and Witnesses § 1252 (NCI4th)— custodial interrogation—invocation of right to counsel—reinitiation of interrogation—incriminating statement—admission as prejudicial error

Defendant invoked his right to counsel during custodial interrogation when he responded "I don't know" to an officer's question as to whether he would like to waive his right to counsel and responded "No, because I don't know how much I want to tell you" when asked if he would sign a waiver of counsel form, and his subsequent incriminating statement made without counsel when the officer and the district attorney reinitiated the interrogation is presumed to be involuntary and inadmissible in a prosecution of defendant for first degree murder of the two-year-old daughter of defendant's girlfriend, first degree sexual offense and misdemeanor child abuse. Furthermore, the State failed to show that the admission of defendant's statement was harmless beyond a reasonable doubt where the statement contained admissions to elements of all three charged offenses; the statement contained the only direct evidence that defendant committed the sexual offense; and the evidence presented a close question for the jury as to whether defendant or the child's mother was responsible for the child's death.

Am Jur 2d, Criminal Law §§ 737, 788, 796; Evidence §§ 529, 556.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Phillips, J., at the 4 March 1991 Criminal Session of Superior Court, Carteret County, upon a jury verdict of guilty of first-degree murder. This Court allowed defendant's motion to bypass the Court of Appeals as to additional judgments on 11 December 1991. Heard in the Supreme Court 5 October 1992.

Lacy H. Thornburg, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for the State.

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

WHICHARD, Justice.

Defendant was convicted of first-degree murder, first-degree sexual offense, and misdemeanor child abuse. The victim was Alicia Nicole Tommasone ("Nicole"), the two-year-old daughter of defendant's girlfriend, Renee Tommasone. The offenses occurred in the early morning hours of Sunday, 9 September 1990, in Renee's trailer, which was occupied at the time by defendant, Nicole, and Renee. Defendant's defense was that Renee committed the offenses while under the influence of alcohol and Xanax, a prescription tranquilizer. The defense was significantly undermined, however, by the introduction of a pretrial statement by defendant containing admissions to elements of all three offenses.

The sole question addressed is whether the trial court committed prejudicial error in permitting introduction of the statement, on the grounds that it was obtained in violation of defendant's constitutional rights. U.S. Const. amend. V. We hold that the statement was obtained in violation of defendant's constitutional rights, and that it was prejudicial error to admit it.

Nicole was the daughter of Renee Tommasone and Frank Jenkins. After Nicole's birth, Frank married another woman. Several years before her relationship with Nicole's father, Renee had dated defendant briefly for five or six months. In the fall of 1989, Renee and defendant remet and renewed a relationship. They dated on and off for several months, and in January 1990 defendant moved in with Renee and Nicole for a period of time. At the end of March 1990, Renee and defendant began to have problems, which culminated in a fight during which defendant broke Renee's nose. Although the two reconciled, defendant stopped living full-time at the trailer with Renee and her daughter.

Renee testified at trial about the following events relating to her daughter's death: When she and defendant first started dating, Nicole got along well with defendant. About the time of the March fight, however, Nicole appeared to become afraid of

defendant. Nicole would cry in defendant's presence, would try to leave, would cling to and follow Renee, and at times would vomit or would not eat. Renee tried to keep Nicole away from defendant by taking her to the home of a friend or relative if she knew defendant would be visiting. Nevertheless, there were times when defendant would visit and Nicole would be present.

The Wednesday before Nicole's death, Renee took her to stay with Renee's parents in Havelock, North Carolina. That day, Renee told a friend that she was afraid of defendant and was going to stay with her parents. Renee and Nicole stayed with Renee's parents until Saturday. Defendant called several times, and each time Renee told him she did not want anything more to do with him. When defendant called on Saturday from Renee's trailer, however, Renee agreed to meet him there and talk. She did go, and they did talk. When Renee dropped defendant at the home of his cousin, Sara Jones, defendant agreed for the first time to leave her alone.

That afternoon, after Nicole's nap, Renee took Nicole with her to play with the children of a friend, Dawn Cox. While the children played, the mothers visited and Renee joined Dawn in drinking Tequila. Renee also drank three beers that evening. Other people were present, including a friend of defendant's named Jim. At 6:00 p.m., defendant called Dawn's house from Renee's trailer to ask for a ride to a party. Jim did not know how to get to the trailer, so Renee went with Dawn and Nicole to retrieve defendant and bring him back to Dawn's to meet Jim. Renee had planned to leave Dawn's at 9:30 p.m., Nicole's bedtime, and return to the trailer. She was going to drop a friend, Brenda, at the highway on the way home. When she rose to leave, however, she discovered that defendant had left already with Brenda in Renee's car. Angry, she called defendant's cousin, Sara Jones, to try to find defendant and tell him to return the car. When defendant returned in the car with Brenda, Renee and defendant fought and slapped each other. As defendant left in Jim's car, Renee threw a beer can after the car.

Renee then left Dawn's and arrived home at 10:00 p.m., where she put Nicole to bed wearing a diaper and a T-shirt. Renee smoked some cigarettes and took a Xanax before going to bed at 11:00 p.m. Renee's doctor had prescribed Xanax two or three months before to help Renee sleep at night. The next thing Renee remembered about the evening was waking to take a call from

defendant's cousin, Sara Jones. After talking with Sara, Renee went back to bed and woke next to find defendant on top of her, pulling her hair, slapping her, and yelling at her. He smelled of alcohol. After a few minutes, defendant stopped, rolled over on the bed, and said, "you are not worth it, bitch, bitch."

Renee heard Nicole crying and went to reassure her. Renee saw that the time was 4:23 a.m. When Renee checked on Nicole, she did not notice any injuries, other than preexisting bruises on her finger and shin. Renee smoked a cigarette and went back to her bedroom, where defendant was sleeping. Because he was asleep, Renee felt safe and went back to sleep herself. She did not call the sheriff's department throughout her troubles with defendant, except the one time after the March fight, because she was afraid the authorities would take Nicole away if she continued to be exposed to domestic violence.

The next thing Renee remembered was the telephone ringing at 8:00 a.m. When she rose to answer it, defendant was right on her heels. As she reached for the telephone in the living room, Renee noticed Nicole lying on the floor. She was not concerned, as Nicole was known to rise at night and go to another place to sleep. Renee was surprised, however, that Nicole made no sound as defendant picked her up and carried her to her bedroom. Concerned about Nicole, Renee handed the telephone receiver to defendant and went to Nicole, whom defendant had covered with a blanket over her eyes. When Renee pulled the blanket back, Nicole's eyes were open with the pupils rolled back, her face was covered with burns, and she was "gurgling." Renee began to scream as she carried Nicole to the bathroom to clean the burns. On the other end of the line, Rick Amen heard her scream, "Jesus Christ, Scooter (defendant's nickname), what have you done to my baby. Oh, my God."

When Renee noticed that Nicole had stopped gurgling, she called 911 but had trouble explaining the location of the trailer. During this time, defendant just stood and said nothing. Renee took Nicole to the car, with defendant following, and defendant held Nicole as Renee drove to the hospital. At the hospital, Nicole was in full arrest and had no pulse. Efforts to revive her were not successful.

One of the attending nurses at the hospital noted burns on Nicole's face, neck, and shoulders and bruises on her back, legs,

and left-upper arm. The nurse also noted that the vaginal area was red, with some blood and an opening larger than normal for a child of Nicole's age.

At trial, pathologist Dr. Charles Garrett testified that Nicole had suffered painful second-degree thermal burns from a hot liquid on her upper chest, shoulder, neck and face. Garrett also described second-degree burns on the back of Nicole's neck and on her upper back, which Garrett concluded were caused by a separate, contemporaneous contact with hot liquid. Garrett further noted bruises on Nicole's knuckles and in the web between the thumb and index finger. Bruises on Nicole's legs were trivial.

Garrett's examination of Nicole's genitals revealed blood, which would have come from a half-inch laceration of the vagina made from a round object, possibly an adult finger. Garrett did not find presence of sperm. He did find a pool of blood in the peritoneal cavity behind the kidneys and uterus. The pool of blood came from a tear in a surrounding membrane that would have been caused by some blunt force, force that could have been consistent with bringing a child suddenly and forcefully down on one's knee. Garrett's opinion was that Nicole died from internal bleeding, that she would have lived for an hour or two after being injured, that neither the burns nor the vaginal injury would have caused Nicole to lose consciousness, and that she would have been capable of leaving her bed and walking a short distance.

When officers investigated the trailer on Sunday morning, they found water running into the bathtub and a green dipper in the tub. A test of the water at the trailer revealed that it was hot enough to cause burns within seconds.

While Renee's testimony placed defendant in the trailer during the hours when Nicole would have received her injuries, it was defendant's own words in a signed, pretrial statement that directly implicated him in the charged offenses. At trial, Detective Dennis of the Carteret County Sheriff's Department read the following summary of the statement to the jury:

> Charles advised R.O., reporting officer, that he had spent the day with Renee Tommasone and she left about 5 o'clock to go to a party and returned for him at 9 o'clock. Charles advised at the party they got into an argument and Renee slapped him. Charles then advised he left and went to a party at

> Sandy Jones's residence. Charles advised he stayed there until 3 o'clock and he left with Jim Gollehon . . . . Jim took Charles to Renee's house. Charles entered through the back door and woke Renee up. Charles tried to talk to Renee and she wouldn't talk. Then the baby started crying and he went into the bedroom to see why she was crying. The baby had thrown up and Charles spanked her. The baby would sometimes put her finger in her throat and make herself throw up for attention. Charles advises that her [sic] took the baby into the bathroom and washed her off in the shower and took a green dipper and poured water on her head. Afterwards he put a clean shirt on her and dried her off. During this time she was still crying and Charles inserted his finger into her vagina. Not for a sexual reason, he was just mad. Charles advises that he did not put anything in her rectum. Charles advised that the baby had a bruise on her and a busted lip when he got there. Charles advised reporting officer, R.O., that he put the baby in the bed and went back and got into the bed with Renee and went to sleep. The phone rang about 8 o'clock and woke them up. When Renee answered the phone, that's when Charles got up and noticed Nicole on the floor with a sheet under her. Charles put her back in the bed and got on the phone. Renee looked at Nicole and said her baby was sick and freaked out. Then they took her to the hospital and Charles gave mouth-to-mouth all the way to the hospital.

Defendant's testimony at trial differed in important respects from the above statement and from Renee's testimony. At trial, defendant testified that during their Saturday meeting, he and Renee had sex. When defendant saw Renee that evening, she was "wasted." Defendant drove Brenda because Renee was too drunk to drive. When defendant and Brenda came back to Dawn's house, Renee jumped on defendant and clawed his face. As defendant left with his friend Jim, Renee threw a tricycle at the car.

Late that night, defendant went to Renee's trailer. As he passed Nicole's room, he heard her crying, checked her, and found that she had vomited. As he was trying to clean her, defendant smacked Nicole on the back of her legs to keep her from spreading the vomit around further. Defendant then took Nicole to the bathroom to clean her. He noticed blood in her diapers. Defendant asked Renee about the blood, but she did not know anything about it. In the bathroom, defendant spread Nicole's legs to see if she was

injured. Defendant denied inserting his finger into Nicole's vagina or telling Dennis that he did. Defendant asserted that he tested the water's temperature before pouring it over Nicole's head.

Besides denying key elements of his pretrial statement, defendant presented evidence suggesting that Renee was responsible for Nicole's injuries and death. Defendant testified that Renee was a good mother except when she drank and took Xanax. When she ingested the two in combination, she would become aggressive and have blackouts. Renee drank many beers and took several Xanax every day. Many of their arguments and fights centered around defendant's displeasure with Renee's excessive drinking, use of Xanax, and treatment of Nicole.

Witnesses for defendant testified that defendant had a loving relationship with Nicole, that Renee drank and used Xanax excessively, and that she abused Nicole when she was under the influence of alcohol and Xanax. Sara Jones, defendant's cousin, testified that she called Renee twice on the night of Nicole's death, once at 2:00 a.m., and both times Renee sounded confused and her speech was slurred. Sara also could hear Nicole crying in the background and heard the sound of a slap. Both Sara and her husband, Carl, testified that after Nicole's death, Renee asked them if they thought she could have killed her own baby. A witness who saw Renee in a bar on the day of Nicole's funeral testified that Renee told some men, "No, I'm not married. I just got rid of my little girl. Oh well, I'm glad it's over with. I didn't need her anyway."

In May 1989, the Department of Social Services ("DSS") had received an allegation that Nicole was neglected. After investigating, Robin Cockerham of DSS had concluded that the allegation was not substantiated. Cockerham was concerned, however, about Renee's use of Xanax. In March 1990, Cockerham had received a second allegation of neglect, based on Nicole's presence during the fight between Renee and defendant in which Renee's nose was broken. This time the complaint was substantiated.

Cockerham discussed the situation with Renee, whom she found to be cooperative, and she explained that Renee needed to avoid fighting in Nicole's presence, as well as excessive drinking. During two subsequent, unannounced home visits, Cockerham did not see anything unusual about the relationship between Renee and Nicole.

On 20 August 1990, Renee told Cockerham she was no longer seeing defendant.

Susan Lansche, a substance abuse counselor, met Renee at the end of May 1990 on a referral from DSS. Lansche administered a chemical dependency test and found nothing alarming. Lansche found stress factors in Renee, and she warned Renee of the potentially addictive quality of Xanax. Lansche found Renee to be "very cooperative" and thought her behavior with Nicole was "very appropriate."

On the other hand, Pamela Piper, another DSS worker, testified on direct that she found Renee to be defensive and angry during a home visit in response to the second neglect allegation. On cross examination, however, Piper testified that Renee was very cooperative and that, if anything, she was too lenient with Nicole. During the home visit, Renee told Piper she and defendant had gotten into the March fight because defendant thought she was too drunk to drive.

The officer who responded to Renee's call about the fight confirmed that Renee was intoxicated; however, defendant also smelled of alcohol. The officer found Renee "belligerent" and defendant "hyper." The officer felt that Renee was "very impaired on something" and that she was not capable of caring for Nicole in her state. As a result, he assisted defendant in calling Nicole's father to come and take her for the evening.

As can be seen, the only direct evidence that defendant committed the charged offenses was defendant's pretrial statement. Defendant disputes the verity of portions of the statement and contends that it was obtained in violation of his invoked right to counsel.

Defendant made the statement to Detective Dennis and District Attorney McFayden at the Carteret County Sheriff's Department at 2:30 p.m. the day of Nicole's death. Dennis first met defendant about 10:00 that morning at the hospital, where Dennis became concerned about defendant's safety, given the high emotions of the Tommasone and Jenkins families.

Based on Dennis' testimony on *voir dire*, the trial court made the following findings of fact about the circumstances surrounding defendant's statement: Dennis had defendant escorted from the hospital to the Morehead Police Department to remove him from

perceived threats to his safety. Shortly before midday, defendant was taken in the company of officers to the Carteret County Sheriff's Department. Dennis joined him there after completing a consensual search of Renee's trailer. Dennis advised defendant of his Miranda rights and asked defendant if he would like to waive his right to counsel. Defendant responded, "I don't know." Dennis then asked defendant if he would sign a waiver of counsel form. Defendant responded, "No, because I don't know how much I want to tell you."

At that point, Dennis discontinued the interrogation. Dennis pursued other matters, including making a telephone call to the District Attorney, while defendant remained in the presence of officers at the Sheriff's Department. At 2:15 p.m., the conversation was revived by Dennis and the District Attorney. Dennis testified that defendant became more emotional and eventually broke down and gave the statement. Dennis reduced the statement to a screen presentation on a computer monitor, which defendant seemed to read. A written copy of the statement was generated, delivered to defendant, studied by him, and signed by him at 3:35 p.m.

Based on its findings of fact, the trial court concluded that at the time defendant made his statement he was in custody. The trial court concluded, however, that under the circumstances defendant made an "implicit waiver" of his right to silence and knowingly, freely, voluntarily, and understandingly waived his right to counsel.

On appeal, the State contends that defendant implicitly waived his rights and that the law recognizes implicit waivers. The State relies on *North Carolina v. Butler*, 441 U.S. 369, 375-76, 60 L. Ed. 2d 286, 293-94 (1979), in which the United States Supreme Court held that an explicit statement of waiver is not invariably necessary to support a finding that a defendant waived the right to remain silent or to have counsel.

As defense counsel notes on appeal, however, the Supreme Court has since clarified that while the right to remain silent can be waived by implication, "additional safeguards are necessary when the accused asks for counsel." *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). Even before *Edwards*, the Supreme Court had "noted that Miranda had distinguished between the procedural safeguards triggered by a request to remain silent and a request

for an attorney." *Id.; accord Michigan v. Mosley*, 423 U.S. 96, 104 n.10, 46 L. Ed. 2d 313, 321 n.10 (1975).

In the case at bar, the right to counsel is at issue, not the right to remain silent. As the trial court's findings of fact note, Dennis asked defendant if he would like to waive his "right to counsel" and if he would sign a waiver of counsel form. The issue, then, is whether defendant's responses to those questions constituted a waiver of, or an invocation of, the right to counsel.

Defendant's first response—to the question of whether he would like to waive his right to counsel—was "I don't know." His second response—to the question of whether he would sign a waiver of counsel form—was "No, because I don't know how much I want to tell you." "There are no 'magic words' which must be uttered in order to invoke one's right to counsel." *State v. Torres*, 330 N.C. 517, 528, 412 S.E.2d 20, 26 (1992). The question is whether the defendant has indicated "in any manner" that he desires the presence or aid of counsel while being interrogated. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 16 L. Ed. 2d 694, 707 (1966). We hold that defendant invoked his right to counsel when he refused to sign the waiver form; in effect, his answer to Detective Dennis' question of whether he would sign the waiver of counsel form was "No" because without assistance he did not know what his legal rights and position were, and until he did, he could not know how much he was willing to say.

This Court recently has held that questions posed by a defendant about the need for an attorney and attempts by another defendant to call his attorney constituted invocations of the right to counsel. *State v. Tucker*, 331 N.C. 12, 35, 414 S.E.2d 548, 561 (1992); *Torres*, 330 N.C. at 529-30, 412 S.E.2d at 27. Certainly, defendant's immediate, negative response to Dennis' pointed invitation to waive counsel is at least as indicative of a desire to have the help of an attorney during custodial interrogation as defendant Torres' inquiry as to whether she needed an attorney and defendant Tucker's attempts to call his attorney. Even if the Court were to deem defendant's response an ambiguous invocation, Dennis would have had to cease interrogation "except for narrow questions designed to clarify [defendant's] true intent." *Torres*, 330 N.C. at 529, 412 S.E.2d at 27. In fact, it appears that Detective Dennis initially took this course when he followed defendant's "I don't know" with a more narrow question of whether defendant would sign a waiver

form. Upon receiving an unequivocal "No" to that question, Dennis ceased the interrogation. *Cf. Smith v. Illinois*, 469 U.S. 91, 100, 83 L. Ed. 2d 488, 496 (1984) ("[A]n accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.").

