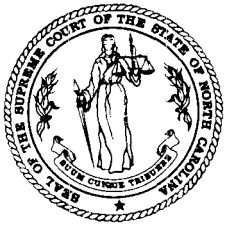
NORTH CAROLINA REPORTS

VOLUME 333

SUPREME COURT OF NORTH CAROLINA



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Given over my hand and seal of the Board of Law Examiners this the 2nd day of April, 1993.

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 20th day of March, 1993, and said persons have been issued license certificates.

MELISSA MARIA COOLEY ..... Raleigh
ELIZABETH ANNE JANEWAY ..... Durham
JOSEPH MICHAEL KOSKO ..... Raleigh
MARGARET WUESTE LESESNE ..... Apex
MICHAEL MATES ..... Clifton Park, New York

Given over my hand and seal of the Board of Law Examiners this the 7th day of April, 1993.

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 20th day of March, 1993 and said persons have been issued license certificates.

WARREN PAUL KEAN ..... Charlotte
SANDRA C. KULLMANN ..... Charlotte
MARTHA L. RAMSAY ..... Charlotte

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 9th day of April, 1993 and said persons have been issued license certificates.

DAVID THOMAS ARCHER ..... Winston-Salem
GENA LYNN ASHE ..... Kernersville

LICENSED ATTORNEYS

Cheri Lynn Beasley	Raleigh
William Stuart Bost III	Raleigh
Diane Lappi Bronson	Charlotte
Elizabeth Marie Brown	Charlotte
Claire Bruni	Roanoke, Virginia
Melissa Garrett Burns	Charlotte
Michael A. Cavanagh	Raleigh
Todd Wakefield Cline	Winston-Salem
James L.S. Cobb	Raleigh
Ann McKee David	Wilmington
Fredrick Wellington Evans	Winston-Salem
William Edward Flanagan	Charlotte
Janet Louise Fort	Charlotte
Ronald Howard Foxworth	Rowland
Mark Steven Good	Aberdeen
James Edward Hairston, Jr.	Garner
Darren Keith Hensley	Stone Mountain, Georgia
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John T. Love	Winston-Salem
J. Christopher Lynch	Raleigh
Matthew F. McGahren	Arden
James Whitelaw Middleton	Coral Gables, Florida
Charles R. Monroe, Jr.	Raleigh
Ann M. Paradis	Raleigh
Stefanie Pfingstl	Lake Wylie, South Carolina
Elizabeth Lynne Rippetoe	Charlotte
Andrea Carol Shaffer	Weddington
Scott Edward Shealy	Charlotte
Robin Leah Sing	Greensboro
Lee Lawson Stockdale	Tryon
Karen Hahn Ventrell	Chapel Hill
Ivan N. Walters	Rock Hill, South Carolina
Harold Lawrence Warner, Jr.	Raleigh
Lori DeAnn Watson	Toast
Christopher H. Wilson	Durham
Louis Ernest Wooten III	Rocky Mount

Given over my hand and seal of the Board of Law Examiners this the 19th day of April, 1993.

Fred P. Parker III
Executive Director
Board of Law Examiners of
The State of North Carolina

I, Fred P. Parker III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 20th day of March, 1993 and said person has been issued license certificate.

Elisa Kristine Poole Johnson	Durham

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 9th day of April, 1993 and said person has been issued license certificate.

GREERSON GREENE MCMULLEN ..... Charlotte

Given over my hand and seal of the Board of Law Examiners this the 30th day of April, 1993.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 9th day of April, 1993 and said person has been issued license certificate.

PAUL MERCER CAULEY ..... Charlotte

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 30th day of April, 1993 and said persons have been issued license certificates.

JAMES ANTHONY GLEASON ..... Grand Island, Nebraska
LILLIAN SALCINES ..... Holden Beach

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 and said persons were issued certificates of this Board:

LYNNE TOWNSEND ALBERT ..... Durham
Applied from the State of Texas
WILLIAM BONSIGNORE ..... Wake Forest
Applied from the State of Indiana
DEAN TAYLOR BUCKIUS ..... Norfolk, Virginia
Applied from the State of Virginia
WILLIAM C. GAMOKE ..... Colby, Wisconsin
Applied from the State of Wisconsin
CAROLYN KURTZACK KOLBEN ..... Bethesda, Maryland
Applied from the District of Columbia
LIZABETH SWEET WATSON ..... Charlotte
Applied from the State of Texas
R. LEONARD WEINER ..... Houston, Texas
Applied from the State of Texas
DOUGLAS B. WYATT ..... Houston, Texas
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 27th day of May, 1993.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 4th day of June, 1993 and said person has been issued license certificate.

DAVID A. SAPP ..... Cantonment, Florida

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 and said persons were issued certificates of this Board:

LYNETTE A. BARNES ..... Greensboro
Applied from the State of Texas
CURTIS LEE BENTZ ..... Rocky Mount
Applied from the State of Ohio
KARL F. EDGAR ..... West Islip, New York
Applied from the State of New York
THOMAS DUBOSE ROBERTS ..... Asheville
Applied from the State of Colorado
LEE ANN ROONEY ..... Charleston, South Carolina
Applied from the State of New York
PHILIP EDWARD SMITH ..... Greensboro
Applied from the District of Columbia
RICHARD S. WEINBERG ..... Wilmette, Illinois
Applied from the State of Illinois

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

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 11th day of June, 1993 and said person has been issued license certificate.

JAMES GUTHRIE HUFF, JR. ..... Vanceboro

LICENSED ATTORNEYS

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

ANDREW ALEXANDER STRAUSS ..... Asheville
Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners this the 21st day of June, 1993.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person duly passed the examinations of the Board of Law Examiners as of the 20th day of March, 1993 and said person has been issued license certificate.

GAYLE A. KOROTKIN ..... Durham

Given over my hand and seal of the Board of Law Examiners this the 20th day of July, 1993.