Once defendant invoked his right to counsel, he was not subject to further police interrogation until counsel was made available. *Edwards*, 451 U.S. at 484-85, 68 L. Ed. 2d at 386; *Tucker*, 331 N.C at 35, 414 S.E.2d at 561. Once Dennis ceased the interrogation, he or his colleagues could only recommence it under two sets of circumstances. The first set of circumstances requires reinitiation of conversation by defendant and a knowing and intelligent waiver of the right to counsel by defendant. *Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46, 77 L. Ed. 2d 405, 411-13 (1983); *Tucker*, 331 N.C. at 35-36, 414 S.E.2d at 561. This set of circumstances is not present here because defendant did not reinitiate the conversation. The second set of circumstances involves police-initiated interrogation *once counsel is present. McNeil v. Wisconsin*, --- U.S. ---, ---, 115 L. Ed. 2d 158, 167 (1991); *see also Minnick v. Mississippi*, 498 U.S. 146, ---, 112 L. Ed. 2d 489, 497-98 (1990). This set of circumstances also did not occur as counsel was not present when Dennis and the District Attorney approached defendant for the interview that resulted in the statement.

A valid waiver of the right to counsel cannot be shown merely by the fact that defendant eventually made a statement after being informed of his rights. *Edwards*, 451 U.S. at 484, 68 L. Ed. 2d at 386. In fact, because Dennis and the District Attorney reinitiated interrogation after defendant had invoked his right to counsel, his subsequent statement is presumed to be involuntary and inadmissible. *McNeil*, --- U.S. at ---, 115 L. Ed. 2d at 167-68.

Because the error in admitting defendant's statement was of constitutional dimension, the State has the burden of demonstrating that admission of the statement was harmless 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); *Tucker*, 331 N.C. at 37-38, 414 S.E.2d at 562. We hold that the State has failed to meet that burden. The statement contained admissions to elements of all three charged offenses: 1) defendant's admission that he spanked Nicole could account for the fatal injury to Nicole's abdomen; 2) defendant's

admission that he poured water over Nicole's head could account for the burns; and 3) most importantly, defendant's admission that he inserted his finger into Nicole's vagina is the only direct evidence that defendant committed the sexual offense. Without the statement, the State would have been left with the following: circumstantial evidence that placed both defendant and Renee in the trailer during the critical hours, testimony by both defendant and Renee that they poured water from the tub faucet over Nicole on the morning of her death, and evidence that both defendant and Renee may have smacked or slapped Nicole sometime during the early morning hours. Even with the benefit of defendant's pretrial statement, containing the only direct evidence of the sexual offense, the State recognized that the question for the jury came down to which of these two adults was responsible for Nicole's death; during closing arguments, the prosecutor posed the following question to the jury: "One of the two of them did it? Is it Renee or the defendant?" Given the recognized closeness of the question, we are not satisfied beyond a reasonable doubt that defendant was not prejudiced by introduction of the statement.

Because the pretrial statement was admitted in violation of defendant's federal constitutional rights and to defendant's prejudice, we award defendant a new trial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. ROBERT LEE HOOD

No. 15A92

(Filed 19 November 1992)

1. Criminal Law § 884 (NCI4th)— failure to instruct on alibi—request at charge conference—appellate review

Although defendant's counsel did not object to the charge when it was given, his earlier request for an alibi instruction at the charge conference was sufficient under Appellate Rule 10(b)(2) to warrant full review on appeal of the court's failure to instruct on alibi.

Am Jur 2d, Appeal and Error § 623; Trial §§ 1082, 1261.

2. **Criminal Law § 777 (NCI4th)— alibi evidence—failure to give requested instruction**

The trial court erred in failing to give an alibi instruction as requested by defendant in a prosecution for first degree murder and felonious assault where defendant presented evidence that he was in Charlotte at the time the crimes were committed in Asheville.

Am Jur 2d, Trial §§ 1093, 1231, 1261.

Duty of court, in absence of specific request, to instruct on subject of alibi. 72 ALR3d 547.

3. **Criminal Law § 778 (NCI4th)— failure to instruct on alibi—burden of proving prejudice**

The trial court's failure to instruct on alibi did not reduce the State's burden of proving, beyond a reasonable doubt, every element of the crimes charged and thus did not violate defendant's due process rights. Therefore, the harmless error standard of N.C.G.S. § 15A-1443(a) applies, and defendant bears the burden of showing a reasonable possibility that, absent the error, a different result would have been reached at trial.

Am Jur 2d, Appeal and Error § 810; Trial § 1266.

4. **Criminal Law § 778 (NCI4th)— failure to instruct on alibi—harmless error**

Defendant was not prejudiced by the trial court's erroneous failure to instruct on alibi in a first degree murder and felonious assault prosecution where the trial court's instructions made it clear that the burden was on the State to prove every element of the crimes charged beyond a reasonable doubt, the jury was not led to believe that defendant had to prove anything in order to be found not guilty, and the court's charge thus afforded defendant the same benefits a formal charge on alibi would have afforded.

Am Jur 2d, Appeal and Error § 810; Trial § 1266.

5. **Indigent Persons § 19 (NCI4th)— denial of court-appointed psychiatrist**

The trial court did not err in the denial of an indigent defendant's request for a court-appointed psychiatrist to assist him in his trial for first degree murder and felonious assault where defendant submitted an affidavit of his counsel and

a copy of a psychiatric report submitted upon defendant's discharge from Dorothea Dix Hospital following a court-ordered competency evaluation; defense counsel's affidavit merely reiterated information contained in the psychiatric report; the report failed to show that defendant's sanity at the time of the offenses would be a factor at trial but provided affirmative evidence that defendant's mental state at the time of the offenses would not be a factor; and defendant did not otherwise make a showing of a particularized need for the assistance of a psychiatric expert.

Am Jur 2d, Criminal Law § 1006.

Right of federal indigent criminal defendant to obtain independent psychiatric examination pursuant to subsection (e) of Criminal Justice Act of 1964, as amended (18 USCS § 3006A(e)). 40 ALR Fed 707.

6. Homicide § 244 (NCI4th)— first degree murder—sufficient evidence of premeditation and deliberation

There was substantial evidence from which the jury could find that defendant killed the victim with premeditation and deliberation so as to support his conviction of first degree murder where the evidence tended to show that the victim had lived with defendant, had left him sometime during the month before the killing, and told him on the day of the murder that she no longer wanted to see him; defendant had ample time to premeditate and deliberate as he walked from the victim's house to his truck, returned to the house to tell the victim that it would not start, again went outside as a friend of the victim attempted to start her car, returned to the house, and went into the kitchen, ostensibly to get a drink of water; when he emerged from the kitchen, defendant fired at least six shots at the victim and her friend, then refused their requests that he help them and told them they had gotten what they deserved; and following the shootings defendant disappeared for over eight years before he was apprehended in New York.

Am Jur 2d, Homicide § 439.

7. Criminal Law § 1242 (NCI4th)— extenuating relationship with murder victim—not mitigating factor for assault of second victim

The trial court did not err by failing to find as a mitigating factor for assault with a deadly weapon with intent to kill

inflicting serious injury that the relationship between defendant and the victim was extenuating or that defendant acted under strong provocation based on evidence of his relationship with a murder victim shot by defendant at the same time he shot the assault victim where the only evidence of defendant's relationship with the assault victim was that the victim had worked for him and that she knew him because he had been seeing the murder victim, and there was no evidence that the assault victim provoked defendant in any manner before he shot her. N.C.G.S. § 15A-1340.4(a)(2)(i).

Am Jur 2d, Assault and Battery § 61.

Modern status of the rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

Appeal as of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from judgments imposing a life sentence for first-degree murder and a consecutive twenty-year sentence for assault with a deadly weapon with intent to kill inflicting serious injury, entered by Downs, J., on 17 May 1991 in Superior Court, Buncombe County. Heard in the Supreme Court on 8 September 1992.

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

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

MITCHELL, Justice.

The State's evidence tended to show that the following events occurred in this case. In August 1981, the defendant lived with Teresa Breedlove, the murder victim, in Charlotte. In September 1981, Breedlove moved to Asheville and moved in with her sister, Kathy Merrill, and her brother-in-law. Breedlove's mother, Dixie Cagle, also lived in Asheville.

On 6 September 1981, Breedlove and Sheila Ann McCall, a lifelong friend, ate breakfast at Cagle's home. After eating breakfast, Breedlove and McCall returned to the Merrill home at about 2 p.m. Breedlove later received a call from the defendant, Robert Lee Hood, who told her he was in Charlotte although he arrived

at the Merrills' house about 15 minutes after the phone call. Hood said that he wanted to talk to Breedlove alone, and the two went into another room for a few minutes. Hood and Breedlove argued, and Breedlove asked him to leave.

The defendant went outside to leave but then came back into the house saying that his truck would not start. Breedlove and McCall went outside and tried to start McCall's car, which also would not start. The three of them then went back inside the house, and the defendant asked for a drink of water. Breedlove told him to get it for himself.

The defendant went into the kitchen and came out a few moments later firing a gun. His shots hit both Breedlove and McCall. When the two women asked the defendant for help, he refused and told them that they had gotten what they deserved.

McCall called the police at 4:47 p.m., stating that she had been shot by Robert Hood. When the police arrived at the scene, McCall again told them that Hood had shot her and Breedlove. Police showed McCall pictures of Hood found in Breedlove's purse, and McCall again identified Hood as the person who had shot her and Breedlove. McCall also identified the defendant in the courtroom as the person who had shot her and Breedlove. Another witness, Carl Roberts, told Officer Lee Warren that he had heard some shots and had seen a black male leaving the Merrill house in a blue and white truck.

As a result of the shooting, Breedlove was killed, and McCall was hospitalized for 45 days with bullet wounds in her side. Officer Lee Warren attended the autopsy and took possession of a .38 caliber slug that had been removed from Breedlove's body. He testified that a .38 caliber slug can be fired from a .357 magnum handgun.

Officers attempted to serve arrest warrants for Robert Lee Hood at the home of his father, Hartford Hood. Although Robert Hood was not there, the officers searched the premises and found a .357 magnum pistol and six unspent .357 cartridges under the bed. A car found outside the residence was registered to Robert Lee Hood.

Witnesses for the defense testified to the effect that the defendant was not in Asheville at the time of the murder and assault. The defendant's sister, Mary Frances Lowery, testified that she

had last seen defendant on 6 September 1981 at about 6:30 p.m. and that, prior to 6:30 p.m., she had seen him from time to time throughout the day in Charlotte. She testified that the defendant did not live at his father's house. She also testified that Robert Hood's father, Hartford Hood, drove a blue and white pickup truck and that the defendant sometimes drove the truck.

The defendant's nephew, Jerome Lowery, testified that he had seen the defendant several times in Charlotte on 6 September 1981 and had last seen the defendant at about 2:30 p.m. on that day. He also testified that the defendant owned a .38 caliber Smith and Wesson and that he had seen the defendant carry the gun in the past.

Law enforcement authorities were unable to locate the defendant for more than eight years after the crimes at issue were committed. The defendant finally was apprehended in New York in the spring of 1990 and was extradited to North Carolina.

The defendant raises four issues on appeal to this Court. First, the defendant argues that the trial court erred by refusing to instruct the jury on the defense of alibi. Second, he argues that the trial court erred in denying his request for a court-appointed mental health expert. Third, the defendant asserts that the trial court erred in denying his motions to dismiss the first-degree murder charge at the close of the State's evidence and at the close of all the evidence. Finally, the defendant asserts that the trial court erred, when sentencing him on the assault conviction, by failing to find as a mitigating factor either that the relationship between the defendant and the victim was an extenuating circumstance or that the defendant acted under strong provocation.

I.

The defendant assigns as error the trial court's failure to instruct the jury on the defense of alibi after the trial judge indicated at the charge conference that he would be willing to instruct on alibi and the defendant's counsel responded that he did want such an instruction. While the trial court did err in failing to instruct the jury on alibi in this case, we conclude that this error was harmless.

[1] At the jury charge conference in the present case, when the trial court indicated that it would be willing to instruct on the defense of alibi, counsel for the defendant immediately responded

that he did want such an instruction. Although the defendant's counsel did not object to the jury charge when it was given, his earlier request for the alibi instruction at the charge conference was sufficient under Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure to warrant this Court's full review on appeal. *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988); *State v. Pakulski*, 319 N.C. 562, 575, 356 S.E.2d 319, 327 (1987).

[2] If the defendant requests an alibi instruction and evidence has been introduced tending to show that the accused was at some other specified place at the time the crime was committed, the trial court must instruct the jury on alibi. *State v. Waddell*, 289 N.C. 19, 33, 220 S.E.2d 293, 303 (1975), *vacated in part*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). In the present case, the defendant introduced testimony which tended to show that he was in Charlotte—not in Asheville—at the time the crimes were committed on 6 September 1981. This evidence was sufficient to entitle the defendant to an alibi instruction if he so requested. *See State v. Hunt*, 283 N.C. 617, 197 S.E.2d 513 (1973) (defendant's evidence, including his own testimony and testimony of other witnesses which tended to show he was elsewhere at the time of the crime, was sufficient to require an alibi instruction). The trial court's failure to instruct the jury on the defense of alibi after the defendant requested such an instruction in this case was error.

[3] The defendant argues that the State bears the burden under N.C.G.S. § 15A-1443(b) of proving that this error was harmless beyond a reasonable doubt because the trial court's failure to instruct the jury on alibi reduced the State's constitutionally required burden of proving every element of the crimes charged beyond a reasonable doubt and, thereby, denied him due process. We disagree. Under the circumstances presented in this case, the trial court's failure to instruct on alibi did not reduce the State's burden of proving, beyond a reasonable doubt, every element of the crimes charged. Because the trial court's instructions did not violate the defendant's due process rights as set forth in *In re Winship*, 397 U.S. 358, 25 L. Ed. 2d 368 (1970), the harmless error standard of N.C.G.S. § 15A-1443(a) applies. The defendant in the present case bears the burden of showing a reasonable possibility that, absent the error, a different result would have been reached at trial.

[4] In the present case, the trial court instructed the jury that the defendant is presumed innocent, that he is not required to

prove his innocence, and that the State bears the burden of proving guilt beyond a reasonable doubt. The trial court instructed the jury on the essential elements of the crimes charged, telling the jury that it could not return guilty verdicts unless it found that every element had been established beyond a reasonable doubt. In its final instruction to the jury, the trial court reiterated the essential elements of the crimes and restated the State's burden of proving every element of the crimes charged beyond a reasonable doubt. The trial court made it clear that the burden was on the State to prove every element of the crimes charged beyond a reasonable doubt, and the jury was not led to believe that the defendant had to prove anything in order to be found not guilty. Because the trial court's charge afforded the defendant the same benefits a formal charge on alibi would have afforded, the defendant was not prejudiced by the trial court's error. *See State v. Shore*, 285 N.C. 328, 343, 204 S.E.2d 682, 691-92 (1974).

II.

[5] The defendant next asserts that the trial court erred by denying his request for a court-appointed psychiatrist to assist in the preparation of his case and that this error violated his constitutional rights under *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985). The Supreme Court of the United States held in *Ake* that an indigent defendant is entitled to the assistance of a psychiatric expert if he makes a "threshold showing to the trial court that his sanity is likely to be a significant factor in his defense." 470 U.S. at 83-84, 84 L. Ed. 2d at 66. The defendant may make such a showing by demonstrating "to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id. Ake* further held that a defendant's sanity is a "significant factor" entitling him to the assistance of a psychiatric expert when the State presents evidence of the defendant's future dangerousness in a capital sentencing proceeding. *Id.* This Court has determined that *Ake* applies to both the guilt phase and the sentencing proceeding in a capital case. *State v. Robinson*, 327 N.C. 346, 354, 395 S.E.2d 402, 406-07 (1990) (citing *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987)); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986)).

In determining whether an indigent defendant has made the threshold showing required before the State must provide expert assistance, "the trial court should consider all the facts and cir-

cumstances known to it at the time the motion for psychiatric assistance is made." *State v. Robinson*, 327 N.C. at 353, 395 S.E.2d at 406 (quoting *State v. Gambrell*, 318 N.C. 249, 256, 347 S.E.2d 390, 394 (1986)). In *Robinson*, this Court found that the defendant had not made the required threshold showing where the only evidence presented by the defendant was the report filed with the trial court by the examining psychiatrist following an evaluation of the defendant's capacity to stand trial. 327 N.C. at 353, 395 S.E.2d at 406. In the report, the defendant was diagnosed as having an alcohol abuse problem and a "personality disorder, mixed with dependent, impulsive, and avoidant features." *Id.* at 352, 395 S.E.2d at 405. The psychiatrist observed that the defendant appeared in "conventional grooming" and had a "cooperative attitude." *Id.* at 351, 395 S.E.2d at 405. The defendant was found to have clear speech and to have coherent and organized thought processes. The defendant was preoccupied and concerned about his legal situation. His insight was limited, although his judgment was found to be appropriate. The defendant denied any history of mental illness, although he admitted to drinking and to occasional use of drugs. The psychiatrist found "no 'evidence of mental illness that could have impaired [defendant's] ability to recognize right from wrong' at the time the crimes were committed," expressed the opinion that the "defendant presented 'no evidence of psychosis or other severe mental illness,' " and recommended that the defendant be discharged in order to proceed to trial. *Id.* at 352, 395 S.E.2d at 405.

In support of his motion for appointment of a psychiatric expert, the defendant in the present case submitted an affidavit of his counsel and a copy of the report completed by Dr. Patricio Lara upon the defendant's discharge from Dorothea Dix Hospital following a court-ordered competency evaluation. The defendant presented no other evidence in support of his motion. Defense counsel's affidavit merely reiterated information contained in the psychiatric report, which included the following information. Dr. Lara diagnosed the defendant as having a "personality disorder with mixed paranoid and schizoid features, with evidence of some obsessive and compulsive traits." He found that the defendant's intelligence level was low average and that the defendant had a sixth-grade education. Although the defendant's thought processes were slow, Dr. Lara found that the defendant's concentration, orientation, and memory functions were normal and that his judgment and insight were fair. Dr. Lara found no evidence of delusions

or hallucinations. The defendant refused to cooperate with the examining psychiatrist, stating that his constitutional rights were being violated. He also was hostile toward his attorneys and refused to consent to the release of his military records to them. The defendant continually discussed his extradition from New York, which he believed had violated his rights. He was given no psychotropic medication during his stay at Dorothea Dix Hospital or thereafter, and Dr. Lara discharged him with the recommendation that he be returned to court to proceed to trial.

Dr. Lara found that the defendant had no history of prior psychiatric treatment other than a pretrial assessment in New York in the early 1980's. The defendant denied committing the crimes of which he was accused and denied any mental impairment at the time the alleged events occurred. He stated that he had no impairment in his ability to recall his actions around the time of the alleged offense. Dr. Lara found that he could not make an accurate determination of the defendant's mental state at the time of the offense, but that available information, including the report given by Sheila Ann McCall, included "no evidence of confusion or impairment at the time of the incident in question."

The evidence presented by the defendant in the present case does not approach the showing found sufficient by this Court in *State v. Gambrell*, 318 N.C. 249, 257-58, 347 S.E.2d 390, 394-95 (1986), or that before the Supreme Court of the United States in *Ake v. Oklahoma*, 470 U.S. 68, 86, 84 L. Ed. 2d 53, 68 (1985). Like the report offered by the defendant in *Robinson*, the report introduced by the defendant in the present case not only fails to show that the defendant's sanity at the time of the offenses would be a factor at trial, but also provides affirmative evidence that the defendant's mental state at the time of the offenses would *not* be a factor at trial. Furthermore, the defendant did not otherwise make a showing of a "particularized need" for the assistance of a psychiatric expert. Therefore, the trial court properly denied the defendant's request for the appointment of a psychiatric expert to assist in the preparation of his case.

III.

[6] The defendant next argues that the trial court erred in denying his motions to dismiss the charge of first-degree murder for insufficiency of evidence tending to show premeditation and deliberation, the only theory on which the charge of first-degree murder

was based. We have explained that "[p]remeditation means thought out beforehand for some length of time, however short, but no particular time is required for the mental process of premeditation." *State v. Williams*, 308 N.C. 47, 68, 301 S.E.2d 335, 348, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983) (citing *State v. Britt*, 285 N.C. 256, 204 S.E.2d 817 (1974)). "Deliberation" is properly described as "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.* at 68, 301 S.E.2d at 348-49 (citing *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982); *State v. Faust*, 254 N.C. 101, 118 S.E.2d 769, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961)). "Cool state of blood" does not mean a lack of passion and emotion; it means that a killing was executed "with a fixed design to kill," even though the defendant may have been angry or emotional at the time. *State v. Ruof*, 296 N.C. 623, 636, 252 S.E.2d 720, 728 (1979).

The appropriate standard for appellate review of motions to dismiss for insufficiency of the evidence is as follows:

> "[T]he 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).

State v. Small, 328 N.C. 175, 180-81, 400 S.E.2d 413, 415-16 (1991), *quoted in State v. Moss*, 332 N.C. 65, 70, 418 S.E.2d 213, 216

(1992); *State v. Quick*, 329 N.C. 1, 19, 405 S.E.2d 179, 190-91 (1991). We now undertake to apply that standard in the present case.

In the present case, the defendant challenges only the sufficiency of the evidence supporting the premeditation and deliberation elements of first-degree murder. Premeditation and deliberation ordinarily cannot be proved by direct evidence, but instead must be proved by circumstantial evidence. *Williams*, 308 N.C. at 68-69, 301 S.E.2d at 349 (citing *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975)). In determining whether evidence tends to show premeditation and deliberation, the following circumstances are among those that we will consider: (1) lack of provocation by the deceased; (2) conduct and statements of the defendant before and after the killing; and (3) "ill-will or previous difficulty between the parties." *Id.* at 69, 301 S.E.2d at 349. Evidence that the defendant fired multiple shots also may raise an inference of premeditation and deliberation. *State v. Smith*, 290 N.C. 148, 164-65, 226 S.E.2d 10, 20, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976).

We conclude that the State presented substantial evidence that the defendant killed Teresa Breedlove with premeditation and deliberation on 6 September 1981. Taken in the light most favorable to the State, evidence presented at trial tended to show that Teresa Breedlove had lived with the defendant in Charlotte, had left him sometime during the month before the killing, and told him on the day of the murder that she no longer wanted to see him. From this evidence, the jury reasonably could infer that Teresa Breedlove did not provoke the defendant and that the defendant felt ill will toward her because she had moved out of their residence in Charlotte and had told him that she no longer wanted to see him. The evidence tended to show that the defendant had ample time to premeditate and deliberate as he walked to his truck to start it, returned to the house to tell the victims that his truck would not start, again went outside as Sheila McCall attempted to start her car, returned to the house, and went into the kitchen, ostensibly to get a drink of water. When he emerged from the kitchen, the defendant fired at least six shots at the victims, then refused their requests that he help them and told them they had gotten what they deserved. Following the shootings, the defendant disappeared for over eight years before he finally was apprehended in New York. Such evidence was substantial evidence from which a jury reasonably could find that the defendant committed the

murder of Breedlove with premeditation and deliberation. The defendant's argument is without merit.

IV.

[7] Finally, the defendant argues that the trial court erred, when sentencing him on the assault charge, by failing to find as a mitigating factor under N.C.G.S. § 15A-1340.4(a)(2)(i) that the relationship between the defendant and the victim was an extenuating circumstance or that the defendant acted under strong provocation. The defendant argues that the evidence presented at trial regarding his relationship with Teresa Breedlove, the murder victim, entitled him to a finding and consideration of this mitigating factor. This argument is without merit.

The trial court is required to find a statutory mitigating factor under the Fair Sentencing Act only if the evidence supporting that factor is uncontradicted and there is no reason to doubt its credibility; even then, the trial court is free to determine what weight it will give such a mitigating factor in sentencing under N.C.G.S. § 15A-1340.4(a). *State v. Jones*, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983). To show that the trial court erred in failing to find a statutory mitigating factor, the defendant bears the burden of persuading the reviewing court that the evidence is so manifestly credible and so clearly supports the mitigating factor that no reasonable inferences to the contrary can be drawn. *Id.*

The defendant was convicted of assaulting Sheila Ann McCall, not Teresa Breedlove. In the present case, the only evidence of the relationship between the assault victim, Sheila McCall, and the defendant was that she had worked for him in Charlotte and that she knew him because he had been seeing Teresa Breedlove. There was no evidence of any extenuating circumstance surrounding the relationship between the defendant and Sheila McCall. Furthermore, there was no evidence that Sheila McCall provoked the defendant in any manner before he fired a bullet into her side. The trial court did not err in failing to find the statutory mitigating factor.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

NO ERROR.

EARL BUMGARNER AND WIFE, EULA BUMGARNER v. HOBART RENEAU AND WIFE, REVA RENEAU, FORMERLY REVA ARNOLD

No. 101A92

(Filed 19 November 1992)

1. Dedication §§ 12, 13 (NCI4th)— public user law—Court of Appeals discussion—disavowed

The Supreme Court disavowed as superfluous the Court of Appeals' discussion of public user law in *Bumgarner v. Reneau*, 105 N.C.App. 362, where the trial court had excluded from evidence a deed which had not been included in the response to a request for documents; the Court of Appeals did not discuss the reason the trial court excluded the evidence, holding instead that the roadway in question had not become a public road because there had been no public acceptance; plaintiffs appealed to the Supreme Court as of right based on a dissent in the Court of Appeals; defendants subsequently filed a petition for discretionary review to determine, based on discovery violations, whether the trial court erred by excluding the deed; and the Supreme Court granted that petition at 332 N.C. 146 and decided the case in this opinion on the issue of whether the deed was properly excluded.

Am Jur 2d, Dedication §§ 34-37, 50-55, 78.

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters. 24 ALR4th 294.

2. Discovery and Depositions §§ 5, 62 (NCI4th)— request for production of documents—failure to produce deed—excluded from trial

The trial court did not abuse its discretion by excluding a deed from evidence in an action seeking an injunction barring interference with a claimed right-of-way where defendants filed a request for documents which was directed towards discovery of the basis for plaintiffs' claimed right-of-way; plaintiffs responded with only one document, a deed which was relevant to a prescriptive easement theory, and stated that this deed was the only document on which they were relying to prove the right-of-way; plaintiffs did not supplement their response; plaintiffs' prescriptive easement theory was apparently thwarted by testimony at trial; and plaintiffs then sought to introduce

the deed in question, which supported a public user theory and was in effect an attempt to change theories prior to resting the case. The imposition of sanctions under N.C.G.S. § 1A-1, Rule 37 for failure to comply with N.C.G.S. § 1A-1, Rule 26(e) is within the sound discretion of the trial judge.

Am Jur 2d, Depositions and Discovery §§ 383, 384.

Exclusion of evidence in state criminal action for failure of prosecution to comply with discovery requirements as to physical or documentary evidence, or the like—modern cases. 27 ALR4th 105.

Dismissal of state court action for failure or refusal of plaintiff to obey request or order for production of documents or other objects. 27 ALR4th 61, sec. 1, supp. sec. 1.

Appeal by plaintiffs as of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 105 N.C. App. 362, 413 S.E.2d 565 (1992), which affirmed a judgment entered for defendants by Hyatt, J., at the 20 August 1990 Civil Session of Superior Court, Jackson County. Defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31 as to an additional issue was allowed by the Court on 16 July 1992. Heard in the Supreme Court 6 October 1992.

Van Winkle, Buck, Wall, Starnes, and Davis, P.A., by Michelle Rippon, for plaintiff-appellants and -appellees.

Long, Parker, Hunt, Payne & Warren, P.A., by Robert B. Long, Jr., for defendant-appellees and -appellants.

MEYER, Justice.

The questions brought before this Court are whether the trial court erred in excluding, because of the plaintiffs' discovery responses, evidence of the defendants' deed and whether defendants' deed constituted a dedication to the public that was accepted by general use of the public. For reasons differing from those relied upon by the Court of Appeals, we conclude that the trial court did not err in excluding evidence of defendants' deed, and we affirm the holding of the Court of Appeals.

The facts pertinent to this case are as follows. Plaintiffs are owners of property located in Jackson County, North Carolina.

They acquired the property in question by deed on 24 March 1956. Plaintiffs' predecessor in title, William Rogers, purchased the property in question sometime between 1939 and 1941. Rogers subsequently reached an agreement with defendants' predecessor in title, Howard Reagan, for a right-of-way, a portion of which passed through the Reagan property and which would provide a means of ingress and egress from Rogers' property to Highway 441. Rogers built a road on the right-of-way in 1949. Reagan testified that he gave Rogers permission to build the twelve-foot-wide road. Reagan then conveyed the property to Artie and Gertrude Jordan in 1955. In 1960, the Jordans conveyed the property to Frank and Floyd Hall. In January of 1964, the Halls conveyed the property to defendant Reva Reneau (formerly Reva Arnold) and her husband at the time, Lester Arnold. The Hall-Arnold deed includes the following provision:

> EXCEPTING AND RESERVING from this conveyance unto the said parties of the second part, their heirs and assigns and the general public, the existing roadway as same is now located, together with the right to maintain same; said roadway to remain the existing width, and to be used as a means of ingress, egress and regress to the property above described and other properties belonging to members of the general public, and said right of way to be and remain perpetually open for the aforesaid purposes but in the event said right of way shall ever cease to be used for road purposes, then and in that event same shall revert to and become the property of the owner of the adjoining lands over which same passes.

Defendants also acquired from R.V. and Harriet Jenkins a two and one-half acre tract of land on which the right-of-way is also located. This property was deeded to defendants on 8 February 1966.

Between 1949 and 1989, plaintiffs and neighboring landowners used the roadway as a means of accessing their property. In 1989, defendants erected metal fence posts connected by metal cross chambers along the side of the roadway for the purpose of curtailing the use of the road by large construction vehicles to reach a nearby subdivision.

On 18 January 1989, plaintiffs filed a complaint praying *inter alia* that defendants be permanently enjoined from interfering with plaintiffs' claimed right-of-way. Plaintiffs filed an amended complaint on 8 February 1989 requesting that judgment be entered declaring the road or right-of-way a public road or, in the alter-

native, for judgment granting plaintiffs a prescriptive easement over the road or right-of-way.

On 4 December 1989, defendants served a request for production of documents pursuant to Rule 34 upon plaintiffs, which requested production of the following:

> 1. Any and all documents and deeds or recorded instruments that you maintain or assert will show your right of access or right of way across the lands of Hobert [sic] Reneau and that you intend to offer at the time of trial.
>
> 2. The document or instrument referred to in your client's depositions which you maintain you have in your possession or in the possession of your client or any agent thereof, that show a deeded right of way across the property of Hobert [sic] Reneau.

In response to this request, plaintiffs sent the following answer to defendants on 21 December 1989:

> I hereby tender photostat copy of Warranty Deed dated March 24, 1956, from W.P. Rogers and wife, Eunice Rogers to William Earl Bumgarner and wife, Eula Bumgarner, said deed recorded in Deed Book 216, at page 66 in the Register of Deeds Office, Jackson County, North Carolina. This document is the same as Exhibit "A" filed with the original Complaint.
>
> This is the only document we are relying on to prove our Right-of-Way across lands of Defendant Reneau.

[1] At trial, plaintiffs attempted to enter into evidence the Hall-Arnold deed, which was marked as Plaintiffs' Exhibit 3. This deed was not included in plaintiffs' response to defendants' request for documents. As a result, the trial court excluded such evidence. Following the conclusion of all of the evidence, the jury found that plaintiffs had not acquired an easement by adverse use over the land, and Judge J. Marlene Hyatt entered judgment accordingly.

Plaintiffs appealed to the Court of Appeals, which, in a decision by a divided panel, affirmed the trial court's judgment. Although the issue of the exclusion of the deed from evidence was briefed and argued in the Court of Appeals upon plaintiffs' appeal, that court did not discuss in its opinion the reason that the trial court excluded the evidence. Rather, in its majority opinion, the panel

concluded that the exception and reservation in the Hall-Arnold deed, which purported to reserve and except the disputed roadway for public use, constituted an express offer of dedication of the road to the general public, but held that because there was no valid acceptance, the roadway did not become a public road. The majority below therefore found that because dedication of a public road cannot be established without evidence of a proper acceptance, the failure of the trial court to admit the deed into evidence did not affect any substantial right of the plaintiffs.

Judge Wynn dissented from this holding, stating that a valid acceptance had been shown, and thus concluded that it was prejudicial error for the trial court to have excluded the deed during the trial of this case. By virtue of Judge Wynn's dissent, plaintiffs appealed as of right the issue of whether there was sufficient evidence that the offer of dedication had been properly accepted. Subsequent to the holding of the Court of Appeals, defendants filed a petition for discretionary review to determine whether, because of plaintiffs' discovery violations, the trial court erred in excluding evidence of Plaintiffs' Exhibit 3, the Hall-Arnold deed, which purported to reserve and except the disputed roadway for public use.

We granted defendants' petition and now decide the case on the issue of whether the trial court properly excluded the Hall-Arnold deed from evidence. We find no error by the trial court and thus disavow the Court of Appeals' discussion of public user law as being superfluous to the case before the court.

[2] Defendants contend that the trial court's ruling that excluded evidence of Plaintiffs' Exhibit 3, the Hall-Arnold deed, was clearly within the discretion of the trial court pursuant to Rule 26(e) and Rule 37(d) of the North Carolina Rules of Civil Procedure. We agree.

The primary purpose of the discovery rules is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial. *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888, *cert. denied*, 297 N.C. 304, 254 S.E.2d 921 (1979). Our focus in this case is on whether the discovery process for this trial afforded defendants a fair opportunity to accomplish what the discovery rules are designed to achieve.

Rule 26 embodies the general provisions relating to all of the discovery rules. Rule 26(e) of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (e) *Supplementation of Responses.*—A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> . . . .
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

N.C.G.S. § 1A-1, Rule 26(e)(2) (1990).

The complaint was filed on 18 January 1989. On 4 December 1989, defendants properly served a request for production of documents requesting certain information as to any documents that plaintiffs intended to use regarding their claimed right-of-way across defendants' property. Defendants' discovery request sought information upon which theory of the case plaintiffs would follow. Plaintiffs' response, served on 21 December 1989, indicated that the only document they were relying on to prove their claimed right-of-way was the deed from Rogers to defendants dated 24 March 1956. Plaintiffs at no time thereafter supplemented their response to produce any and all documents and deeds or recorded instruments that they maintained would show their right-of-way or right of access across the land of defendants, and which they intended to offer at the time of trial. In addition, plaintiffs never amended the statement in their response to the discovery request that plaintiffs' deed "is the only document we are relying on to prove our Right-of-Way across lands of Defendant Reneau."

At the 20 August 1990 Civil Session of Superior Court, plaintiffs attempted to introduce into evidence the deed from the Halls to defendant, Reva Reneau (formerly Reva Arnold), which was Plaintiffs' Exhibit 3. After defendants objected to the introduction of the Hall-Arnold deed, the jury was excused and a bench conference

was held. The apparent basis for the trial judge's exclusion of the evidence was plaintiffs' failure to supplement their response to requested discovery.

As the defendants suggest, there is a dearth of decisions by this Court regarding Rule 26(e). Our Court of Appeals, as well as the federal courts with regard to the comparable federal rule, have, however, consistently held that the purpose behind Rule 26(e) is to prevent a party with discoverable information from making untimely, evasive, or incomplete responses to requests for discovery. See cases cited in *Willoughby v. Wilkins*, 65 N.C. App. 626, 641, 310 S.E.2d 90, 99 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E.2d 697 (1984). The trial court not only has the inherent authority to regulate trial proceedings, but it has the express authority under Rule 37, "to impose sanctions on a party who balks at discovery requests." *Green v. Maness*, 69 N.C. App. 292, 299, 316 S.E.2d 917, 922, *cert. denied*, 312 N.C. 621, 323 S.E.2d 922 (1984).

The comment to Rule 26(e) is instructional in that it states that the duty to supplement will be enforced through sanctions imposed by the trial court, "including exclusion of evidence, continuance, or other action, as the court may deem appropriate." A party's failure to comply with the limited duty imposed by Rule 26(e) is a ground for the trial court to impose such sanctions as exclusion of evidence, continuance, or other appropriate measures on the defaulting party. *See* William A. Shuford, *North Carolina Civil Practice and Procedure* § 26-22 (4th ed. 1992).

Rule 37 establishes certain sanctions for failure of a party to comply with discovery processes. The imposition of sanctions under Rule 37 for failure to comply with Rule 26(e) is within the sound discretion of the trial judge. *Willoughby*, 65 N.C. App. 626, 310 S.E.2d 90. North Carolina Rule of Civil Procedure 37(d) provides in pertinent part:

> If a party . . . fails . . . (iii) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subdivisions a, b, and c of subsection (b)(2) of this rule.

N.C.G.S. § 1A-1, Rule 37(d)(iii) (1990). Subdivision b of subsection (b)(2) of Rule 37 provides that a judge of the court in which the action is pending may make

> [a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence[.]