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 6th day of August, 1993 and said persons have been issued certificates of this Board:

MARILYN H. ELAM ..... Chapel Hill
Applied from the State of Texas
ROBERT MANNER HURLEY ..... Raleigh
Applied from the District of Columbia
DANIEL EDWARD UYESATO ..... Chapel Hill
Applied from the State of Connecticut
MICHAEL JOHN GARDNER ..... Virginia Beach, Virginia
Applied from the State of Virginia
J. STANLEY PAYNE ..... Martinsville, Virginia
Applied from the State of Virginia
TERESA J. SIGMON ..... Memphis, Tennessee
Applied from the State of Tennessee
LAWRENCE L. MANYPENNY ..... New Cumberland, West Virginia
Applied from the State of West Virginia

JAMES H. NOBOA ..... Summerfield
Applied from the State of New York
HOPE ANNE ROOT ..... Charlotte
Applied from the State of Tennessee
WILLIAM LLEWELLYN MOYER ..... Flat Rock
Applied from the State of Pennsylvania
STEVEN KAPUSTIN ..... Radnor, Pennsylvania
Applied from the State of Pennsylvania
GREGORY JAMES ROSS ..... Charlotte
Applied from the State of Ohio
JOSEPH A. GAWRYS ..... Norfolk, Virginia
Applied from the State of Virginia
STEPHEN J. SCHANZ ..... Mattawan, Michigan
Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 10th day of August, 1993.

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 20th day of August, 1993 and said persons have been issued license certificates.

ERIN SUSANNE ACKERMAN ..... Raleigh
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PATRICK MARTIN ALLEN ..... Kernersville
CHARLES LENARD ALSTON, JR. ..... Chapel Hill
PATRICK MAXWELL ANDERS ..... Burlington
MEREDITH GAIL ANDERSEN ..... Charlotte
RICHARD LEE ANDERSON ..... Charlotte
LISA MARIE ANGEL ..... Raleigh
JAMES MCFARLAN ARGES ..... Durham
JAY MICHAEL ASHENDORF ..... Charlotte
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LINDA RAMSEY ATTARIAN ..... Raleigh
RICHARD CORNWELL AVERY ..... Winston-Salem
AMY ZAKRAJSHECK BABB ..... Greensboro
ERIC ANTHONY BACH ..... Charlotte
HAROLD GLENN BAGWELL, JR. ..... Garner
CHARLES SELDEN BALDWIN IV ..... Winston-Salem
STEPHEN MICHAEL BALL ..... Winston-Salem
SALVATORE BALSAMO ..... Winston-Salem
FLOYD DOUGLAS BANKS ..... Charlotte
THOMAS COKE BATES ..... Winston-Salem
STEPHEN JOHN BATTEN ..... Durham
CHARLES FREDERICK BAUER ..... Winston-Salem

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STEPHEN COPPAGE BAYNARD ..... Raleigh
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CARI LYN BECK ..... Rural Hall
DIANE R. BECKER ..... Raleigh
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BROOKS FREEMAN BOSSONG ..... Winston-Salem
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KAREN LEIGH BOYER ..... Winston-Salem
JOHN HUGH BRADLEY ..... Atlanta, Georgia
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Douglas Bruce Elliott	Greensboro
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Tracey Hope Harrell	Tarboro
Edward Lloyd Harrelson	Garner
Stephen Donnell Harris	Winston-Salem
Rosalee Marie Hart	Winston-Salem
Blake W. Hassan	Charlotte
James Gregory Hatcher	Morristown, Tennessee
Scott Carson Hatfield	Maryville, Tennessee
Scott Edgeworth Hawkins	Solana Beach, California
Susan Leigh Hayes	Reidsville
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CHRISTIAN ELIZABETH HEINDEL ..... Chapel Hill
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MIMI MICHELLE JONES ..... Danville, Kentucky
PAULA R. JORDAN ..... Winston-Salem
STEPHANIE WATSON JORDAN ..... Charlotte
BENJAMIN ARTHUR KAHN ..... Greensboro
LYNNE M. KAY ..... Lillington
BRIAN SANDERSON KELLY ..... Durham
DENNIS MICHAEL KILCOYNE ..... Greenville
ELIZABETH CAROLINE KIM ..... Raleigh
JOHN MCKINLEY KIRBY ..... Raleigh
STEPHEN E. KLEE ..... Greensboro
KATHRYN LANE KLOTZBERGER ..... Greensboro
JEFFREY GRANT KOENIG ..... Charlotte
MICHAEL ANTHONY KOLB ..... Charlotte
SARAH JOHNSON KROMER ..... Charlotte
H. GEORGE KURANI ..... Charlotte
ALLYSON KAY KURZMANN ..... Chapel Hill
SETH NORRIS LACKEY ..... Shelby
ROBERT JAMES LAMB, JR. ..... Charlotte
MICHELLE LOUISE LAMBERT ..... Durham
DAVID L. LAMBERT ..... Durham
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MARGARET KINNAN LANE ..... Edenton
JULIE ANN LANIER ..... Greenville

ADRIAN MICHAEL LAPAS ..... Kinston
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LYDIA ELLEN LAVELLE ..... Durham
DONNA MICHELLE LEE ..... Garner
HELGA LURA LEFTWICH ..... Durham
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THOMAS LEO MITCHELL ..... Charlotte
CHARLES H. MOORE II ..... Greenville
DAWN H. MORGAN ..... Winston-Salem
SAMUEL WILSON MORRIS ..... Fayetteville
JOSEPH WILLIAM MOSS, JR. ..... Davidson
TABATHA L. MULLINS ..... Buies Creek
PHILIP ALDON MULLINS IV ..... Durham
WILLIAM STEWART MULWEE ..... Morganton
PATRICIA ANN MURPHY ..... Winston-Salem
ELIZABETH ANN MURPHY ..... Lenoir
JANET ELIZABETH MYNATT ..... Oak Ridge, Tennessee
ELIZABETH ANNE MYRICK ..... Asheboro
KENNETH MOORE NANNEY ..... Matthews