N.C.G.S. § 1A-1, Rule 37(b)(2)(b) (1990). The sanction provision permits the court to make such orders as are "just" upon a party's failure to obey an order to provide or permit discovery, including refusing to permit the disobedient party to introduce the matters in question into evidence. *Mt. Olive Home Health Care Agency, Inc. v. N.C. Dept. of Human Resources*, 78 N.C. App. 224, 226, 336 S.E.2d 625, 626 (1985). The matter of the imposition of sanctions under Rule 37(d) is in the sound discretion of the trial judge and cannot be overturned absent a showing of abuse of that discretion. *Segrest v. Gillette*, 96 N.C. App. 435, 442, 386 S.E.2d 88, 92 (1989), *rev'd on other grounds*, 331 N.C. 97, 414 S.E.2d 334, *reh'g denied*, 331 N.C. 386, 417 S.E.2d 791 (1992).

In *Rudder v. Lawton*, 62 N.C. App. 277, 302 S.E.2d 487 (1983), the Court of Appeals upheld a trial court ruling granting plaintiff's motion in limine to exclude evidence of the consumption of alcohol that was in direct variance with the defendant's prior answers to interrogatories. Plaintiff filed suit against defendant for injuries sustained in an automobile accident in which defendant was driving. Plaintiffs' complaint alleged that defendant negligently drove a vehicle, in which plaintiff was a passenger, into a telephone pole. In his answer, defendant denied negligence and alleged that plaintiff was contributorily negligent in not protesting defendant's driving at the time. Defendant then answered interrogatories filed by plaintiff but asserted his Fifth Amendment right in regard to a question relating to whether defendant was under the influence. On the second day of trial, defendant filed a supplemental answer to the interrogatory regarding his being under the influence and admitted he was under the influence at the time of the collision. During the presentation of evidence, defendant moved to amend his answer to allege that plaintiff was contributorily negligent because he voluntarily rode with defendant, while knowing or having reason to know that defendant was intoxicated. The trial court denied the motion, and no evidence of alcohol consumption was admitted during the trial. The Court of Appeals held:

> Plaintiff made diligent efforts to obtain discovery concerning defendant's defense. The defendant's misleading answers to plaintiff's interrogatories, his dilatory filing of the supplemental answer to plaintiff's interrogatory No. 9, and his late motion to amend his answer had the effect of surprising the plaintiff and leaving him unprepared to rebut defendant's affirmative defense.

Rudder, 62 N.C. App. at 281, 302 S.E.2d at 489.

In the case at bar, defendants' request for documents was directed towards discovery of the basis for plaintiffs' claimed right-of-way. Although this is not a case in which plaintiffs failed or refused to respond to defendants' request for documents, it is a situation where plaintiffs clearly responded that only one document would be admitted at trial to support their case. The only document that plaintiffs responded they were relying upon was relevant to the prescriptive easement theory.

Assuming, *arguendo*, that plaintiffs' amended complaint was adequate to give defendants notice of plaintiffs' basis for their claimed right-of-way, we believe that plaintiffs' subsequent actions effectively negated notice of this theory. Plaintiffs' response to defendants' request for documents, made subsequent to the amended complaint, did not include the Hall-Arnold deed, which was plaintiffs' only evidence supporting the public user theory. Defendants planned their trial strategy accordingly. At trial, plaintiffs attempted to introduce the Hall-Arnold deed, which had the effect of surprising defendants and leaving defendants unprepared to rebut plaintiffs' theory.

From the record, it appears that plaintiffs' theory of prescriptive easement was thwarted by the testimony of Howard Reagan, William Rogers, and Charles Bradley. All three witnesses testified that permission to build and use the roadway had been granted by prior owners and that such permission had been accepted by plaintiffs' predecessor in title. At this point, plaintiffs called Reva Reneau as an adverse witness and attempted to introduce the Hall-Arnold deed into evidence. Plaintiffs, in effect, attempted to change theories prior to resting their case.

Plaintiffs offer no explanation for their failure to supplement their response. Defendants' discovery request of plaintiffs sought information upon which theory of the case plaintiffs would follow.

Plaintiffs responded, in no uncertain terms, that plaintiffs' deed "is the only document we are relying on to prove our Right-of-Way across lands of Defendant Reneau." Under these circumstances, this Court finds no abuse of discretion in the trial judge's ruling excluding the Hall-Arnold deed from evidence. It is for this reason and not the reason stated by the majority of the panel below that we affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

NATIONWIDE MUTUAL INSURANCE COMPANY v. ROBYN SILVERMAN, A MINOR CHILD, BY AND THROUGH HER GUARDIAN AD LITEM, LEESA RADJA

No. 36PA92

(Filed 19 November 1992)

1. **Insurance § 527 (NCI4th)— UIM coverage—guest in insured vehicle—Class II insured**

Where the injured party was merely a guest in one of the vehicles covered by an automobile insurance policy, she was a "Class II" insured for purposes of underinsured motorist (UIM) coverage.

Am Jur 2d, Automobile Insurance § 322.

2. **Insurance § 528 (NCI4th)— UIM coverage—Class II insured—no intrapolicy stacking**

The UIM coverages provided in an automobile liability policy which listed two vehicles may not be aggregated or stacked to compensate a "Class II" insured person for injuries sustained in an automobile accident since a "Class II" insured person is only entitled to the UIM coverage applicable to the vehicle she was occupying at the time of the accident. N.C.G.S. §§ 20-279.21(b)(3) and (4).

Am Jur 2d, Automobile Insurance §§ 322, 326, 329.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 104 N.C. App. 783, 411 S.E.2d 152 (1991), affirming an order entered by Barnette, J.,

in the Superior Court, Wake County, on 30 November 1990. Heard in the Supreme Court 11 September 1992.

Bailey & Dixon, by Gary S. Parsons and David S. Coats, for plaintiff-appellant.

Taft, Taft & Haigler, by Mario E. Perez, for defendant-appellee.

FRYE, Justice.

The issue presented in this case is whether the Court of Appeals erred in holding that the underinsured motorist (UIM) coverages provided in an automobile liability insurance policy which listed two automobiles may be aggregated or stacked to compensate a "Class II" insured person for injuries sustained in an automobile accident. The Court of Appeals concluded that a guest who is injured while riding in a motor vehicle driven by the named insured is a "person insured," and therefore entitled to stack the UIM coverages of both vehicles listed in the named insured's policy of insurance. *Nationwide Mutual Insurance Company v. Silverman*, 104 N.C. App. 783, 787, 411 S.E.2d 152, 155 (1991). However, we conclude that since a "Class II" insured person's entitlement to UIM benefits is tied to the vehicle, this "Class II" defendant is not entitled to aggregate or stack the UIM coverages of both automobiles listed in the named insured's policy. Therefore, we reverse the decision of the Court of Appeals.

On 28 July 1988, defendant was injured while a passenger in a 1985 Buick automobile owned and operated by Henry Czubek (Czubek) and insured by plaintiff, Nationwide Mutual Insurance Company (Nationwide). The passengers in the vehicle were: 1) Elsie Czubek, the wife of the driver and a resident of North Carolina; 2) Arlene Pierce, Elsie Czubek's sister and a resident of Maryland; and 3) defendant, the five-year-old granddaughter of Arlene Pierce and a resident of Maryland. At the time of the accident, Czubek's Nationwide policy covered two vehicles, the 1985 Buick involved in the accident and a 1977 Ford truck. The policy of insurance provided UIM coverage in the amount of $100,000 per person and $300,000 per accident for each vehicle listed in the policy.

The other vehicle involved in the accident was owned by James Revels and insured by an automobile liability insurance policy issued by State Auto Insurance Company (State Auto). State Auto tendered its per-accident coverage of $100,000 to all of the claimants who

were occupants of the Czubek vehicle. Defendant received $37,500 of the $100,000 paid by State Auto; however, defendant claims damages in excess of this amount.

On 4 April 1990, Nationwide commenced a declaratory judgment action "seeking a declaration of the rights, status, and relations" of Nationwide and defendant under the policy issued to Czubek. Nationwide also sought a judicial determination that only $100,000 in UIM coverage was available to defendant.

On 17 May 1990, defendant, through her guardian ad litem, filed an answer to Nationwide's complaint and asked the court to enter judgment declaring that the policy provides $200,000 UIM coverage to defendant. Subsequently, Nationwide filed a motion, pursuant to N.C.G.S. § 1A-1, Rule 12(c), for judgment on the pleadings. The motion was heard during the 16 October 1990 Session of Wake County Superior Court. Judge Henry V. Barnette, Jr., entered an order on 30 November 1990 denying plaintiff's motion and granting judgment on the pleadings for defendant. The trial court held that the UIM coverage available to defendant was $200,000. The Court of Appeals affirmed, holding:

> Once the claimant is a "person insured" the ability to stack UIM coverage is available to this claimant. There can be no artificial barriers imposed upon the privilege of stacking; once the claimant here established that she was a "person insured," then the privilege of stacking UIM coverage from both covered vehicles flowed to her. The decision of the trial court correctly recognized that Robyn Silverman, as a guest in the motor vehicle of the named insured, was a "person insured" and was entitled to stack the coverage from both Czubek vehicles totaling $200,000.

Nationwide Mutual Insurance Company v. Silverman, 104 N.C. App. at 787, 411 S.E.2d at 155.

Before reaching the question of whether defendant is entitled to stack the UIM coverages provided in Czubek's policy, we must first determine whether the UIM coverage for each vehicle applies to the injuries she received in the accident. If there is only one coverage, there is nothing to stack.

When trying to determine the amount of UIM coverage available to an injured party, careful attention must be given to the policy language and the applicable statutory provisions. The policy con-

tains definitions of certain terms used in the policy, including the following:

> "**Your covered auto**" means:
>
> 1. Any vehicle shown in the Declarations.
>
> . . . .
>
> "**Family member**" means a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child.

Part D of the policy issued to Czubek addresses uninsured motorist coverage (and by virtue of an endorsement, UIM coverage) and provides in pertinent part:

> We will pay damages which a **covered person** is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> . . . .
>
> "**Covered person**" as used in this Part means:
>
> 1. You or any **family member.**
>
> 2. Any other person **occupying**:
>
> a. **your covered auto**; or
>
> b. any other auto operated by you.

Defendant was a guest in the 1985 Buick shown in the declarations section of the Nationwide policy at the time of her accident. Therefore, the policy language clearly establishes that while riding in the Buick (a "covered auto"), defendant was a "covered person." She does not contend that she is a "family member" as that term is defined in the policy. While both the 1985 Buick and the 1977 Ford are "covered autos" under the general definitions section of the policy, defendant was only *occupying* the Buick automobile at the time of the accident. Therefore, only the UIM coverage on the Buick is available to her under the policy language. This coverage is $100,000 per person.

The applicable statutory provisions are N.C.G.S. § 20-279.21(b)(3) and (4).[1] "Persons insured" is defined in N.C.G.S. § 20-279.21(b)(3) which addresses UM coverage as follows:

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

N.C.G.S. § 20-279.21(b)(3) (1989) (emphasis added). This definition of "persons insured" is incorporated by reference in N.C.G.S. § 20-279.21(b)(4) which addresses UIM coverage. Therefore, the definition of "persons insured" set forth in § 20-279.21(b)(3) applies to both UM and UIM coverage.

The applicable statute establishes that defendant was a "person insured," since she was a guest in a vehicle listed in the policy. However, it is clear that N.C.G.S. § 20-279.21(b)(3) establishes two classes of "persons insured": 1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either, and 2) any person who uses with the consent, expressed or implied, of the named insured, the insured vehicle, and a guest in such vehicle. *Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991); *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 143, 400 S.E.2d 44, 47 (1991).

The first class of insured persons is referred to as "Class I" insureds and includes the named insured, and while resident of the same household, the spouse of the named insured and relatives of either. *Id.* In the instant case, the injured party was not a named insured or spouse, and she was not a family member residing in Czubek's household at the time of the accident. Therefore, she was not a "Class I" insured.

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1. N.C.G.S. § 20-279.21 was amended by the General Assembly in 1991. 1991 N.C. Sess. Laws ch. 646, §§ 1-4. However, the amendments do not affect claims arising or litigation pending prior to the amendments. *Id.* § 4. Unless otherwise noted, any citation to or discussion of N.C.G.S. § 20-279.21 in this opinion will be with respect to that version of the statute in effect at the time of the accident.

[1] The second class of insured persons is referred to as "Class II" insureds and includes any person who uses with the consent, expressed or implied, of the named insured, the insured vehicle, and a guest in such vehicle. *Sproles v. Greene*, 329 N.C. at 608, 407 S.E.2d at 500; *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. at 143, 400 S.E.2d at 47. In the instant case, the injured party was merely a guest in one of the covered vehicles. Therefore, she was a "Class II" insured.

[2] This Court has held that "Class II" insureds are not entitled to the same UIM coverage as "Class I" insureds. *Sproles v. Greene*, 329 N.C. at 610, 407 S.E.2d at 500. Persons who are "members of the second class are 'persons insured' for the purposes of UM and UIM coverage only when the insured vehicle is involved in the insured's injuries." *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. at 143, 400 S.E.2d at 47. Hence, the UIM coverage available to "Class II" insureds is tied to the vehicle occupied by the injured person at the time of the accident.

Defendant was a passenger in Czubek's 1985 Buick when she sustained her injury. Czubek has UIM coverage for the Buick in the amount of $100,000. As a "Class II" person insured, defendant is only entitled to the UIM coverage applicable to the vehicle she was occupying at the time of the accident. The UIM coverage provided for Czubek's 1977 Ford truck is not applicable to this defendant, a "Class II" insured person, because she was not injured while occupying the Ford truck. Thus, defendant has no coverage under this portion of the policy to stack with the UIM coverage on the Buick.

We conclude therefore that under both the policy language and the applicable statutory provisions, the UIM coverage available to defendant in this case is limited to $100,000. The decision of the Court of Appeals to the contrary must be reversed.

REVERSED.

STATE OF NORTH CAROLINA v. ANTHONY LEE McKOY

No. 425A91

(Filed 19 November 1992)

1. Evidence and Witnesses § 1252 (NCI4th)— murder—invocation of right to counsel—mistake in signing form—further questioning

The trial court did not err in a murder prosecution by denying defendant's motion to suppress an inculpatory statement made while in custody where the State's evidence was that defendant waived his *Miranda* rights at an initial interview when he was not under arrest; indicated to officers after he was arrested that he wanted to waive his rights; signed a form at a place indicating that he did not waive his rights; and, after being questioned by officers as to whether he had intentionally signed the waiver form indicating that he did not want to waive his rights, scratched out his first signature, waived his rights, and made a statement. Although defendant contended that there was nothing ambiguous or equivocal about the defendant signing the non-waiver portion of the form and that the officers could not question him further, officers who are conducting a custodial interrogation may make a further inquiry to determine whether the person being interrogated has expressed his true feeling in answering a question when the context in which the answer was given indicates that the person has made a mistake.

Am Jur 2d, Criminal Law § 797.

What constitutes assertion of right to counsel following Miranda warnings: state cases. 83 ALR4th 443, sec. 1.

What constitutes assertion of right to counsel following Miranda warnings: federal cases. 80 ALR Fed 622, supp. sec. 1.

2. Homicide § 380 (NCI4th)— murder—defense of others—necessity—evidence not sufficient

The trial court did not err in a murder prosecution by not charging on self-defense based on the defense of a third person where the evidence does not support a finding that there could have been a reasonable belief in the mind of a

person of ordinary firmness that it was necessary to stab the victim in order to defend the third person.

Am Jur 2d, Homicide §§ 291, 519-521.

Construction and application of statutes justifying the use of force to prevent the use of force against another. 71 ALR4th 940.

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, sec. 1.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for first degree murder entered by Jenkins, J., at the 18 February 1991 Criminal Session of Superior Court, Lee County, upon a jury verdict of guilty of first degree murder. Defendant's motion to bypass the Court of Appeals as to additional judgment allowed by the Supreme Court 6 January 1992. Heard in the Supreme Court 9 September 1992.

The defendant was tried for his life for first degree murder. He was also tried in the same action for felonious larceny. The State's evidence showed that the body of William Frank Buchanan was found at his residence in Sanford on 11 January 1990 by his sister and his niece. Mr. Buchanan had been stabbed in the back and strangled with a bedsheet.

Kevin Gray and James Eads, detectives with the Sanford Police Department, testified that they arrested the defendant on 16 January 1990. They testified further that defendant first told them that he killed Mr. Buchanan for money and that he acted alone. He then changed his story and said a person named Tim Judd went with him to Mr. Buchanan's home on the night of 10 January 1990. The defendant told the detectives that Judd and Mr. Buchanan quarreled and Mr. Buchanan advanced on Judd with a knife. The defendant said that he took the knife from Mr. Buchanan who then seized a lamp and tried to hit Judd with it. At that time, the defendant stabbed Mr. Buchanan in the back with the knife. Mr. Buchanan fell to the floor and the defendant then choked him with the bedsheet. Tim Judd testified he was not in Mr. Buchanan's home during the night in which Mr. Buchanan was killed.

The defendant was convicted of first degree murder and felonious larceny. The jury recommended that the defendant be sentenced to life in prison and this sentence was imposed. The court imposed a sentence of ten years on the felonious larceny conviction to commence at the expiration of the life sentence.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

[1] The defendant first assigns error to the denial of a motion to suppress an inculpatory statement he made while he was in custody on the ground that he did not waive his right to counsel before making the statement. *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). A hearing on this motion was held prior to the trial of the case.

The State's evidence showed that Mr. Eads and Mr. Gray interviewed the defendant on 12 January 1990, at which time the defendant was not under arrest. The officers warned him of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), and the defendant signed a written waiver of these rights. The defendant denied any involvement on 10 January 1990 with Mr. Buchanan. On 16 January 1990 an arrest warrant was issued for the defendant and the two officers placed him under arrest.

After the defendant was arrested on 16 January 1990, he was again warned of his *Miranda* rights and he indicated to the officers that he wanted to waive them. A waiver form was submitted to the defendant and he signed on the form at a place which indicated he did not waive his rights.

The officers then questioned the defendant as to whether he had intentionally signed the waiver form at a place which indicated he did not want to waive his rights under *Miranda*. Mr. Eads testified:

> I asked Mr. McKoy if he had made a mistake. And he looked at me and I informed him he had signed a non-waiver which stated he either did not desire to talk to us or answer any of the questions or he desired his lawyer. I questioned him

to see whether he still wanted to talk to us or whether he desired his lawyer. He declined to either have his lawyer present, and still desired to answer our questions, at which time he signed the top line and then scratched out his name in his own hand at the bottom of the page.

The defendant testified that he told the officers that he did not want to answer any questions and he wanted an attorney. He also testified that the officers continued to question him after he had signed the waiver form, but he refused to answer any questions.

At the conclusion of the hearing, the court made findings of fact consistent with the State's evidence. It found that the defendant had made a mistake when he signed the form in a place which indicated he did not want to waive his rights. The court ordered that the defendant's statement to the officers could be introduced into evidence.

The defendant, relying on *Miranda*, contends that when he signed the non-waiver portion of the form, this indicated to the officers that he did not want to talk to them and that he wanted an attorney. At that time, says the defendant, all interrogation had to cease and nothing he said after that could be used against him. The defendant argues further that *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, establishes the rule that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Id.*, 451 U.S. at 484, 68 L. Ed. 2d at 386. The defendant says that when he signed the non-waiver portion of the form, the officers could not question him further and his statements made after he had invoked his right to remain silent and have an attorney cannot be used to show he had waived those rights.

The superior court found that the defendant made a mistake when he signed the portion of the form which showed he did not waive his *Miranda* rights. This finding was supported by the evidence. The question posed by this assignment of error is whether officers who are conducting a custodial interrogation may make a further inquiry to determine whether the person being interrogated has expressed his true feeling in answering a question when the context in which the answer was given indicates such a person has made

a mistake. We hold that such an inquiry may be made. We believe such a rule promotes the interests protected by *Miranda* and its progeny. It enhances the search for the truth and it does not infringe on a person's right not to be a witness against himself and to be represented by an attorney.

The defendant concedes that if the person being interrogated makes an ambiguous or equivocal statement as to whether he waives his *Miranda* rights, it has been held that the interrogator may ask questions to clarify the answer. *See State v. Torres*, 330 N.C. 517, 412 S.E.2d 20 (1992); *Ruffin v. United States*, 524 A.2d 685 (D.C. App. 1987), *cert. denied*, 486 U.S. 1057, 100 L. Ed. 2d 927 (1988). He says these cases are not applicable to this case because there was nothing ambiguous or equivocal about the defendant's statement. We believe the same rule should apply. If there is evidence, in the context in which an answer is given, that the person being interrogated made a mistake in the way he answered, the interrogator should be allowed to ask questions which will clarify the answer.

This assignment of error is overruled.

[2] The defendant next assigns error to the court's failure to charge on self-defense based on the defense of a third person. The defendant bases this argument on the statement made by the defendant to the two officers who interrogated him on 16 January 1990. The defendant told the officers that Mr. Buchanan had quarreled with Tim Judd and advanced on Mr. Judd with a knife. The defendant said he took the knife from Mr. Buchanan. Mr. Buchanan then started to hit Mr. Judd with a lamp, at which time the defendant stabbed Mr. Buchanan in the back with the knife.

A person has the right to kill not only in his own self-defense but also in the defense of another. *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461 (1961). A person may lawfully do in another's defense, however, only what the other might lawfully do in his own defense. *State v. McLawhorn*, 270 N.C. 622, 155 S.E.2d 198 (1967).

The defendant contends that on the evidence he was entitled to an instruction on self-defense for his defense of Judd. We have held that there are two types of self-defense. One type is called perfect self-defense which excuses a killing altogether. We also have what we have called imperfect self-defense which may reduce

murder to voluntary manslaughter. *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982). In order to have either perfect or imperfect self-defense, the evidence must show that it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself or another from death or great bodily harm. It must also appear that the defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992); *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981).

We hold that there was not sufficient evidence in this case to warrant a charge on either perfect or imperfect self-defense. The defendant's argument fails in that the evidence does not support a finding that there could have been a reasonable belief in the mind of a person of ordinary firmness that it was necessary to stab Mr. Buchanan in order to defend Mr. Judd. The defendant had taken the knife from Mr. Buchanan a few minutes before he said the assault on Mr. Judd occurred. It should have been easier to take the lamp. The evidence does not show the age or size of Mr. Judd, but it does show the defendant was 27 years of age at the time of the incident. Mr. Buchanan was 64 years of age, five feet nine inches tall and weighed 166 pounds. A reasonable man with a mind of ordinary firmness could not have believed it necessary to launch a deadly assault on Mr. Buchanan if Mr. Buchanan was attempting to use a lamp as a weapon against Mr. Judd. There were two men present to defend against the assault. The defendant should have known, as a reasonable man would have known, that without too much difficulty the two men could have defended against the assault by Mr. Buchanan without resorting to deadly force.

This assignment of error is overruled.

NO ERROR.

LINDA SORRELLS, ADMINISTRATRIX OF THE ESTATE OF TRAVIS CAIN SORRELLS v. M.Y.B. HOSPITALITY VENTURES OF ASHEVILLE, D/B/A RHAPSODY'S FOOD AND SPIRITS

No. 153PA92

(Filed 19 November 1992)

Intoxicating Liquor § 43 (NCI4th)— serving drunken patron—contributory negligence—dismissal proper

The trial court did not err, as the Court of Appeals held, by dismissing plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6) where decedent was killed after losing control of his vehicle and striking a bridge abutment and plaintiff, the administratrix of decedent's estate, brought an action against defendant alleging negligence and gross negligence based on serving alcohol to an intoxicated consumer with knowledge that the consumer would thereafter drive and cause injuries that were reasonably foreseeable. Plaintiff's negligence claim would be barred by contributory negligence in that decedent drove while impaired. The rule that decedent's contributory negligence is not a bar to recovery if defendant's acts were sufficient to establish willful and wanton negligence does not apply because, to the extent that the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of decedent.

Am Jur 2d, Intoxicating Liquors §§ 553-614.

Right to recover under civil damage or dramshop act for death of intoxicated person. 64 ALR2d 705.

Contributory negligence allegedly contributing to cause of injury as defense in Civil Damages Act proceeding. 64 ALR3d 849, sec. 1.

Liability of persons furnishing intoxicating liquor for injury to or death of consumer outside coverage of civil damage acts. 98 ALR3d 1230.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 105 N.C. App. 705, 414 S.E.2d 372 (1992), reversing an order entered by Hyatt, J., in the Superior Court, Haywood County, at the 1 January 1991 Administrative Ses-

sion, granting defendant's Rule 12(b)(6) motion to dismiss. Heard in the Supreme Court 7 October 1992.

Russell L. McLean, III, for plaintiff-appellee.

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

FRYE, Justice.

Defendant contends that the Court of Appeals erred in reversing the trial court's order granting defendant's Rule 12(b)(6) motion to dismiss. The underlying issue in this case is whether the personal representative of the estate of a twenty-one-year-old who was fatally injured as a result of driving while in a highly intoxicated state may recover in a wrongful death action against the seller of the alcohol. We hold that recovery in this case is barred. Therefore, we reverse the decision of the Court of Appeals and remand for reinstatement of the trial court's order dismissing plaintiff's complaint.

I.

In evaluating a Rule 12(b)(6) motion to dismiss, we must take the factual allegations in plaintiff's complaint as true. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 286, 395 S.E.2d 85, 87 (1990). The allegations of the complaint establish the following facts: On or about 21 May 1990, Travis Cain Sorrells, the twenty-one-year-old decedent, and three friends went to Rhapsody's Food and Spirits, defendant's place of business in Asheville, North Carolina. Upon arrival at Rhapsody's, the decedent ordered and then consumed a shot of tequila. Thereafter, the decedent attempted to order another drink. Upon being informed by one of the decedent's friends (Carla Jacobson) that the decedent was driving and should not be served any more alcohol, the waitress refused to accept decedent's order for another drink.

When the decedent and a male friend ("Tim") left the table to visit the restroom, the waitress returned to the table to find out whether the two young men really wanted another drink. The waitress was told that the decedent was driving and had already had enough to drink. After the men returned to the table, the waitress checked on the group again. The decedent told the waitress that he wanted another shot of tequila. At that point, the waitress asked who was driving. She was again advised that the decedent was driving and that he should not be served another drink. At

that time, both men were highly intoxicated and showed visible signs of impairment.

A few minutes later, the decedent and Tim went to the restroom again, stopping at the bar on their way back to the table. The waitress returned to their table to inform the two young women there that the decedent and Tim had ordered drinks at the bar. She further stated that she told the manager that she had been advised not to serve the men but the manager told the bartender to go ahead and serve them. The decedent was served a glass of "Ice Age Tea," a large drink made with various liquors and alcoholic spirits.

After the decedent finished his drink, his companions asked him not to drive home and offered to have someone else drive him. The decedent refused these requests and proceeded to drive himself. While on Interstate Highway 26, he lost control of the vehicle, struck a bridge abutment and was killed.

Plaintiff, the administratrix of the decedent's estate, sued defendant for wrongful death, alleging negligence and gross negligence. The trial court granted defendant's Rule 12(b)(6) motion to dismiss based on decedent's contributory negligence. Plaintiff appealed to the Court of Appeals, which reversed the trial court and remanded the case for trial. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 105 N.C. App. 705, 414 S.E.2d 372 (1992). We allowed defendant's petition for discretionary review. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 331 N.C. 555, 417 S.E.2d 803 (1992).

II.

Our wrongful death statute, N.C.G.S. § 28A-18-2, provides that the fiduciary of an estate may only pursue such actions for damages as the decedent could have brought had he lived. *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984). The question before us now is whether decedent could have brought a negligence action against defendant had he lived.

Plaintiff bases this action on the premise that defendant was negligent in two ways: first, by "violat[ing] N.C.G.S. 18B" and second, by serving alcohol to an intoxicated consumer with knowledge that the consumer would thereafter drive and cause injuries that were reasonably foreseeable. We have recognized that both of these bases may support a recovery for injuries to third parties. *See Clark v. Inn West*, 324 N.C. 415, 379 S.E.2d 23 (1989) (N.C.G.S.

§ 18B-121 creates a cause of action for damages for injuries to an "aggrieved person"); *Hart v. Ivey*, 332 N.C. 299, 420 S.E.2d 174 (1992) (complaint against a social host who served alcohol to a person who drove while intoxicated and injured a third party stated a claim for negligence at common law). However, we conclude that defendant's motion to dismiss was properly granted since plaintiff's complaint "discloses an unconditional affirmative defense which defeats the claim asserted [and] pleads facts which deny the right to any relief on the alleged claim." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 166 (1970).

In this state, a plaintiff's contributory negligence is a bar to recovery from a defendant who commits an act of ordinary negligence. *Adams v. Board of Education*, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958). The Superior Court and the Court of Appeals both found that the allegation that decedent drove his vehicle while impaired established contributory negligence as a matter of law. *Sorrells*, 105 N.C. App. at 707, 414 S.E.2d at 374. Thus, plaintiff's claim would be barred if defendant was merely negligent.

However, plaintiff argues and the Court of Appeals held that defendant's acts of serving the visibly intoxicated decedent alcohol after being requested to refrain from serving him were sufficient to constitute willful and wanton negligence, such that the decedent's contributory negligence would not act as a bar to recovery. *Id.* at 708, 414 S.E.2d at 374. While we recognize the validity of the rule upon which the Court of Appeals relied, we do not find it applicable in this case. Instead, we hold that plaintiff's claim is barred as a result of decedent's own actions, as alleged in the complaint, which rise to the same level of negligence as that of defendant.

It is admitted in this case that decedent, a willing consumer of alcohol, drove his vehicle while highly intoxicated. He did so in violation of N.C.G.S. § 20-138.1. That statute provides that one who drives on a highway "[w]hile under the influence of an impairing substance" commits the misdemeanor offense of impaired driving. This Court has held that a willful violation of this statute constitutes culpable negligence. *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985). Proof of both a willful violation of the statute and a causal connection between the violation and a death is all that is needed to support a successful prosecution for manslaughter. *Id.* at 636, 336 S.E.2d at 92. Plaintiff cannot dispute

either of these elements under the facts as alleged in the complaint. In fact, to the extent the allegations in the complaint establish more than ordinary negligence on the part of defendant, they also establish a similarly high degree of contributory negligence on the part of the decedent. Thus, we conclude that plaintiff cannot prevail.

In reaching our decision, we note that the same result has been reached by a majority of states that have considered this issue. *See, e.g., Smith v. The 10th Inning, Inc.*, 49 Ohio 3d 289, 551 N.E.2d 1296 (1990) (Supreme Court of Ohio held that an intoxicated patron has no cause of action against a liquor permit holder where the injury sustained by the patron off the premises of the permit holder was proximately caused by the patron's own intoxication); *Davis v. Stinson*, 508 N.E.2d 65 (Ind. App. 4 Dist. 1987) (an intoxicated driver's operation of an automobile upon a public highway constitutes willful and wanton misconduct which bars recovery against the provider of alcohol for injuries to the driver); *Sheehy v. Big Flats Community Day, Inc.*, 73 N.Y.2d 629, 636, 543 N.Y.S.2d 18, 22, 541 N.E.2d 18, 22 (1989) ("the courts of this State have consistently refused to recognize a common-law cause of action against providers of alcoholic beverages in favor of persons injured as a result of their own voluntary intoxication."); *Bertelmann v. Taas Associates*, 69 Haw. 95, 100, 735 P.2d 930, 933 (1987) (Supreme Court of Hawaii rejected "the contention that intoxicated liquor consumers can seek recovery from the bar or tavern which sold them alcohol. Drunken persons who harm themselves are solely responsible for their voluntary intoxication and cannot prevail under a common law or statutory basis."); *Reed v. Black Caeser's Forge Gourmet Restaurant, Inc.*, 165 So.2d 787, 788 (Fla. App. 1964), *cert. denied*, 172 So.2d 597 (Fla. 1965) (Complaint did not state a cause of action because "the death of the plaintiff's husband was the result of his own negligence or his own voluntary act of rendering himself incapable of driving a car rather than the remote act of the defendant in dispensing the liquor[.]").

Accordingly, plaintiff's wrongful death claim against the provider of the alcohol is barred by the decedent's own actions as alleged in the complaint. Thus, the trial court correctly dismissed plaintiff's complaint pursuant to Rule 12(b)(6).

The decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for reinstatement of the trial court's order dismissing plaintiff's complaint.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. KENNETH ODELL HUCKS

No. 157A92

(Filed 19 November 1992)

1. **Evidence and Witnesses § 84 (NCI4th)— murder victim's wife—recent heart attack—relevancy**

Evidence tending to show that a murder victim's wife had recently suffered a heart attack was relevant and admissible for the purpose of showing why she and the victim had communicated with each other by telephone, causing her to know that he was killed after 3:45 p.m. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence § 253.

2. **Evidence and Witnesses § 621 (NCI4th)— identification testimony—waiver of right to contest on constitutional grounds**

Defendant waived the right to contest the admissibility of a witness's identification of defendant at trial on the ground that it was the result of unconstitutionally suggestive pretrial identification procedures by failing to challenge this evidence by one of the methods provided in N.C.G.S. Ch. 15A, Art. 53.

Am Jur 2d, Appeal and Error §§ 601, 602; Trial §§ 405, 406.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgment entered by Bowen, J., on 4 December 1991, in the Superior Court, Robeson County, sentencing the defendant to life imprisonment for murder in the first degree. Submitted to the Supreme Court on 8 October 1992 without oral argument, by motion of the parties, pursuant to Rule 30(d) of the North Carolina Rules of Appellate Procedure.

Lacy H. Thornburg, Attorney General, by Jeffery P. Gray, Assistant Attorney General, for the State.

Donald W. Bullard for the defendant-appellant.

MITCHELL, Justice.

This is the defendant's second appeal of this case. On his first appeal, this Court ordered a new trial for errors committed in the trial court. *State v. Hucks*, 323 N.C. 574, 374 S.E.2d 240 (1988). Thereafter, the defendant was retried in a non-capital trial upon a proper bill of indictment charging him with murder and entered a plea of not guilty. The jury found the defendant guilty of murder in the first degree and the trial court imposed a sentence of life imprisonment. The defendant appealed to this Court as a matter of right.

The State's evidence tended to show *inter alia* that the victim, Earl Allen, owned and operated a jewelry store in St. Pauls, North Carolina. He left home to go to the store at approximately 8:00 a.m. on Saturday, 5 October 1985. During that day, he called his wife several times to check on her because she was recuperating from a heart attack. She last talked with him around 3:45 p.m.

Peggy Holloman Owens entered the jewelry store on 5 October 1985 to have her watch repaired. While she was there, the defendant and another man entered the store and looked around before going back outside. As Owens left, she saw the defendant and the other man go back into the jewelry store.

Mildred Durham Couthen and Mike Hicks entered Earl Allen's jewelry store at approximately 3:45 p.m. on 5 October 1985 to pick up a watch and bracelet. They saw the defendant and another man behind the jewelry counter. The defendant said, "bye, see you later," as he came out from behind the counter and left the store.

After the two men left the store, Mildred Couthen realized that something was wrong and called out for Earl Allen. When he did not answer, she stepped out of the store onto the sidewalk and saw the defendant and the other man start running. One of the men was carrying a brown paper bag.

Mildred Couthen reentered the store and found Earl Allen lying on the floor behind the counter with blood on his face. She told Mike Hicks that Allen had been shot and ran next door to

call an ambulance. An ambulance arrived and took Allen to a hospital, where he died. Dr. Bob Barcus Andrews, a pathologist, performed an autopsy on the body of the victim. He identified the cause of death as a gunshot wound to the victim's head.

A search of the defendant's residence pursuant to a search warrant yielded several watches from the victim's jewelry store. When the defendant was arrested, he stated that the watch he was wearing was one of the watches that came from the robbery. Extensive additional evidence was introduced for the State. In light of the issues presented by the defendant on appeal, however, it is unnecessary to review that evidence here. The jury found the defendant guilty of murder in the first degree, and the trial court entered judgment sentencing him to life imprisonment.

By an assignment of error, the defendant contends that the medical condition of Melba Allen on the day her husband was murdered was irrelevant and immaterial to any issue arising during the trial of this case. He argues that the admission of this evidence was error tending to incense the jury against him and worked to his substantial prejudice.

[1] Evidence is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). The evidence in the present case tending to show that the victim's wife had recently suffered a heart attack was relevant and admissible for the purpose of showing why she and the victim had communicated with each other by telephone, causing her to know that he was killed after 3:45 p.m. *See State v. Roper*, 328 N.C. 337, 402 S.E.2d 600, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991); *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989). This assignment of error is without merit.

[2] By another assignment of error, the defendant contends that the trial court committed reversible error by failing to conduct a *voir dire* hearing to determine whether the identification of the defendant at trial by witness Linda McGee was the result of unconstitutionally suggestive pretrial identification procedures. The defendant candidly acknowledges that he failed to challenge this evidence by one of the methods provided in Article 53 of Chapter 15A of the General Statutes. His failure to do so constitutes a waiver of any right to contest the admissibility of the evidence

in question on constitutional grounds. *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984). Accordingly, this assignment of error is overruled.

The defendant has brought forward other assignments of error on appeal but has not supported them with argument or authority. As a result, those assignments are deemed abandoned under Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976).

For the foregoing reasons, we conclude that the defendant's trial was free of prejudicial error.

No error.

STATE OF NORTH CAROLINA, EX REL. BEVERLY WILLIAMS, MOTHER OF LATOYA RASHUNDA WILLIAMS, MINOR CHILD v. WILLIAM EARL COPPEDGE

No. 129A92

(Filed 19 November 1992)

Appeal of right by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 105 N.C. App. 470, 414 S.E.2d 81 (1992), finding no error in the trial and affirming a judgment entered 17 September 1990 by Allen (Claude W., Jr.), J., in District Court, Franklin County. Plaintiff's petition for discretionary review of additional issue pursuant to N.C.G.S. § 7A-31(a), N.C. R. App. P. 15(a) and 16(a), was allowed. Heard in the Supreme Court on 8 October 1992.