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ANGELA RENEE NARRON ..... Wake Forest
STEPHEN LYBROOK NEAL, JR. ..... McLean, Virginia
ROGER NEWMAN ..... Fayetteville
ROBERT R. NICCOLINI ..... Greensboro
JENNIFER LOUISE O'CAIN ..... Hendersonville
ELAINE ROSE O'HARA ..... Buies Creek
PAUL LEONARD OERTEL III ..... Burlington
KENNETH BROWN OETTINGER, JR. ..... Durham
STACY ONDERS ..... Northport, New York
MATTHEW EDWARD OSBORNE ..... Chapel Hill
MONICA GLYNN PARHAM ..... Alexandria, Virginia
CHARLES W. PARNELL, JR. ..... High Point
MARTHA THOMPSON PARSON ..... Asheville
DAVID RAY PAYNE ..... Asheville
SONJA CAMILLE PAYTON ..... Charlotte
ERLE EWART PEACOCK, JR. ..... Chapel Hill
ROBERT CHRISTIAN PEEL ..... Arlington, Virginia
MARTHA BERNADETTE PERKOWSKI ..... Bridgeport, Connecticut
MARCUS SHAWN PERRY ..... Sanford
ALEXANDER STEPHEN PERRY ..... Durham
HENRY NEAL PHARR III ..... Charlotte
JAMES ALAN PHELPS ..... Greensboro
STEVEN BRADLEY PHILLIPS ..... Durham
DAVID JOSEPH WARREN PIKUL ..... Fayetteville
MATTHEW RAY PLYLER ..... Fayetteville
DEAN ROBERT POIRIER ..... Cary
EDWARD NEAL POLLARD ..... Winston-Salem
MARY SHEEHAN POLLARD ..... Winston-Salem
KEVIN ADRIAN PRAKKE ..... Cary
D. MARSH PRAUSE ..... Greensboro
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AMY BAILEY QUILLEN ..... Durham
KIMBERLY WATERS RABREN ..... Charlotte
NATALIE REID RAFALSKY ..... Charlotte
GREGORY JOHN RAMAGE ..... Chapel Hill
JANET L. RAMSTACK ..... Raleigh
DONNA R. RASCOE ..... Chapel Hill
AUDREY FRANCES DANOVITCH RASMUSSON ..... Durham
JEANINE SUSANNE RAY ..... Cary
RENE M. REILLY ..... Jacksonville
JOHN DANIEL RENNEISEN ..... Arlington, Virginia
CLIFFORD FORREST REY ..... Spring Valley, California
WALTER ARNOLD REYNOLDS IV ..... Charlotte
WILLIAM MACK RICE ..... Bayboro
BERNARD RICHARDS, JR. ..... Raleigh
HEIDI SCHOWALTER RISSER ..... Charlotte
CHRISTOPHER HAROLD ROBERTS ..... Charlotte
REGINA L. ROBINSON ..... Mt. Airy
STEPHEN GRAHAM ROBINSON ..... Belmont
TIMOTHY J. ROOKS ..... Winston-Salem
BRUCE JOSEPH ROSE ..... Huntersville
BRYAN D. ROSENBERG ..... Cary

AUBREY ATWOOD ROTHROCK III ..... High Point
NANCY IRENE RUEDIN ..... Statesville
KARLA PHILIPPA RUSCH ..... River Falls, Wisconsin
JOHN HUNTER RUSSELL, JR. ..... Asheville
D. STELLA SABLE ..... Greensboro
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DAVID HARROLD SAMPSELL ..... Wheaton, Illinois
ANDREW KEITH SANDMAN ..... Raleigh
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MARY HELEN SAWYER ..... Winston-Salem
KURT ANTHONY SEEBER ..... Winston-Salem
SANDRA LYNN SELF ..... Lawndale
ANNETTE KIRSTEN SELLARS ..... Henderson
MARTHA LASSITER SEWELL ..... Raleigh
TIMIKA SHAFEEK ..... Winston-Salem
JEANNE MARIE SHAFFER ..... Lillington
EDWARD MICHAEL SHAHADY ..... Chapel Hill
FARRA DANNIELLE SHAW ..... Jacksonville
RICHARD SCOTT SHAW ..... Jacksonville
SCOTT HENRIES SHELTON ..... Hendersonville
ANDREW DEAN SHORE ..... Charlotte
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LARA ENGLISH SIMMONS ..... Charlotte
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Given over my hand and seal of the Board of Law Examiners this the 27th day of September, 1993.

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The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FRED GOODMAN v. WENCO FOODS, INC., D/B/A WENDY'S OLD FASHIONED HAMBURGERS AND GREENSBORO MEAT SUPPLY COMPANY, INC.[1]

No. 484A90

(Filed 18 December 1992)

1. Food § 2 (NCI3d); Uniform Commercial Code § 13 (NCI3d)—restaurant—sale of food—merchant—implied warranty of merchantability

Admissions by defendant Wendy's in its answer that it is a seller of food intended for human consumption, that it is engaged in and operates fast food restaurants, and that one of the products it sells is hamburgers containing meat patties made of beef products established that it is a mer-

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1. This caption, which sets forth the state of this case as argued before the Court of Appeals, differs somewhat from the caption on the record. The captions on the parties' briefs before the Court of Appeals and before this Court are inconsistent: Wenco Foods, Inc., is referred to both as Wenco's Foods, Inc., and as Wendy's Foods, Inc.; Wenco Management, Inc., occasionally appears without indication of incorporation. Plaintiff took voluntary dismissals with prejudice as to defendants Wenco Management, Inc., and Wendy's International, Inc. That leaves only those defendants indicated in the record as having been duly served with summonses—Wenco Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers, and Greensboro Meat Supply Company—to be retained as defendants in the caption for this appeal.

chant and the foods it sells are subject to the implied warranty of merchantability.

Am Jur 2d, Food §§ 84, 94.

Implied warranty of fitness by one serving food. 7 ALR2d 1027.

2. Food § 2 (NCI3d)— natural substance in food—cause of injury—implied warranty of merchantability

When a substance in food causes injury to the consumer of the food, it is not a bar to recovery against the seller on the basis of implied warranty of merchantability that the substance was "natural" to the food provided the substance is of such a size, quality or quantity, or the food has been so processed, or both, that the presence of the substance should not reasonably have been anticipated by the consumer. The decision of *Adams v. Tea Co.*, 251 N.C. 565, should no longer be considered as authoritative insofar as it holds that there can never be recovery on the basis of implied warranty for injury caused by a substance in food that is natural to the food.

Am Jur 2d, Food §§ 84, 94, 98; Products Liability § 227.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product. 2 ALR5th 189.

3. Food § 2 (NCI3d)— injury from substance in food—warranty of merchantability—compliance with government standards

Proof of compliance with government food standards and regulations is no bar to recovery on a breach of warranty theory for an injury from a substance in food. Although such evidence may be pertinent to the issue of the existence of a breach of any warranty, it is not conclusive.

Am Jur 2d, Food §§ 63-72.

4. Food § 2 (NCI3d)— injury from bone in hamburger—breach of warranty of merchantability—sufficiency of evidence

Plaintiff's evidence was sufficient for the jury in an action against defendant Wendy's for breach of the warranty of merchantability of a hamburger sandwich where it tended to show that plaintiff was injured when he bit down on a triangular, one-half inch, inflexible bone shaving in the meat of a ham-

burger sandwich purchased from a Wendy's restaurant. The jury could reasonably determine the meat to be of such a nature, i.e., hamburger, and the bone in the meat of such a size that a consumer of the meat should not reasonably have anticipated the bone's presence.

Am Jur 2d, Food §§ 94, 98, 104; Products Liability § 227.

5. **Rules of Civil Procedure § 50 (NCI3d)— negligence action—directed verdict**

Directed verdict in a negligence action should be granted with caution because, ordinarily, it is for the jury to determine whether the applicable standard of care has been breached. But when there is no evidence of an essential element of plaintiff's claim, directed verdict is proper.

Am Jur 2d, Negligence §§ 20-23.

6. **Food, Drugs, and Cosmetics § 8 (NCI4th)— adulterated food—sale by restaurateur—beef bone in hamburger—standard of care**

The N.C. Pure Food, Drug and Cosmetic Act imposes upon a restaurateur the general duty not to sell adulterated food, which might include beef bone in hamburger, if the quantity of the bone "ordinarily render[ed] it injurious to health." N.C.G.S. § 106-129. However, the Act provides no standard by which to comply with that duty, and such a standard of care would presumably be imposed by state regulations, promulgated pursuant to the Act, that specify the tolerance for bone fragments in ground meat.

Am Jur 2d, Food §§ 20-22, 35; Products Liability §§ 226, 227.

7. **Food § 2 (NCI3d)— injury from bone fragment in hamburger—negligence of restaurateur—insufficient evidence for jury**

A directed verdict was properly entered for defendant Wendy's on the issue of its negligence in selling plaintiff a hamburger containing a bone fragment where plaintiff's evidence tended to show that he was injured when he bit down on a triangular, one-half inch, inflexible bone shaving in a hamburger purchased at a Wendy's restaurant, and plaintiff's evidence also showed that Wendy's took precautions to ensure that meat used in its hamburgers was reliably free of inju-

rious bone fragments in that its grinding specifications stated that "acceptable" preparation of its meat was to chop beef free of "all bones" and force it through a one-eighth inch plate; the grinding process for hamburger supplied to Wendy's forces the chopped meat through two plates with progressively smaller holes; and a "bone collector" device on the processor's grinding machines, not required by N.C. Department of Agriculture or U.S.D.A. regulations, removes much of the bone and gristle remaining after the grinding process. The presence of a small bone fragment, standing alone, creates no inference that Wendy's was negligent in its inspection of the hamburger it served to plaintiff.

Am Jur 2d, Food §§ 35, 89, 94, 104; Products Liability § 227.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product. 2 ALR5th 189.

8. **Rules of Civil Procedure § 56.2 (NCI3d)— defendant's motion for summary judgment—burden of proof**

A defendant moving for summary judgment must first meet the burden of proving that an essential element of plaintiff's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense. Only after a moving party meets this burden must the nonmovant produce a forecast of evidence demonstrating that the plaintiff will be able to make out a prima facie case at trial. At this second stage it is not incumbent upon a plaintiff to present all the evidence available in his favor, but only that necessary to rebut the defendant's showing.

Am Jur 2d, Summary Judgment § 15.

9. **Food § 2 (NCI3d)— bone fragment in hamburger—meat supplier—breach of warranty of merchantability—summary judgment improper**

The trial court erred in entering summary judgment for defendant meat supplier in plaintiff's action for breach of the warranty of merchantability of ground beef allegedly supplied by defendant to a Wendy's restaurant where plaintiff's complaint and deposition stated that he had eaten approximately one half of a hamburger purchased at a Wendy's restaurant

when he bit into a piece of bone that was "in the meat" and broke off pieces of two teeth, that the bone appeared to be a meat bone and most of the substance in plaintiff's mouth at the time of the injury was meat, and that he incurred medical and dental bills as a result thereof, and defendant admitted in its answer that it was a supplier of ground beef to the Wendy's restaurant where plaintiff was injured and that some of its meat products were used to make hamburger patties. Plaintiff's deposition testimony that he had no direct proof that the bone came from the meat or that the meat came from defendant supplier did not require summary judgment for the defendant since the sources of the meat and bone could be proven at trial by inferences from other facts.

Am Jur 2d, Food § 98; Products Liability § 227; Summary Judgment §§ 6, 27.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product. 2 ALR5th 189.

10. **Sales § 22.1 (NCI3d)— bone fragment in hamburger—meat supplier—warranty of merchantability—defense under Products Liability Act—summary judgment improper**

In plaintiff's action to recover for injuries received when he bit down on a bone fragment in a hamburger purchased at a Wendy's restaurant, defendant meat supplier was not entitled to summary judgment on plaintiff's claim for breach of warranty of merchantability of ground beef it allegedly supplied to the restaurant on the ground that the action was barred by two sections of the Products Liability Act, N.C.G.S. §§ 99B-3 and 99B-4, where there was no forecast of evidence that any alteration or modification in the ground beef after the product left defendant's control was not in accord with its instructions or specifications and that such a modification was the cause of the alleged defect resulting in plaintiff's injuries.

Am Jur 2d, Food §§ 95, 98; Products Liability §§ 226, 227; Summary Judgment §§ 6, 27.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product. 2 ALR5th 189.