Lacy H. Thornburg, Attorney General, by T. Byron Smith, Assistant Attorney General, for the State, plaintiff-appellant.

No counsel contra.

PER CURIAM.

This is an action, brought pursuant to Article 9, Chapter 110, and Article 3, Chapter 49, of the North Carolina General Statutes, to establish paternity of an illegitimate child and to require defendant to support the child and to reimburse the State for past public assistance provided to the child. At trial the jury found defendant not to be the child's father, and a judgment was entered accordingly in favor of defendant. A majority of the Court of Appeals, Judge Walker dissenting, found no error in the trial and affirmed the judgment.

Plaintiff's petition for discretionary review of an additional issue was improvidently allowed.

For the reasons given in Judge Walker's dissenting opinion, the decision of the Court of Appeals is reversed and the matter remanded to that court for further remand to the District Court, Franklin County, for a new trial.

PETITION FOR DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED; REVERSED AND REMANDED; NEW TRIAL.

BRUCE McKINNON MEYERS v. DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA AND THE STATE PERSONNEL COMMISSION OF THE STATE OF NORTH CAROLINA

No. 119A92

(Filed 19 November 1992)

On appeals by the defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 105 N.C. App. 665, 415 S.E.2d 70 (1992), which affirmed the order entered 10 October 1990 by Brown (Frank R.), J., in Superior Court, Craven County. Heard in the Supreme Court on 5 October 1992.

David P. Voerman, for plaintiff-appellee.

Lacy H. Thornburg, Attorney General, by Ann Reed, Senior Deputy Attorney General, for defendant-appellant Department of Human Resources of the State of North Carolina.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for defendant-appellant The State Personnel Commission of the State of North Carolina.

PER CURIAM.

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

On 24 June 1992, this Court allowed the petition of the defendant-appellant, State Personnel Commission, for discretionary review of the additional issue as to whether the Personnel Commission is a necessary party. We now determine that discretionary review of that issue was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ANDRE LEONARD AND RENEE LEONARD v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 40A92

(Filed 19 November 1992)

On appeal by the defendant pursuant to N.C.G.S. § 7A-30(2) from a divided panel of the Court of Appeals, 104 N.C. App. 665, 441 S.E.2d 178 (1991), affirming the judgment of Henderson, J., entered 6 December 1990 in Superior Court, Nash County. Heard in the Supreme Court 8 September 1992.

This is an action to determine whether the underinsured motorist coverages in an insurance policy issued by the defendant may be stacked. The Court of Appeals held that the coverages may be stacked. The defendant appealed.

Duffus and Associates, P.A., by J. David Duffus, Jr., for defendant appellee.

Nichols, Caffrey, Hill, Evans and Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant appellant.

PER CURIAM.

We reverse the decision of the Court of Appeals for the reasons stated in *Nationwide Mutual Insurance Company v. Robyn Silverman*, a minor child, by and through her guardian ad litem, Leesa Radja, No. 36PA92, filed today.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. HOWARD LEE BROOKS, A/K/A HAROLD LEE BROOKS, JR., AND JAMES ANTHONY DAVIS

No. 475PA91

(Filed 19 November 1992)

On discretionary review for defendant Davis and on writ of certiorari for defendant Brooks to review an unpublished opinion of the Court of Appeals, 104 N.C. App. 139, 408 S.E.2d 762 (1991), finding no error in the defendants' convictions and sentences by Rousseau, J., on 2 May 1990 in Superior Court, Forsyth County. Heard in the Supreme Court 8 October 1992.

Lacy H. Thornburg, Attorney General, by Angelina M. Maletto, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant appellant Howard Lee Brooks.

David F. Tamer for defendant appellant James Anthony Davis.

PER CURIAM.

Discretionary review and writ of certiorari improvidently allowed.

STATE OF NORTH CAROLINA v. LARRY FAISON

No. 521PA91

(Filed 19 November 1992)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion by the Court of Appeals finding no error in the judgments of Allsbrook, J., entered at the 18 February 1991 Criminal Session of Superior Court, Halifax County. Heard in the Supreme Court 7 October 1992.

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

Glover & Petersen, P.A., by James R. Glover; and Johnson & Jones, by Bruce C. Johnson, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MICHAEL WAYNE ADAMS v. JOSEPH SCOTT LOVETTE

No. 52A92

(Filed 19 November 1992)

Appeal by the plaintiff pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 105 N.C. App. 23, 411 S.E.2d 620 (1992), affirming orders entered 23 February 1990 by Johnson (E. Lynn), J., and 2 November 1990, by Weeks, J., in the Superior Court, Cumberland County. Heard in the Supreme Court on 5 October 1992.

Rand, Finch & Gregory, P.A., by Thomas Henry Finch, Jr., for the plaintiff-appellant.

Singleton, Murray, Craven & Inman, by Rudolph G. Singleton, Jr., for the defendant-appellee.

PER CURIAM.

Affirmed.

LAKE FOREST, INC. v. CAROLYN T. WILLIAMS

No. 68PA92

(Filed 19 November 1992)

On writ of certiorari, pursuant to N.C.G.S. § 7A-32(b), to review an unpublished opinion of the Court of Appeals, 104 N.C. App. 802, 411 S.E.2d 205 (1991), reversing a judgment entered by Rice, J., on 14 September 1990, in District Court, New Hanover County. Heard in the Supreme Court 6 October 1992.

Murchison, Taylor, Kendrick, Gibson & Davenport, by John L. Coble, for plaintiff-appellee.

Shipman & Lea, by Gary K. Shipman and Jennifer L. Umbaugh, for defendant-appellant.

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

SUSAN DALE SPRY v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION

No. 95A92

(Filed 19 November 1992)

Appeal by plaintiff pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 105 N.C. App. 269, 412 S.E.2d 687 (1992), reversing a judgment for plaintiff in the sum of $454,910.00 entered by Booker, J., on 7 March 1990 in Superior Court, Forsyth County. Heard in the Supreme Court 7 October 1992.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff appellant.

Womble Carlyle Sandridge & Rice, by Anthony H. Brett, for defendant appellee.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., Ann L. Majestic, Allison B. Schafer, and Jonathan A. Blumberg, for the North Carolina School Boards Association, amicus curiae.

PER CURIAM.

AFFIRMED.

WILSON FORD TRACTOR, INC., PLAINTIFF v. MASSEY-FERGUSON, INC., DEFENDANT v. THURMAN ALLEN BASS AND WIFE, BARBARA D. BASS, ADDITIONAL PARTY DEFENDANTS

No. 144PA92

(Filed 19 November 1992)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous opinion by the Court of Appeals, 105 N.C. App. 570, 414 S.E.2d 43 (1992), affirming the judgment of Brown (Frank R.), J., entered 20 November 1990 in the Superior Court, Wilson County. Heard in the Supreme Court 8 October 1992.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Robin K. Vinson, for plaintiff-appellant and additional party defendant-appellants.

Everett, Everett, Warren & Harper, by Edward J. Harper, II, for defendant-appellee.

PER CURIAM.

AFFIRMED.

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

IN THE MATTER OF: JULIE ANN MURPHY AND STEPHANIE MURPHY

No. 151A92

(Filed 19 November 1992)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(1) from a unanimous decision of the Court of Appeals, 105 N.C. App. 651, 414 S.E.2d 396 (1992), which affirmed the judgment and order entered 9 January 1991 by Osborne, J., in District Court, Yadkin County terminating the parental rights of respondent. Heard in the Supreme Court on 2 November 1992.

W. Lee Zachary, Jr., for respondent-appellant.

Richard N. Randleman, for petitioner-appellee.

Shore, Hudspeth & Harding, P.A., by Benjamin H. Harding, Jr., Guardian Ad Litem for the Juveniles.

PER CURIAM.

AFFIRMED.

BEAVER v. HAMPTON

No. 242PA92

Case below: 106 N.C.App. 172

Petition by unnamed defendant (Nationwide) for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

BROOKS v. GIESEY

No. 302A92

Case below: 106 N.C.App. 586

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16 as to additional issues denied 18 November 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

CANADY v. MANN

No. 349PA92

Case below: 107 N.C.App. 252

Petition by defendants (Brinn and Carolina Lakes Corporation) for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

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

No. 343PA92

Case below: 107 N.C.App. 278

Petition by defendant for writ of supersedeas allowed 18 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

CARSON v. TOWNSEND

No. 220P92

Case below: 106 N.C.App. 231

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

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

CRUMP v. BOARD OF EDUCATION

No. 363P92

Case below: 107 N.C.App. 375

Motion by defendants to dismiss appeal for lack of substantial constitutional question allowed 18 November 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

DEBNAM v. N.C. DEPARTMENT OF CORRECTION

No. 397PA92

Case below: 107 N.C.App. 517

Petition by defendant for writ of supersedeas allowed 23 November 1992. Appeal filed by defendant pursuant to G.S. 7A-30 retained 23 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 23 November 1992.

EDWARDS v. UNIVERSITY OF NORTH CAROLINA

No. 377P92

Case below: 107 N.C.App. 606

Petition by defendant for temporary stay allowed 26 October 1992.

HARLEYSVILLE INSURANCE CO. v. POOLE

No. 332P92

Case below: 107 N.C.App. 234

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 19 October 1992.

HOLLOWELL v. HOLLOWELL

No. 333PA92

Case below: 107 N.C.App. 166

Petition by several defendants for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

IRA EX REL. OPPENHEIMER v. BRENNER COMPANIES, INC.

No. 321P92

Case below: 107 N.C.App. 16

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

JOHNSON v. SIMS

No. 266P92

Case below: 106 N.C.App. 493

Petition by defendant (Allstate Insurance Co.) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

LUSK v. CRAWFORD PAINT CO.

No. 227PA92

Case below: 106 N.C.App. 292

Petition by defendants (Ruscon Corp., George W. Kane, Inc., Carolina Steel Corp., Crawford Paint Co.) for discretionary review pursuant to G.S. 7A-31 allowed 18 November 1992.

MITCHELL v. GOLDEN

No. 380A92

Case below: 107 N.C.App. 413

Petition by defendants for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to additional issues allowed as to 2nd issue only, otherwise denied 18 November 1992.

MOORE v. WYKLE

No. 331P92

Case below: 107 N.C.App. 120

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

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

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

No. 290PA92

Case below: 106 N.C.App. 475

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 18 November 1992.

NCNB NATIONAL BANK v. LYNN

No. 334P92

Case below: 107 N.C.App. 302

Petition by defendant (Bob Dunn Ford, Inc.) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

PERRY-GRIFFIN FOUNDATION v. PROCTOR

No. 374P92

Case below: 107 N.C.App. 528

Petition by defendant (Jimmie C. Proctor) for writ of supersedeas and temporary stay denied 22 October 1992.

RYLES v. DURHAM COUNTY HOSPITAL CORP.

No. 373P92

Case below: 107 N.C.App. 454

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992. Amended petition filed by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992. Motion to dismiss and strike by defendant and response to plaintiff's amendment to petition for discretionary review dismissed 18 November 1992.

STATE v. ATTAWAY

No. 361P92

Case below: 107 N.C.App. 489

Motion by Attorney General to dismiss appeal by defendant for lack of substantial constitutional question allowed 18 November

1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. BELL

No. 267P92

Case below: 106 N.C.App. 493

Motion by Attorney General to dismiss appeal by defendant (Roger Emanuel) for lack of substantial constitutional question allowed 18 November 1992. Petition by defendant (Roger Emanuel) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. BOND

No. 238P92

Case below: 105 N.C.App. 443

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 November 1992.

STATE v. CAMPBELL

No. 339P92

Case below: 107 N.C.App. 302

Motion by Attorney General to dismiss appeal by defendant for lack of substantial constitutional question allowed 18 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992. Motion by defendant to amend record on appeal dismissed 18 November 1992.

STATE v. COWELL

No. 258P92

Case below: 106 N.C.App. 494

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. CRUMMY

No. 357P92

Case below: 107 N.C.App. 305

Motion by Attorney General to dismiss appeal by defendants for lack of substantial constitutional question allowed 18 November 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992. Defendants' supplement to Notice of Appeal and Petition for Discretionary Review dismissed 18 November 1992.

STATE v. FLOWE

No. 370P92

Case below: 107 N.C.App. 468

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. HEATH

No. 289P92

Case below: 106 N.C.App. 706

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. HOLDEN

No. 231P92

Case below: 106 N.C.App. 244

Motion by Attorney General to dismiss appeal by defendant for lack of substantial constitutional question allowed 18 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. MAPP

No. 208P92

Case below: 106 N.C.App. 232

Motion by Attorney General to dismiss appeal by defendant for lack of substantial constitutional question allowed 18 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. MEBANE

No. 309P92

Case below: 106 N.C.App. 516

Motion by Attorney General to dismiss appeal by defendants for lack of substantial constitutional question allowed 18 November 1992. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. MOORE

No. 283P92

Case below: 107 N.C.App. 388

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 18 November 1992.

STATE v. PAKULSKI

No. 275P92

Case below: 106 N.C.App. 444

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. QUICK

No. 299P92

Case below: 106 N.C.App. 548

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. SUTTON

No. 188P92

Case below: 106 N.C.App. 230

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE v. TYSON

No. 307P92

Case below: 106 N.C.App. 707

Motion by Attorney General to dismiss appeal by defendant for lack of substantial constitutional question allowed 18 November 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE EX REL. UTILITIES COMM. v.
CAROLINA UTILITY CUST. ASSN.

No. 209P92

Case below: 106 N.C.App. 218

Petition by defendant (Piedmont Natural Gas Co.) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE EX REL. UTILITIES COMM. v.
CAROLINA UTILITY CUST. ASSN.

No. 225P92

Case below: 106 N.C.App. 306

Petition by defendant (Piedmont Natural Gas Co.) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

STATE EX REL. UTILITIES COMM. v.
CAROLINA UTILITY CUST. ASSN.

No. 279P92

Case below: 106 N.C.App. 491

Petition by plaintiff (N.C. Natural Gas Corp.) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

THACKER v. THACKER

No. 375P92

Case below: 107 N.C.App. 479

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

THOMCO REALTY, INC. v. HELMS

No. 328P92

Case below: 107 N.C.App. 224

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

WERK v. FAROUCHE, INC.

No. 348P92

Case below: 107 N.C.App. 304

Petition by defendant (Virginia M. Spicher) for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

YARBOROUGH & CO. v. E. I. DU PONT DE NEMOURS

No. 254P92

Case below: 106 N.C.App. 396

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 18 November 1992.

APPENDIX

AMENDMENT RELATING TO THE
CLIENT SECURITY FUND

AMENDMENT RELATING TO THE 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 October 23, 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 published in 311 N.C. 776, and in 331 N.C. 808 be and the same are hereby amended as follows:

The Rules for administration and governance for the North Carolina State Bar Client Security Fund are amended in the following respects:

1. By adding at the end of Rule 17.7 a sentence reading as follows: "The foregoing limitations shall apply in those cases in which the first claim alleging Dishonest Conduct of an Attorney is filed after June 26, 1992."

2. By inserting a new Rule, designated Rule 17.11, reading as follows:

17.11(a) If the Board receives, or believes that it may receive, claims from more than one Applicant based upon alleged Dishonest Conduct of one Attorney in amounts, in the aggregate, exceeding $100,000, the Board may, in its discretion, publish written notice (the "Notice") in a newspaper published, or of general circulation, in the County in which the Attorney whose Dishonest Conduct is the subject of such claims maintained such Attorney's last known office. Such notice shall state that any claim based on the alleged Dishonest Conduct of such Attorney must be presented in writing to the Board within one year following the first date of publication of the Notice or such claims will be barred. The Notice shall be substantially in the following form:

Before the Client Security Fund
of The North Carolina State Bar

In the Matter of	Notice of Deadline
[NAME OF ATTORNEY]	for Claims

NOTICE IS HEREBY GIVEN that the Board of Trustees (the "Board") of the Client Security Fund (the "Fund") of The North Carolina State Bar will consider claims for reimbursement of losses sustained by clients of [NAME OF ATTORNEY], who

formerly maintained an office for the practice of law at [OFFICE ADDRESS]. If you have or believe you may have sustained a loss as a result of Dishonest Conduct of [NAME OF ATTORNEY], you should promptly contact the Fund by calling or writing:

The Client Security Fund
P. O. Box 25908
Raleigh, NC 27611
Tel.: 919/828-4620

Any claim must be filed in writing on forms available upon request from the Fund on or before [DATE WHICH IS ONE YEAR FOLLOWING DATE NOTICE IS PUBLISHED]. Any claims not filed on or before such date shall be barred and not be considered by the Board.

Reimbursement of losses is a matter of grace in the sole discretion of the Board, and not a matter of right.

This the ___ day of [MONTH], [YEAR].

By order of the Board of Trustees

/s/ [NAME], Secretary
The Client Security Fund of
The North Carolina State Bar

(b) If the Notice is published as provided herein, the Board shall not reimburse any Applicants for claims based on alleged Dishonest Conduct of the Attorney named in the Notice until after the expiration of the deadline for filing written claims stated in the Notice.

(c) If the Notice is published as provided herein, after expiration of the deadline for claims stated in the Notice, the Board shall consider all claims properly filed on or before the deadline based upon alleged Dishonest Conduct of the Attorney named in the Notice. If such claims as finally approved for reimbursement by the Board, in the aggregate, exceed $100,000, the Board shall cause to be disbursed to each Applicant a pro rata portion of $100,000 determined by multiplying $100,000 by a fraction, the numerator of which is the amount of the claim of each Applicant finally determined by the Board to be a Reimbursable Loss in accordance with these Rules and the denominator of which is the total amount of all claims finally determined by the Board to be Reimbursable Losses resulting from the Dishonest Conduct of the

Attorney named in the Notice, subject to the limitation that the Board shall not reimburse any Applicant in an amount in excess of $60,000.

(d) If the notice is published as provided herein, the Board shall not consider any claim filed after the deadline based upon alleged Dishonest Conduct of the Attorney named in the Notice, but shall inform the Applicant or any attorney representing the Applicant that the claim is barred and the Board is prohibited from considering such claim by reason of failure to file such claim within the time allowed.

(e) The Board shall request that the State Bar include in any press releases announcing the institution of proceedings before, or the imposition of discipline by, the Disciplinary Hearing Commission based upon Dishonest Conduct of an Attorney, a statement reading as follows:

> "Clients of a North Carolina lawyer whose money or property is shown to have been misappropriated or embezzled by that lawyer may, if timely application is filed, be able to obtain full or partial reimbursement from the Client Security Fund of The North Carolina State Bar, which can be contacted by writing P. O. Box 25908, Raleigh, NC 27611 or calling 919/828-4620."

The provisions of subsections (a)-(d) of this Rule 17.11 shall be effective notwithstanding the failure of such statement to be included in any press release.

By renumbering existing Rule 17.11 as 17.12 and Rule 17.12 as 17.13.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its meeting on October 23, 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 5th day of November, 1992.

L. THOMAS LUNDSFORD, II
Secretary-Treasurer

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 18 day of November, 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 18 day of November, 1992.

LAKE, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

ARSON AND OTHER BURNINGS

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CONSTITUTIONAL LAW

submitted as an aggravating circumstance that the murder was committed while defendant was engaged in a burglary. *State v. Upchurch*, 439.

§ 226 (NCI4th). Mistrial based on prosecutorial misconduct

There was no double jeopardy violation in the second trial of a murder defendant following a mistrial for the State's failure to comply with discovery where the first trial court had found that there had been a breakdown in communication but no prosecutorial misconduct and the defense attorneys did not object after being invited to do so. *State v. Walker*, 520.

§ 290 (NCI4th). What constitutes denial of effective assistance; miscellaneous

Defendant was not denied effective assistance of counsel where, although defendant contended that the court refused to hear counsel's arguments, it does not appear that defense counsel ever made any effort to argue in support of defendant's position. *State v. Pittman*, 244.

§ 309 (NCI4th). Counsel's abandonment of client's interest

A defendant being tried for the murder of a child was not deprived of effective assistance of counsel where the Supreme Court believed that defense counsel's closing argument had been that defendant was innocent of all charges but that defendant had slapped the victim and, if he were to be found guilty of anything, it would be involuntary manslaughter. *State v. Greene*, 565.

§ 327 (NCI4th). Requirement that delay be negligent or willful and prejudicial; particular circumstances

Defendant's constitutional right to a speedy trial was not violated where discovery was not completed until August 1987 and the trial commenced in September 1987. *State v. Willis*, 151.

§ 342 (NCI4th). Presence of defendant at proceedings generally

The trial judge erred in communicating with a juror out of the presence of defendant and her attorneys when he inquired of a juror whether a family member of one of the parties had spoken to him, but this error was harmless where the trial judge placed in the record information about this inquiry. *State v. Willis*, 151.

A defendant on trial for first degree murder was not prejudiced when the prosecutor examined three prospective jurors while defendant and one of her attorneys were absent from the courtroom. *Ibid.*

Any error by the trial court in permitting the defendant in a capital case to be absent from the courtroom while a detective was reading a statement made by another prosecution witness was harmless where defendant became visibly upset during the detective's testimony and asked permission to leave the courtroom. *Ibid.*

A defendant in a noncapital murder prosecution waived his right to be present at bench and chambers conferences where he failed to request to be present or to object to his absence. *State v. Pittman*, 244.

The trial court did not err in a murder prosecution by conducting unrecorded bench and chambers conferences. *State v. Upchurch*, 439.

There was no constitutional error in a murder prosecution where the record was abundantly clear that the court's contact with a juror outside defendant's presence was about a letter signed by the judge for the juror's employer. *Ibid.*

CRIMINAL LAW — Continued

frame required by the discovery statute where defendant failed to show that he brought this alleged violation of the statute to the trial court's attention. *State v. Taylor*, 372.

§ 107 (NCI4th). Discovery proceedings; reports not subject to disclosure by State

The trial court did not err in a prosecution for kidnapping, murder and robbery by denying defendant's motion for access to investigative files or for an in camera inspection. *State v. Soyars*, 47.

Defendant was deprived of no information or evidence that would have materially assisted his defense or have led to a different result when the trial court denied his motion for discovery of the psychiatric evaluation of an accomplice. *Ibid.*

§ 113 (NCI4th). Discovery proceedings; failure to comply

The trial court did not abuse its discretion in a noncapital murder prosecution and there was no prejudice where defendant contended that the State had not given an inculpatory statement to defendant or provided a list of witnesses interviewed by law enforcement officials at the scene, but defendant never informed the trial court that the statement had not been provided, did not inform the court he had not been provided with the list of witnesses, and did not inform the court that he thought he was entitled to the list. *State v. Pittman*, 244.

The trial court did not abuse its discretion by denying defendant's motion to dismiss for failure of the State to comply with discovery procedures because laboratory reports were furnished by the prosecutor's office to defendant after the commencement of the trial where the delay resulted from an unavoidable turnover in SBI laboratory personnel. *State v. Mills*, 392.

The trial court did not abuse its discretion by offering to grant a mistrial rather than a dismissal of the charges against defendant for failure of the State to comply with discovery requirements when information not contained in a serologist's report furnished to defendant was introduced into evidence. *Ibid.*

§ 217 (NCI4th). Speedy Trial Act; excludable periods of delay; discovery

Defendant's statutory right to a speedy trial was not violated where defendant made a motion for discovery before the indictment was returned and the trial began within 120 days after discovery was completed. *State v. Willis*, 151.

§ 314 (NCI4th). Joinder of charges against multiple defendants generally

G.S. 15A-296(b)(2)a provides for joinder of charges against two or more defendants only upon motion of the State and provides no basis for a motion by defendant to compel joinder of his case for trial with that of his brother. *State v. Jeune*, 424.

§ 395 (NCI4th). Statements made by trial court during jury selection

The trial court did not express an opinion during jury selection for a murder prosecution when it described the proceeding to potential jurors as being like the two halves of a football game. *State v. Upchurch*, 439.

§ 414 (NCI4th). Right to conclude argument

A murder prosecution was remanded for a new trial where the court denied defendant's request that both attorneys be allowed to address the jury during closing arguments in the guilt-innocence phase of the trial. *State v. Campbell*, 116.

CRIMINAL LAW — Continued

§ 466 (NCI4th). Jury argument; comments regarding defense attorney

The prosecutor's jury argument about defendant's tactic of shifting the blame for a killing to his codefendants was not an improper comment on defense counsel's credibility and effective assistance and was not error. *State v. Willis*, 151.

The prosecutor's closing arguments in a murder prosecution were not so grossly improper as to require intervention ex mero motu where the prosecutor mentioned smoke or smoke screen four times during his closing argument. *State v. Thompson*, 204.

There was no error requiring the court to intervene ex mero motu where the prosecutor argued that justice would be dead if defendant was found not guilty. *State v. Pittman*, 244.

§ 480 (NCI4th). Communications between jurors and outsiders

The trial court did not commit prejudicial error in failing to make further inquiry when the court asked a juror whether a family member of one of the parties had talked to him and the juror said that no family member had done so. *State v. Willis*, 151.

§ 496 (NCI4th). Deliberations; review of testimony

The trial court did in fact exercise its discretion in denying the jury's request, after deliberations had begun, to review the testimony of a kidnapping and rape victim. *State v. Jeune*, 424.

§ 506 (NCI4th). Witnesses acting as custodians of jury

A deputy sheriff who testified for the State and served as a bailiff did not act as custodian or officer in charge of the jury so as to require a conclusive presumption of prejudice where the only service he performed for the jury was in holding the gate open and opening the jury room door. *State v. Jeune*, 424.

§ 507 (NCI4th). Record of proceedings generally

The trial court did not commit prejudicial error in a noncapital murder prosecution by failing to record bench and chambers conferences or jury charge conferences where defendant failed to demonstrate prejudice. *State v. Pittman*, 244.

The statute requiring recordation of "all statements from the bench" does not apply to private bench conferences between the trial judge and attorneys for both sides. *State v. Cummings*, 487.

§ 518 (NCI4th). Circumstances in which mistrial may be ordered; prejudice to defendant; basic rules

The trial court did not abuse its discretion by denying a murder defendant a mistrial based upon the State's failure to provide discovery material regarding tests performed by the State's investigators where one test was inconclusive and any advantage which may have been gained by defendant through greater exposition of the second could have been countered by the State. *State v. Walker*, 520.

The trial court did not err in a murder prosecution by denying defendant's motion for a mistrial based upon the State's failure to make defense counsel aware of an SBI finding that the belt buckle worn by defendant had two small drops of blood on it. *Ibid.*

CRIMINAL LAW — Continued

§ 777 (NCI4th). Instructions on alibi generally

The trial court erred in failing to give an alibi instruction as requested by defendant where defendant presented evidence that he was in Charlotte at the time the crimes were committed in Asheville. *State v. Hood*, 611.

§ 778 (NCI4th). What constitutes a sufficient instruction on alibi

Defendant had the burden of showing a reasonable possibility that the trial court's erroneous failure to instruct on alibi was prejudicial. *State v. Hood*, 611.

Defendant was not prejudiced by the trial court's erroneous failure to instruct on alibi in a first degree murder and felonious assault prosecution where the court's charge afforded defendant the same benefits a formal charge on alibi would have afforded. *Ibid.*

§ 793 (NCI4th). Instruction as to acting in concert generally

The substance of defendant's request that the trial court reinstruct on "mere presence" if it reinstructed on "acting in concert" was satisfied by the trial court. *State v. Bromfield*, 24.

The trial court's acting in concert instructions did not permit the jury to find that defendant was constructively present even though the jury did not find that she intended to aid or encourage the actual perpetrator of a murder, that she did not convey that intent to the perpetrator, and that the perpetrator was not aware of that intent. *State v. Willis*, 151.

§ 838 (NCI4th). Instructions on defense witnesses generally

The trial court did not err in a murder prosecution by giving an instruction on false, contradictory or conflicting statements where the inconsistencies brought to light by the comparison between certain statements of defendant and the evidence at trial were not completely irrelevant and had substantial probative force, tending to show consciousness of guilt. *State v. Walker*, 520.

§ 860 (NCI4th). Instruction on defendant's eligibility for parole

Assuming the trial judge failed properly to instruct a prospective juror who inquired about the length of time someone sentenced to life imprisonment would actually serve, the appropriate relief would be a new sentencing proceeding, not a new trial. *State v. Cummings*, 487.

§ 873 (NCI4th). Written or oral additional instructions

The trial court did not fail to exercise its discretion when it denied the jury's request for a written copy of instructions on the elements of armed robbery and instead reinstructed the jury orally. *State v. Bromfield*, 24.

§ 884 (NCI4th). Appellate review of jury instructions; objections; waiver of appeal rights

Defendant's request for an alibi instruction at the charge conference was sufficient to warrant full review on appeal of the court's failure to instruct on alibi although defense counsel did not object to the charge when it was given. *State v. Hood*, 611.

§ 959 (NCI4th). Grounds for motion for appropriate relief; newly discovered evidence

A motion for appropriate relief in the Supreme Court was denied where it was discovered after the trial that a State's witness may have committed perjury. *State v. Jolly*, 351.

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EVIDENCE AND WITNESSES — Continued

EVIDENCE AND WITNESSES — Continued

a charge of breaking or entering and that on another occasion he went with defendant to engage in a fight since this testimony was not relevant except to show that defendant had a propensity for bad acts and acted in conformity therewith in killing the victim, but this error was harmless. *State v. Willis*, 151.

§ 621 (NCI4th). Suppression of evidence; motion in superior court

Defendant waived the right to contest the admissibility of a witness's identification of defendant at trial on the ground that it was the result of unconstitutionally suggestive pretrial identification procedures by failing to challenge this evidence by one of the methods provided in G.S. Ch. 15A, Art. 53. *State v. Hucks*, 650.

§ 672 (NCI4th). Introduction of like evidence without objection as waiver

A defendant in a homicide prosecution waived his right to assign error to the admission of testimony concerning notes taken upon his admission to a hospital prior to a crime where his cross-examination testimony was substantially the same. *State v. Jolly*, 351.

§ 720 (NCI4th). Prejudicial error in the admission of evidence as to defendant's character generally

There was no prejudicial error in a homicide prosecution from the admission of testimony regarding defendant's failure to spend time with his sons, statements by the victim, and testimony about the victim's marital situation because the evidence could not have affected the outcome of the trial. *State v. Jolly*, 351.

§ 729 (NCI4th). Prejudicial error in the admission of evidence; real or demonstrative evidence; documentary evidence

There was no prejudice in a murder prosecution in allowing the jury to see documents from the Asheville Police Department, the S.B.I., and the F.B.I. which identified defendant as the suspect. Assuming error, it is obvious that any criminal defendant standing trial is a suspect in the case. *State v. Thompson*, 204.

§ 754 (NCI4th). Cure of prejudicial error by admission of other evidence; evidence resulting from illegal search and seizure

There was no prejudicial error in a prosecution for kidnapping, murder and robbery from the admission of evidence seized from defendant's backpack and duffle bag where the evidence was merely cumulative. *State v. Soyars*, 47.

§ 787 (NCI4th). Cure of prejudicial error by admission of testimony of similar import by same witness

Any error in the trial court's sustention of the State's objection to a question as to whether the witness had been told by officers that it was defendant they wanted was cured when the witness later answered the same question. *State v. Willis*, 151.

§ 860 (NCI4th). Hearsay; attacking credibility of declarant

The trial court did not err in a noncapital homicide prosecution by admitting conflicting hearsay statements and allowing the jury to determine which was the most convincing. Where the hearsay statements of a declarant are conflicting, the conflict raises a question of credibility rather than reliability. *State v. Jolly*, 351.

EVIDENCE AND WITNESSES — Continued

§ 875 (NCI4th). Hearsay; statements to show state of mind

A murder victim's hearsay statements concerning defendant's prior physical assaults against her were admissible to show the victim's state of mind. *State v. Walker*, 520.

§ 927 (NCI4th). Relationship of hearsay evidence admitted under exceptions to hearsay rule to right to confrontation

Two of three statements from a homicide victim concerning a previous incident with defendant were admissible under the excited utterance exception and did not violate defendant's right of confrontation where the two statements were made immediately after the incident and while the victim was still emotionally upset. The third statement was harmless because the same facts would have been before the jury without the statement and there was ample evidence before the jury from which it could find defendant guilty. *State v. Jolly*, 351.

§ 959 (NCI4th). Hearsay; state of mind exception

There was no error in a homicide prosecution from the introduction of testimony by two witnesses that the victim had said that defendant would see her dead before he'd see her with anyone else and that she had said that there had been threats which she felt would be carried out. The testimony went directly to the victim's state of mind. *State v. Jolly*, 351.

§ 960 (NCI4th). Decedent's declaration of intention

A murder victim's statement to his supervisor that he wanted time off from work the next day because he planned to meet the defendant and then buy a boat was admissible under the Rule 803(3) exception for statements of then-existing intent and plan to engage in a future act. *State v. Taylor*, 372.

A murder victim's statement to a coworker that he and an unidentified man who met with him at work had discussed the sale of a gun shop in South Carolina was not admissible under the Rule 803(3) exception but was inadmissible hearsay. *Ibid.*

§ 967 (NCI4th). Exceptions to the hearsay rule; records of regularly conducted activity generally

The trial court did not err in a noncapital murder prosecution by allowing into evidence a sales ticket and testimony concerning the purchase of pistol ammunition. *State v. Ligon*, 224.

§ 1088 (NCI4th). Effect of silence or failure to respond in face of statement by co-defendant

The trial court did not err in a noncapital first degree murder prosecution by denying defendant's motion to suppress tapes and transcripts of two telephone conversations where a portion of the conversations constituted an implied admission. *State v. Thompson*, 204.

§ 1134 (NCI4th). Applicability of Bruton rule

Statements made by a nontestifying codefendant in defendant's presence about plans to divide a murder victim's jewelry and money and about a chance defendant had to get the victim when the victim was beating her were admissible against defendant as implied admissions and were not barred under the *Bruton* rule. *State v. Willis*, 151.

EVIDENCE AND WITNESSES – Continued

§ 1143 (NCI4th). Acts and declarations of companions, codefendants, and co-conspirators; sufficiency of evidence to establish conspiracy

The trial court did not err by admitting the testimony of a co-conspirator regarding statements made by another co-conspirator incriminating defendant where defendant contended that the statements were made before the conspiracy was formed but there was evidence to the contrary. *State v. Mahaley*, 583.

§ 1150 (NCI4th). Statements made in reassurance that transaction which is subject of conspiracy will occur

Defendant's statements to a codefendant, "You do your part and . . . I'll take care of the rest" and "Don't worry, Baby, it will get done" were admissible as declarations made in furtherance of a conspiracy to murder the victim. *State v. Willis*, 151.

§ 1218 (NCI4th). Matters affecting admissibility or voluntariness of confession generally

A murder defendant's third statement to officers was not coerced and was voluntary where a reasonable person in defendant's position would not have believed that he was in custody; defendant was not held incommunicado or deprived of food or drink; defendant was not deprived of his free will when confronted with apparent inconsistencies in his statements; and officers did not intimate that defendant could avoid prosecution or that any sentence imposed would be lessened if he confessed. *State v. Greene*, 565.

A murder defendant's fourth statement was not involuntary based on the totality of the circumstances where the trial court's findings that defendant was advised of his rights, that he understood and waived each right, and that he was alert, sober and coherent were supported by competent evidence. *Ibid.*

§ 1220 (NCI4th). Admissibility of confession; effect of illegality of arrest or seizure

Defendant was not illegally seized or detained in violation of the Fourth Amendment to the U. S. Constitution so as to render inadmissible defendant's first statement to police officers where a reasonable person would have believed that he was free to leave at the time defendant made his first statement. *State v. Bromfield*, 24.

Assuming arguendo that defendant was arrested prior to giving his second statement to the police, the statement was not inadmissible as fruit of the poisonous tree where the evidence reveals that defendant's arrest was based upon probable cause and that defendant waived his rights to remain silent and to have a lawyer present during questioning. *Ibid.*

Where the trial court properly denied defendant's motion to suppress defendant's first two statements to the police because defendant was not illegally seized in violation of the Fourth Amendment, defendant's Fourth Amendment challenge to the admission of his third statement as being the fruit of the poisonous tree is also without merit. *Ibid.*

The trial court erred by admitting an inculpatory statement made by defendant after her illegal arrest where the intervening circumstances cited by the State were not sufficient to break the chain of causation between the arrest and the statements. *State v. Allen*, 123.

EVIDENCE AND WITNESSES — Continued

§ 1227 (NCI4th). Matters affecting admissibility or voluntariness of confession; impropriety of prior or subsequent confession

Although a murder defendant's first statement should have been suppressed under the presumption of involuntariness rule of Miranda, his second and third statements were properly admitted because there was no evidence that the first statement had been induced by promises or threats. *State v. Greene*, 565.

§ 1233 (NCI4th). Confession made to person other than police officer

The trial court did not err in concluding that defendant's cellmate was not an agent of the State and that incriminating statements made by defendant to his cellmate were not obtained in violation of defendant's Sixth Amendment right to counsel. *State v. Taylor*, 372.