11. Food § 2 (NCI3d); Sales § 22.1 (NCI3d)— bone fragment in hamburger—negligence by meat supplier—summary judgment improper

The trial court erred in entering summary judgment for defendant meat supplier on plaintiff's claim for negligence in supplying ground beef containing a bone fragment to a Wendy's restaurant where plaintiff's complaint and deposition stated that a bone fragment in the meat of a hamburger purchased at the Wendy's restaurant injured him and resulted in monetary damages; defendant admitted in its answer that it was a supplier of ground beef to the Wendy's restaurant where plaintiff was injured and that some of its meat products were used by Wendy's to make hamburger patties; and defendant did not meet its initial burden of showing that plaintiff could not prove defendant's negligence at trial by presenting evidence at the summary judgment hearing or pointing to evidence already adduced during discovery to establish that it had exercised due care in the preparation of its meat products.

Am Jur 2d, Food §§ 89, 95, 98; Products Liability §§ 226, 227; Summary Judgment §§ 6, 27.

Liability for injury or death allegedly caused by food product containing object related to, but not intended to be present in, product. 2 ALR5th 189.

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

On appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 100 N.C. App. 108, 394 S.E.2d 832 (1990), reversing in part order entered on 23 May 1989 by Ellis, J., directing verdict in favor of defendant Wenco Foods, Inc., and reversing in part order entered on 21 December 1987 by Brannon, J., granting summary judgment in favor of defendant Greensboro Meat Supply Co., Inc. Heard in the Supreme Court 12 February 1991.

The Law Offices of Brenton D. Adams, by Brenton D. Adams and C. Chris Webster, for plaintiff-appellant and -appellee.

Faison, Fletcher, Barber & Gillespie, by O. William Faison, Reginald B. Gillespie, Jr., and Cynthia T. Shriner, for defendant-appellant and -appellee Wenco Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Sanford W. Thompson, IV, and Kari Lynn Russwurm, for defendant-appellant and -appellee Greensboro Meat Supply Company.

EXUM, Chief Justice.

The plaintiff was injured when he bit down on a small bone in a hamburger sandwich purchased at Wendy's Old Fashioned Hamburgers. He brought actions in negligence and breach of the implied warranty of merchantability against Wenco Management, Wenco Foods, Inc., d/b/a Wendy's Old Fashioned Hamburgers [hereinafter Wendy's], and against Greensboro Meat Supply Co. [hereinafter GMSC], which allegedly supplied the hamburger meat for that Wendy's restaurant.

The trial court granted summary judgment on both claims for defendant GMSC, but allowed plaintiff's action against Wendy's to go to trial. At trial, the trial court allowed Wendy's' motion for directed verdict on both claims at the close of plaintiff's evidence.

In its majority opinion as reported the Court of Appeals reversed both the directed verdict for Wendy's and summary judgment for GMSC. A majority of the Court of Appeals panel (Judges Arnold and Greene) concluded that plaintiff's implied warranty of merchantability claims should have survived Wendy's' motion for a directed verdict and GMSC's motion for summary judgment. Only Judge Greene, writing the principal opinion for the panel, concluded that the negligence claims should also have survived these motions by defendants. Only Chief Judge Hedrick concluded that the trial court correctly entered summary judgment for GMSC and directed verdict for Wendy's on both the warranty and negligence claims.

We affirm the Court of Appeals' decision affirming the directed verdict on plaintiff's negligence claim against Wendy's. We affirm the Court of Appeals' decision reversing directed verdict for Wendy's and summary judgment for GMSC on plaintiff's breach of the implied warranty of merchantability claims. We conclude, however, that the majority of the Court of Appeals erroneously affirmed summary judgment for GMSC as to plaintiff's negligence claim; we therefore reverse this decision. The result is that the case is remanded for trial on plaintiff's implied warranty of merchantability claims against both defendants and on plaintiff's negligence claim against GMSC.

I. WENDY'S

At trial, only plaintiff offered evidence. Plaintiff testified that on 28 October 1983, he and an employee stopped for lunch at the Hillsborough Wendy's restaurant. Plaintiff ordered a double hamburger and had eaten about half of it when he bit down and felt immediate pain in his lower jaw. Plaintiff took from his mouth the hamburger, a piece of bone that did not come from his mouth, and pieces of teeth. Plaintiff described the piece of bone as triangular, one-sixteenth- to one-quarter-inch thick, one-half-inch long and tapering from one-quarter inch at its base to a point. He indicated that, as far as he knew, the bone was a cow bone. It was about the size of his small fingernail, thick on one side, shaved down to a point on the other, and too small to be flexible. Plaintiff stated the bite containing the bone was mostly meat and that the bone had been in the meat, but he admitted it was possible the bone could have been in any of the condiments or in the bun. Plaintiff's luncheon companion testified he witnessed the incident and saw plaintiff show the bone to the restaurant manager. He noted plaintiff missed at least one day of work. Plaintiff's wife testified as to the extent and intensity of her husband's pain resulting from the broken teeth, and plaintiff's dentist and endodontist testified as to the dental damage, their work on his teeth over several months, and the cost of their services.

Plaintiff also introduced into evidence a copy of Wendy's' grinding specifications for its meat suppliers, which require that chopped meat be "[f]ree from bone or cartilage in excess of 1/8 inch in any dimension that is ossified" prior to grinding and packing.

The owner of GMSC, Jake Leggett, called as a witness by plaintiff, testified that in 1983, and at all times relevant to this incident, GMSC supplied all the ground beef to the Wendy's restaurant in Hillsborough. The beef was certified by the United States Department of Agriculture. Leggett submitted as an exhibit U.S.D.A. boneless meat inspection criteria, which included a chart describing criteria for when bone fragments in meat were considered a defect in the product. The chart indicated that bone fragments less than one-and-one-half inches in their greatest dimensions were "minor" defects. Bone fragments less than three-quarters of an inch in length and less than one-quarter inch wide which are flexible or which crumble easily are considered "insignificant."

More than five minor fragments in a sample unit of thirty pounds is considered a "major" defect.

According to Leggett, meat is inspected prior to grinding. During 1983, a state meat inspector was on site at GMSC at all times to inspect, grade, and approve or reject each lot of meat prior to grinding. State supervisory personnel periodically spot-checked behind the inspectors. Inspectors from Wendy's also randomly inspected GMSC and were "very meticulous and strict" in enforcing Wendy's' own regulations. Random inspection, sometimes occurring several times a week, ensured that GMSC effectively enforced these regulations.