Defendant's right against self-incrimination under the Fifth Amendment was neither implicated nor violated by the admission of defendant's statements to a cellmate where the cellmate was not an agent of the State and no interrogation occurred. *Ibid.*

§ 1240 (NCI4th). Particular statements as volunteered or resulting from custodial interrogation; statements made at police station

There was no prejudicial error in a prosecution for the murder of a child in the admission of a statement made by defendant at a police station where defendant was detained and not advised of his Miranda rights where the statement was exculpatory and other inculpatory statements were properly admitted. *State v. Greene*, 565.

A murder defendant's statements to officers were not the result of an unlawful seizure where defendant was not in custody when two of the statements were made and the third was made after a lawful arrest. *Ibid.*

A trial court did not err by concluding that a murder defendant was not in custody for Miranda purposes when she gave three statements at the police station where the court's findings were amply supported by substantial evidence tending to show that defendant never indicated that she wanted to terminate an interview, that the officers continuously informed the defendant that she was free to leave at any time during the interviews, and that she understood that she was free to go and was not required to make a statement. *State v. Mahaley*, 583.

§ 1252 (NCI4th). Confessions; what constitutes invocation of right to counsel; extent of invocation

Defendant invoked his right to counsel during custodial interrogation when he responded "I don't know" to an officer's question as to whether he would like to waive his right to counsel and responded "No, because I don't know how much I want to tell you" when asked if he would sign a waiver of counsel form, and his subsequent incriminating statement made without counsel when the officer and the district attorney reinitiated the interrogation is presumed to be involuntary and inadmissible. *State v. Morris*, 660.

The trial court did not err in a murder prosecution by denying defendant's motion to suppress an inculpatory statement made while in custody where defendant indicated that he wanted to waive his rights, signed a waiver form in the place indicating that he did not want to waive his rights, was questioned by officers as to whether that was intentional, and then marked out his first signature, waived his rights and made a statement. *State v. McKoy*, 639.

EVIDENCE AND WITNESSES — Continued

§ 1694 (NCI4th). Photographs of location and appearance of homicide victim's body

The trial court in a first degree murder prosecution did not abuse its discretion in the admission of twenty-three photographs of the autopsies of the victim and her sister and the graves in which the bodies were found. *State v. Cummings*, 487.

The trial court did not err in a murder prosecution by admitting into evidence photographs of the victim to illustrate the testimony of the medical examiner with respect to the location and condition of the body. *State v. Mahaley*, 583.

§ 1745 (NCI4th). Maps and the like generally

Any error in introducing crime scene sketches by a nontestifying codefendant in a murder prosecution was harmless where the information in the sketches had already been testified to by other witnesses and the court gave a limiting instruction in its charge to the jury. *State v. Thompson*, 204.

§ 1907 (NCI4th). Composite picture

The trial court did not err in an armed robbery prosecution by admitting into evidence composite drawings of the perpetrators created by an investigator using an Identikit procedure during consultations with four witnesses the day after the robbery. A composite picture is the functional equivalent of a photograph. *State v. Patterson*, 409.

§ 2228 (NCI4th). Testimony as to powder residue

The trial court did not err in a noncapital murder prosecution by admitting testimony from an investigator that no gunpowder residue tests had been performed on the victim because the investigator had no doubt that the victim had not handled a gun. *State v. Jolly*, 351.

§ 2473 (NCI4th). Disclosure of plea bargain; offer of plea bargain

The trial court did not err in the denial of one defendant's motion to compel the State to disclose any plea bargain made by any codefendant or accomplice where there is nothing in the record to indicate that a plea bargain had been made. *State v. Willis*, 151.

§ 2479 (NCI4th). Exclusion or sequestration of witnesses in criminal cases generally

The trial court did not abuse its discretion in a noncapital murder prosecution by denying defendant's motion for sequestration of the State's witnesses where defendant gave no reason for suspecting that the State's witnesses would use previous witnesses' testimony as their own. *State v. Pittman*, 244.

§ 2873 (NCI4th). Scope of cross-examination generally; relevant matters

The trial court did not err in sustaining the State's objection to a repetitious question asked by defense counsel on cross-examination of a State's witness. *State v. Willis*, 151.

§ 2923 (NCI4th). Impeachment of own witness; general rule

A defendant charged with murder could not call the victim's husband as a defense witness and then attempt to impeach him by inquiring into prior charges or indictments against the husband for killing his first wife and shooting his second wife. *State v. Mills*, 392.

EVIDENCE AND WITNESSES — Continued

§ 3081 (NCI4th). Inconsistent or contradictory statements; statements made to officials or investigators

The trial court did not err in a murder prosecution by allowing into evidence three out of court statements for purposes of corroboration and impeachment where some of the statements should not have been read to the jury, but defendant could not demonstrate prejudice given the evidence against him. *State v. Thompson*, 204.

§ 3172 (NCI4th). Prior consistent statements; inclusion of new facts

The trial court did not err in a murder prosecution by allowing a defendant to read to the jury a statement by a witness to police for corroborative purposes only. *State v. Thompson*, 204.

There was no prejudice in a prosecution for the murder of a child in the admission of testimony from an SBI agent corroborating the testimony of an inmate to whom defendant had made incriminating remarks. *State v. Greene*, 565.

§ 3198 (NCI4th). Witness testifying as to prior statement of another witness; transcripts

The trial court did not err in a noncapital murder prosecution by allowing a defense witness to read into evidence the prior suppression hearing testimony of a State's witness. *State v. Pittman*, 244.

EXECUTORS AND ADMINISTRATORS

§ 103 (NCI4th). Claims against the estate; bar of statutes of limitation

Plaintiff underinsured motorist insurer's subrogation claim against the tortfeasor's estate was not barred by G.S. 28A-19-3(b) since the tortfeasor lived for twenty-four hours after the accident from which the claim arose, and the claim thus arose before rather than at or after the tortfeasor's death. *State Farm Mutual Auto. Ins. Co. v. Blackwelder*, 135.

FRAUD, DECEIT AND MISREPRESENTATION

§ 18 (NCI4th). Detrimental reliance generally

The trial court correctly denied defendant's motions for directed verdict and judgment notwithstanding the verdict in an action arising from the sale of building material containing asbestos to a school board. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 1.

HOMICIDE

§ 43 (NCI4th). Constitutionality of felony murder rule

The felony murder rule in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection because premeditation and deliberation are not elements of felony murder. *State v. Thomas*, 544.

§ 200 (NCI4th). Sufficiency of evidence that death resulted from injuries inflicted by defendant; circumstantial evidence

The trial court properly denied defendant's motions to dismiss a charge of first degree murder for insufficient evidence where the evidence suggested that

the victim was either shot by her lover in cold blood or that she took her own life in his presence. *State v. Walker*, 520.

§ 230 (NCI4th). Sufficiency of evidence; first degree murder generally

There was sufficient evidence of each element of two first degree murders. *State v. Pittman*, 244.

§ 240 (NCI4th). First degree murder; evidence concerning planning and execution of crime

The trial court did not err by submitting first degree murder to the jury where there was substantial evidence that defendant acted in furtherance of a conspiracy to murder her husband. *State v. Mahaley*, 583.

§ 244 (NCI4th). Evidence of premeditation and deliberation generally

There was substantial evidence from which the jury could find that defendant shot and killed his former girlfriend with premeditation and deliberation so as to support his conviction of first degree murder. *State v. Hood*, 611.

§ 245 (NCI4th). Manner of proving premeditation and deliberation; circumstantial evidence

The circumstantial evidence of premeditation and deliberation was sufficient to submit first degree murder to the jury where defendant contended that the victim committed suicide in his presence but there was evidence indicating that there was a conflict between defendant and the victim prior to her death; that defendant mercilessly waited for an hour after the shooting before seeking medical care for the victim; and that defendant was avoiding the truth in his rendition of the facts. *State v. Walker*, 520.

§ 253 (NCI4th). Premeditation and deliberation; nature and execution of crime; severity of injuries, along with other evidence

There was sufficient evidence in a first degree murder prosecution that the victim died as a result of a premeditated and deliberate murder by defendant. *State v. Moss*, 65.

The State's evidence was sufficient to support the jury's verdict finding that defendant killed the victim with premeditation and deliberation based on evidence that defendant beat the victim into submission, inserted his hand into the victim's vagina and pulled out the victim's organs, dragged her into the woods, and left her helpless and bleeding to death. *State v. Thomas*, 544.

The trial court did not err by submitting to the jury the charge of first degree murder based on premeditation and deliberation where there was evidence that defendant delivered several hard blows to the child victim's head during a brutal beating. *State v. Greene*, 565.

§ 268 (NCI4th). Murder in perpetration of robbery; acting in concert

The evidence was sufficient for the jury to find that both victims were robbed so as to support defendant's conviction of first degree murder of both victims committed in the perpetration of armed robbery under the theory that he acted in concert with the actual perpetrator. *State v. Bromfield*, 24.

§ 277 (NCI4th). Murder in perpetration of robbery; other evidence

There was sufficient evidence from which the jury could find defendant guilty of felony murder based on common law robbery. *State v. Moss*, 65.

HOMICIDE — Continued

§ 372 (NCI4th). Accessory before the fact; elements of offense

The trial court in a first degree murder case did not err in failing to submit the lesser-included offense of accessory before the fact of first degree murder where defendant was constructively present at the time the victim was killed. *State v. Willis*, 151.

§ 374 (NCI4th). Acting in concert; conspiracy; first-degree murder

The evidence was sufficient for the jury to find that defendant was actually or constructively present and acted in concert with the codefendant when a killing occurred so as to support the trial court's submission to the jury of a charge of first degree murder on the theory that defendant was acting in concert with the codefendant. *State v. Willis*, 151.

§ 380 (NCI4th). Self-defense and defense of others; necessity

The trial court did not err in a murder prosecution by not charging on self-defense based on the defense of a third person where there was insufficient evidence of necessity. *State v. McKoy*, 639.

§ 489 (NCI4th). Use of examples in instructions on premeditation and deliberation

The trial court did not err in instructing the jury that it could infer premeditation and deliberation from lack of provocation by the victim. *State v. Thomas*, 544.

§ 496 (NCI4th). Matters considered in proving premeditation and deliberation; defendant's conduct

The trial court did not err in a noncapital first degree murder prosecution by giving an instruction which permitted the jury to infer premeditation and deliberation from the vicious circumstances of the killing where defendant subjected the victim to psychological abuse. *State v. Jolly*, 351.

§ 552 (NCI4th). Premeditated and deliberated murder generally; lack of evidence of lesser crime

The trial judge in a first degree murder prosecution did not err in refusing to instruct the jury on the lesser included offense of second degree murder where there was no evidence to negate the elements of premeditation and deliberation other than defendant's denial. *State v. Cummings*, 487.

There was no evidence in a first degree murder prosecution showing a lack of premeditation, deliberation and intent to kill so as to require the trial court to instruct the jury on second degree murder where the evidence showed that defendant beat the victim into submission, inserted his hand into the victim's vagina and pulled out the victim's organs, dragged her into the woods, and left her helpless and bleeding to death. *State v. Thomas*, 544.

The jury's findings of the emotional disturbance and impaired capacity mitigating circumstances did not negate premeditation and deliberation so as to require an instruction on second degree murder. *Ibid.*

§ 562 (NCI4th). Voluntary manslaughter; just cause, legal provocation, or heat of passion

The trial court did not err in a murder prosecution by not instructing the jury on the lesser included offense of voluntary manslaughter based on provocation where there was absolutely no evidence that defendant shot the victim in the heat of passion upon adequate provocation. *State v. Thompson*, 204.

INSURANCE — Continued

automobile insurer's subrogation right against the tortfeasor's estate for the underinsured motorist payment it made to the injured party. *State Farm Mutual Auto. Ins. Co. v. Blackwelder*, 135.

§ 514 (NCI4th). Stacking uninsured motorist coverage

G.S. 20-279.21(b)(3), prior to its 1991 amendment, did not require an automobile insurer to aggregate or stack its intrapolicy UM coverage provided with respect to each of the vehicles named in the policy. *Lanning v. Allstate Insurance Co.*, 309.

The language of an automobile policy prohibited intrapolicy stacking of its UM coverages. *Ibid.*

§ 527 (NCI4th). Underinsured motorist coverage generally

In determining whether a tortfeasor's vehicle is an "underinsured highway vehicle" within the meaning of G.S. 20-279.21(b)(4), the "applicable limits of liability" referred to in the statute are those under the UIM coverage in the owner's policy, and the proper comparison is between the tortfeasor's liability coverage and plaintiff's UIM coverage. *Harris v. Nationwide Mut. Ins. Co.*, 184.

Where the injured party was merely a guest in one of the vehicles covered by an automobile insurance policy, she was a "Class II" insured for purposes of UIM coverage. *Nationwide Mutual Ins. Co. v. Silverman*, 633.

§ 528 (NCI4th). Extent of underinsured motorist coverage

Underinsured motorist coverage is available under an automobile/truck policy issued to a named insured when a motorcycle owned by the named insured and involved in his injuries is insured under a separate policy not containing underinsured coverage. *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 109.

The language "applicable limits of liability" in G.S. 20-279.21(b)(4) refers to all UIM limits available in a policy applicable to plaintiff's claim and allows intrapolicy stacking of UIM coverages in determining whether a tortfeasor's vehicle is an "underinsured highway vehicle." *Harris v. Nationwide Mut. Ins. Co.*, 184.

The minor plaintiff, as a nonowner family member living in the same household as the named insured, is entitled to stack UIM coverages in her parents' policy in determining whether the tortfeasor's vehicle is underinsured. *Ibid.*

The wife of the owner-insured of an automobile policy is entitled as a Class I insured to UIM coverage under the husband's policy when the wife was injured while riding in another car owned by her and insured by another carrier under a separate policy not containing UIM coverage. *Grain Dealers Mutual Ins. Co. v. Long*, 477.

The UIM coverages provided in an automobile liability policy which listed two vehicles may not be stacked to compensate a "Class II" insured person for injuries sustained in an automobile accident. *Nationwide Mutual Ins. Co. v. Silverman*, 633.

§ 529 (NCI4th). Underinsured motorist coverage as excess or additional coverage

Stacking multiple vehicles on one policy by a nonowner is not "excess" or "additional" coverage not subject to the compulsory provisions of the Financial Responsibility Act under G.S. 20-279.21(g). *Harris v. Nationwide Mut. Ins. Co.*, 184.

prejudicial where the record does not show the race of any challenged juror. *State v. Willis*, 151.

KIDNAPPING

§ 1.2 (NCI3d). Sufficiency of evidence

There was substantial evidence that defendant removed the victim from one place to another to support his conviction of kidnapping although defendant's brother was the driver of the car in which the victim was removed. *State v. Jeune*, 424.

§ 1.3 (NCI3d). Instructions

Any error in the trial court's instruction in a first degree kidnapping case defining the element of sexual assault as including rape and fellatio when there was no evidence that defendant engaged in fellatio with the victim was not plain error where the jury found defendant guilty of first degree kidnapping and rape. *State v. Jeune*, 424.

§ 2 (NCI3d). Punishment

The trial court did not err in sentencing defendant for second degree kidnapping, although there was no specific adjudication of guilt as to that offense, where the jury found defendant guilty of first degree kidnapping and first degree rape, and the trial court arrested judgment on the first degree kidnapping charge because the rape was the sexual assault used to elevate the kidnapping to first degree. *State v. Jeune*, 424.

LIMITATION OF ACTIONS

§ 2 (NCI3d). Applicability to sovereign

The trial court correctly denied defendant's motion for summary judgment based on various statutes of limitation and repose in an action by a school board for fraud and misrepresentation in the sale of products containing asbestos for use in schools. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 1.

MASTER AND SERVANT

§ 69 (NCI3d). Amount of compensation recovery generally

The deduction allowed by G.S. 97-42 from amounts paid as workers' compensation entitles defendant employer to full dollar-for-dollar rather than week-to-week credit for disability payments voluntarily paid to plaintiff employee, and the amount of this deduction is the gross before-tax amount paid by the employer's disability plan. *Evans v. AT&T Technologies*, 78.

MUNICIPAL CORPORATIONS

§ 12.3 (NCI3d). Waiver of governmental immunity

Defendant City did not waive governmental immunity by organizing the Risk Acceptance Management Corporation for the payment of tort claims of $1,000,000 or less against the City. *Blackwelder v. City of Winston-Salem*, 319.

PARENT AND CHILD

§ 2.1 (NCI3d). Liability of parent for injury or death of child generally

The parent-child immunity doctrine does not apply to a claim by an unemancipated minor against a parent for a willful and malicious act resulting in injury to the child, and a suit by two minor plaintiffs against their father for damages allegedly resulting from his having repeatedly raped and sexually molested them was thus not barred by the parent-child immunity doctrine. *Doe v. Holt*, 90.

RAPE AND ALLIED OFFENSES

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The jury could reasonably find that defendant's actions in pulling back the bedclothing of a hospital patient, pulling up the patient's gown, and pulling her panties aside amounted to actual physical force sufficient to support defendant's conviction for second degree sexual offense. *State v. Brown*, 262.

The State presented sufficient evidence of serious personal injury other than the fatal injury to support defendant's conviction of first degree sexual offense. *State v. Thomas*, 544.

§ 6 (NCI3d). Instructions generally

The trial court's instructions on the element of force required for a second degree sexual offense did not permit the jury to convict if it found merely that the victim suffered from fear, fright or coercion but did not find that such fear, fright or coercion was induced by defendant's actions. *State v. Brown*, 262.

The trial court's instruction permitting the jury to convict defendant of second degree sexual offense upon the theory of a threatened use of force was supported by the evidence. *Ibid.*

§ 6.1 (NCI3d). Instructions on lesser degrees of the crime

The trial court in a prosecution for second degree sexual offense did not err by failing to instruct on the lesser included offense of attempted second degree sexual offense. *State v. Brown*, 262.

RULES OF CIVIL PROCEDURE

§ 50.3 (NCI3d). Grounds for directed verdict

There was no inherent bar to granting a motion for a directed verdict, even though the non-moving party established a prima facie case, where the credibility of the movant's documentary evidence was manifest. *Goodwin v. Investors Life Insurance Co. of North America*, 326.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

Applicants for Medicaid benefits for medically needy persons are not required to own their primary place of residence in order for property contiguous to their residence to be excluded from their assets under G.S. 108A-55 for purposes of determining their eligibility for Medicaid benefits. *Correll v. Division of Social Services*, 141.

WILLS

§ 58.1 (NCI3d). Gifts of stocks, bonds, or other securities

A bequest of corporate stocks was intended to be a general bequest, and the beneficiaries were thus entitled to receive accessions to the stocks from routine stock splits and dividend reinvestments. *Edmundson v. Morton*, 276.

Absent any expression of intent in the will or compelling circumstances to the contrary, accessions to publicly held stocks by way of stock splits, stock dividends or dividend reinvestments occurring in the normal course of business between the date of execution of the will and the date of testator's death should pass to the beneficiary of the stock named in the will. *Ibid.*

WORD AND PHRASE INDEX