In addition, Leggett described the grinding process required by Wendy's regulations and used by GMSC. By this process chopped meat is forced through two plates with progressively smaller holes. A "bone collector" device on GMSC's grinding machine removes much of the bone and gristle remaining after the grinding process. The meat is not inspected after grinding, but is packed in twenty-pound bags, vacuum sealed, and placed in a cooler.

A. IMPLIED WARRANTY OF MERCHANTABILITY

A motion for a directed verdict presents the question whether the evidence is sufficient to carry the case to the jury.

> In passing on this motion, the trial judge must consider the evidence in the light most favorable to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law.

Arnold v. Sharpe, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979).

The implied warranty of merchantability as codified under the Uniform Commercial Code, N.C.G.S. § 25-2-314 (1986), accords with prior North Carolina law. *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 394, 186 S.E.2d 161, 166 (1972). *See generally*, Jeanne Owen, *Note. Sales—Warranties—Implied in Sale of Food for Human Consumption*, 32 N.C. L. Rev. 351, 354 (1954). The statute states, in pertinent part:

> Unless excluded or modified, . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

> [T]he serving of food or drink to be consumed either on the premises or elsewhere is a sale.

N.C.G.S. § 25-2-314(1) (1986). Goods, to be merchantable, "must be at least such as . . . are fit for the ordinary purposes for which such goods are used." N.C.G.S. § 25-2-314(2), (2)(c) (1986).

> To prove a breach of implied warranty of merchantability under N.C.G.S. § 25-2-314, "a plaintiff must prove, first[,] that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of the sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale."

Morrison v. Sears, Roebuck & Co., 319 N.C. 298, 301, 354 S.E.2d 495, 497 (1987) (quoting *Cockerham v. Ward*, 44 N.C. App. 615, 624-25, 262 S.E.2d 651, 658, *disc. rev. denied*, 300 N.C. 195, 269 S.E.2d 622 (1980)) (citations omitted).

[1] Wendy's admitted in its answer that it is a seller of food intended for human consumption, that it is engaged in and operates fast food restaurants, including the Hillsborough restaurant where plaintiff was allegedly injured, and that one of the products it sells is hamburgers containing meat patties made of beef products. The Court of Appeals correctly concluded these admissions establish that Wendy's is a merchant and that the foods it sells are subject to the implied warranty of merchantability.

Plaintiff's evidence, viewed in the light most favorable to him, tended to show that his broken teeth and resulting physical and financial damage were caused by biting down on a bone in a hamburger purchased from Wendy's restaurant. Whether the bone in the hamburger caused the product to be unfit for consumption, *i.e.*, "defective," is the keystone to resolving whether plaintiff's claims for breach of implied warranty should have survived Wendy's' motion for a directed verdict.

Wendy's, relying on this Court's decision in *Adams v. Tea Co.*, 251 N.C. 565, 112 S.E.2d 92 (1960), contends that plaintiff's claim for breach of implied warranty must fail because the bone was "natural" to the foodstuff. In *Adams* the plaintiff bit down

on a piece of crystallized corn in his spoonful of cornflakes, cracking his eyetooth, and brought an action for breach of implied warranty against the retailer. This Court held that nonsuit (the precursor of a directed verdict) had been properly entered upon plaintiff's evidence, "where the substance causing the injury [was] natural to the corn flakes, and not a foreign substance, and where a consumer of the product might be expected to anticipate the presence of the substance in the food." 251 N.C. at 572, 112 S.E.2d at 95.

The Court of Appeals construed this language as establishing a two-part inquiry: "(1) whether the substance causing the injury is natural or foreign; and (2) if natural, whether 'a consumer of the product might be expected to anticipate the presence of this substance in the food.' " 100 N.C. App. at 114, 394 S.E.2d at 835 (quoting *Adams v. Tea Co.*, 251 N.C. at 572, 112 S.E.2d at 98). *See also Evart v. Suli*, 211 Cal. App. 3d 605, 611 n.4, 259 Cal. Rptr. 535, 539 n.4 (1989) (reading *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936), as stating similar two-part test and *Adams* as adopting second prong).

The question is whether by this language the *Adams* Court meant to adopt a two-prong test for liability under which a plaintiff could prevail on either prong, or whether it was the Court's intent to adopt the rule that whenever a substance causing injury is natural to the food itself there can be no liability because every consumer should anticipate and be on guard against the presence of such a substance. For the reasons that follow, we conclude the *Adams* Court took the latter approach.

The Court in *Adams* surveyed a number of cases from other jurisdictions in which substances "natural" to the food had caused injury. The Court regarded as anomalous the rejection of the "foreign-natural" distinction in *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942), in which the court declined to say "as a matter of law" that a can of oysters containing a quarter-sized piece of shell "was reasonably fit for human consumption." *Id.* at 563, 28 A.2d at 915. The Court in *Adams* appeared to join what was then a majority of jurisdictions which espoused the view that a substance "natural" to the injurious food cannot be a "defect" in the food so as to cause the seller of the food to be liable.

> No case has been found . . . holding that because an article has retained a portion of itself that was intended to be extracted . . . the product has thereby been rendered unwhole-

> some and unfit for human consumption. Only when the courts have found extraneous, foreign matter to be present have they held defendant liable for breach of warranty, in either tort or trespass.

251 N.C. at 571, 112 S.E.2d at 97 (quoting *Recent Cases: Sales—Foods—Implied Warranties*, 17 Temple U.L.Q. 203, 204 (1942-43)).

In *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d 674, 59 P.2d 144 (1936), quoted copiously and relied upon in *Adams*, the California Supreme Court observed the statutory requisite that food be "reasonably" fit for its purpose and opined,

> in certain instances a deviation from perfection, particularly if it is *of such a nature as in common knowledge could be reasonably anticipated and guarded against by the consumer*, may not be such a defect as to result in the food being not reasonably fit for human consumption.

Id. at 681, 59 P.2d at 147-48, *quoted in Adams v. Tea Co.*, 251 N.C. at 567-68, 112 S.E.2d at 96 (emphasis added).

In *Adams* the Court noted that, at the time, no court except the Pennsylvania Court in *Bonenberger* had extended liability based on implied warranty to a restaurateur when the substance causing injury was natural to the food served. According to the *Adams* Court's research, in all other existing cases in which the food was found not to be reasonably fit for human consumption, it was by reason of contamination by a foreign substance or the food's own noxious condition. In contrast, "[b]ones which are natural to the type of meat served cannot legitimately be called a foreign substance, and a consumer who eats meat dishes ought to be on his guard and anticipate against such bones." *Adams v. Tea Co.*, 251 N.C. at 568, 112 S.E.2d at 95 (quoting *Mix v. Ingersoll Candy Co.*, 6 Cal. 2d at 682, 59 P.2d at 148).

The Court in *Adams* restated numerous holdings in which courts exercising the "foreign-natural" test articulated in *Mix* held "natural" defects in foods do not violate the restaurateur's implied warranty. In virtually every case[2] approval of the "foreign-natural"

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2. One exception, *Silva v. F.W. Woolworth Co.*, 28 Cal. App. 2d 649, 83 P.2d 76 (Ct. App. 1938), exemplifies an extreme to which the "foreign/natural" test has been put. In *Silva* the plaintiff swallowed a turkey bone that had been hidden in the dressing served with the turkey. The court, "look[ing] upon the service

test coincided with the courts' recognition of consumer expectations as the foundation of the test. In other words, if a substance causing injury was "natural" to the food being served, the consumer ought reasonably to anticipate its presence and could not hold the server liable for any damages it caused. The court in *Shapiro v. Hotel Statler Corp.*, 132 F. Supp. 891, 893 (S.D. Cal. 1955), quoted the holding by the California Supreme Court in *Mix* that "bones which are natural to type of fish served are not a 'foreign substance,' and a customer who eats such food *ought to anticipate and guard against* the presence of such bones." *Adams v. Tea Co.*, 251 N.C. at 569, 112 S.E.2d at 96 (emphasis added). "One who eats pork chops, or the favorite dish of spareribs and sauerkraut, or the type of meat that bones are natural to, *ought to anticipate and be on his guard against* the presence of bone, which he knows will be there." *Brown v. Nebiker*, 299 Iowa 1223, 1234, 296 N.W. 366, 371 (1941), *quoted in Adams v. Tea Co.*, 251 N.C. at 570, 112 S.E.2d at 96 (emphasis added). The Court approved the holding in a negligence case, *Lamb v. Hill*, 112 Cal. App. 2d 41, 245 P.2d 316 (1952), that "customer was *not entitled to expect* an entirely boneless chicken pie in every instance." *Adams v. Tea Co.*, 251 N.C. at 569, 112 S.E.2d at 95 (emphasis added).

Thus *Adams*, which said there was to be no liability in implied warranty whenever the injurious substance was natural to the food because the consumer should *reasonably expect* such substances to be present, came to be regarded as a case exemplifying the "foreign-natural" distinction in implied warranty actions. *See, e.g.*, Jane M. Draper, Annotation, *Liability for Injury or Death Allegedly Caused by Food Product Containing Object Related to, but not Intended to be Present in Product*, 2 A.L.R. 5th 189, 208 (1992); *Hochberg v. O'Donnell's Restaurant*, 272 A.2d 846, 848 n.3 (D.C. 1971); *Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824, 826 (Fla. 1967); *Musso v. Picadilly Cafeterias, Inc.*, 178 So. 2d 421, *writ. denied*, 248 La. 468, 179 So. 2d 641 (1965); *Williams v. Braum Ice Cream Stores, Inc.*, 534 P.2d 700, 701 (Okla. 1974); *Finocchiaro v. Ward Baking Co.*, 104 R.I. 5, 12 n.3, 241 A.2d 619, 623 n.3 (1968); *Betehia v. Cape Cod Corp.*, 101 Wis. 2d 323, 328, 103 N.W.2d 64, 67 (1960). *Adams* thus articulates one branch of a dichotomy

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as one dish as delivered, in which there was no substance not 'natural' to the type of meat served," denied plaintiff recovery as a matter of law. *Id.* at 651, 83 P.2d at 77.

among jurisdictions as to whether a substance "natural" to a product may be a "defect" in the product: Some courts hold simply that any non-foreign substance—such as shell in oyster stew or a pit in a cherry pie—will not support a claim for breach of implied warranty of merchantability because the possible presence of the substance should have been anticipated in every instance by the consumer; other courts hold that whether such a substance is a "defect" depends upon the "reasonable expectations" of the consumer. *See generally* Donald A. Anderson, *3 Anderson on the Uniform Commercial Code* §§ 2-314:184, 2-314:185 (1983).

In an earlier case the Court of Appeals seemed reluctant to read *Adams* (as we now read it) to preclude recovery whenever the substance causing injury is natural to the food being consumed. *Coffer v. Standard Brands*, 30 N.C. App. 134, 266 S.E.2d 534 (1976). In *Coffer* a breach of implied warranty claim was brought by a plaintiff whose tooth allegedly broke on a piece of filbert shell in a jar of mixed nuts. The Court of Appeals cited *Adams* as supporting the doctrine "well recognized in this and other jurisdictions passing on the question that the presence of natural impurities is no basis for liability," *id.* at 141, 226 S.E.2d at 538, and held that "[s]ince the impurity complained of in this case was a natural incident of the goods in question, . . . there was no breach of the implied warranty of merchantability." 30 N.C. App. at 142, 266 S.E.2d at 539. Nevertheless, the court buttressed this conclusion with reasoning that seems by implication to be grounded in part on the "reasonable expectation" doctrine. The court found the food's compliance with federal and state food quality standards "highly persuasive in establishing merchantability under G.S. 25-2-314(2)(a)," 30 N.C. App. at 140, 226 S.E.2d at 538. The court also noted that figures for the incidence of peanut shells in units of shelled peanuts indicated that "there is some tolerance in the trade for unshelled filberts, as well." *Id.* In addition, the court found "instructive" N.C.G.S. § 106-129, under which food is not deemed "adulterated" if "any poisonous or deleterious substance . . . is not an added substance . . . [provided] the *quantity* of such substance . . . does not ordinarily render it injurious to health." *Id.* at 140-141, 226 S.E.2d at 538 (quoting N.C.G.S. § 106-129 (1988)) (emphasis added). The court's reliance on this statute suggests the court's belief that recovery for injury caused by a substance natural to the food may depend in part upon the quantity, or size, of the substance.

In the case before us the Court of Appeals read *Adams* as permitting recovery on implied warranty for an injury-causing substance natural to the food if presence of the substance was nevertheless not reasonably to be anticipated by the consumer.

[2] While we disagree with this reading of *Adams* by the Court of Appeals, we think it is time to reexamine the *Adams* holding. We conclude that *Adams* should no longer be considered authoritative insofar as it holds there can never be recovery on the basis of implied warranty for injury caused by a substance in food that is natural to food. We think the modern and better view is that there may be recovery, notwithstanding the injury-causing substance's naturalness to the food, if because of the way in which the food was processed or the nature, size or quantity of the substance, or both, a consumer should not reasonably have anticipated the substance's presence. This, essentially, is the test adopted below by the Court of Appeals.

"Naturalness of the substance to any ingredients in the food served is important only in determining whether the consumer may reasonably expect to find such substance in the particular type of dish or style of food served." *Betehia v. Cape Cod Corp.*, 101 Wis. 2d 323, 328, 103 N.W.2d 64, 67. *See also Zabner v. Howard Johnson's, Inc.*, 201 So. 2d 824, 826.

> It is not the fact that a defect is a natural one which is important to this inquiry, but the fact that the ordinary consumer would expect that he might encounter it, and thus he would normally take his own precautions. A package of ground meat is not expected to be consumed from the sealed package as a bottle of soda water or milk, but is expected to be processed or otherwise altered before consumption by the purchaser.

Loyacano v. Continental Insurance Co., 283 So. 2d 302, 305 (La. App. 1973), *quoted in Matthews v. Campbell Soup Co.*, 380 F. Supp. 1061, 1065 (S.D. Tex. 1974). "Surely it is within the expectation of the consumer to find a bone in a T-bone steak; but just as certainly it is reasonable for a consumer not to expect to find a bone in a package of hamburger meat." *Morrison's Cafeteria v. Haddox*, 431 So. 2d 975, 978 (Ala. 1983).

We thus hold that when a substance in food causes injury to a consumer of the food, it is not a bar to recovery against the seller that the substance was "natural" to the food, provided

the substance is of such a size, quality or quantity, or the food has been so processed, or both, that the substance's presence should not reasonably have been anticipated by the consumer.

A triangular, one-half-inch, inflexible bone shaving is indubitably "inherent" in or "natural" to a cut of beef, but whether it is so "natural" to hamburger as to put a consumer on his guard—whether it "is to be reasonably expected by the consumer"—is, in most cases, a question for the jury. *Betehia v. Cape Cod Corp.*, 101 Wis. 2d at 332, 103 N.W.2d at 69. "We are not requiring that the respondents' hamburgers be perfect, only that they be fit for their intended purpose. It is difficult to conceive of how a consumer might guard against the type of injury present here, short of removing the hamburger from its bun, breaking it apart and inspecting its small components. . . . [W]e doubt that any hamburger manufacturer seriously expects consumers to go to such lengths, especially since a hamburger sandwich is meant to be eaten out of hand, without cutting, slicing, or even the use of a fork or knife." *Evart v. Suli*, 211 Cal. App. 3d at 613-14, 259 Cal. Rptr. at 541. "If one 'reasonably expects' to find an item in his or her food then he guards against being injured by watching for that item. When one eats a hamburger he does not nibble his way along hunting for bones because he is not 'reasonably expecting' one in his food." *Jackson v. Nestle-Beiche, Inc.*, 212 Ill. App. 3d 296, 304, 569 N.E.2d 1119, 1123 (1991) (quoting *O'Dell v. DeJean's Packing Co.*, 585 P.2d 399, 402 (Okla. Ct. App. 1978)).

We conclude that Wendy's' implied warranty regarding "merchantable" hamburgers neither requires perfection nor stops at some manifest line between "foreign" and "natural" substances in the meat. It depends upon what the consumer should reasonably expect to encounter.

[3] Defendant Wendy's introduced a U.S.D.A. chart of meat defects that has been adopted by the State Board of Agriculture pursuant to N.C.G.S. § 106-128. This statute provides:

> A food shall be deemed to be adulterated . . . [i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated . . . if the quantity of such substance in such food does not ordinarily render it injurious to health.

N.C.G.S. § 106-129 (1988). Wendy's argues that the evidence supported its contention that its hamburger complied with these standards. Wendy's reasons that this chart indicates some tolerance in the trade for bone fragments in meat and that its hamburgers, like the filbert shell in the mixed nuts in *Coffer*, are therefore merchantable as a matter of law.

The Court of Appeals rejected this argument, noting that compliance "with all state and federal regulations is only some evidence which the jury may consider in determining whether the product was merchantable." 100 N.C. App. at 115, 394 S.E.2d at 836. We agree. Proof of compliance with government standards is no bar to recovery on a breach of warranty theory: although such evidence may be pertinent to the issue of the existence of a breach of any warranty, it is not conclusive. *Reid v. Eckerds Drugs, Inc.*, 40 N.C. App. 476, 483, 253 S.E.2d 344, 349, *cert. denied*, 297 N.C. 612, 257 S.E.2d 219 (1979). *See also Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 68-69, 376 S.E.2d 425, 428 (1989) (compliance with statutory standard is only evidence of due care); *Wilson v. Hardward, Inc.*, 259 N.C. 660, 666, 131 S.E.2d 501, 505 (1963) (voluntary adoption of a safety code as the guide to be followed for protection of the public is at least some evidence that a reasonably prudent person would adhere to the requirements of the code).

[4] We thus conclude, as did the Court of Appeals majority, that a jury could reasonably determine the meat to be of such a nature, *i.e.*, hamburger, and the bone in the meat of such a size that a consumer of the meat should not reasonably have anticipated the bone's presence. The Court of Appeals therefore properly reversed directed verdict for Wendy's on plaintiff's implied warranty of merchantability claim.

B. NEGLIGENCE

[5] Directed verdicts in a negligence action should be granted with caution because, ordinarily, it is for the jury to determine whether the applicable standard of care has been breached. *See Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987). But when there is no evidence of an essential element of plaintiff's negligence claim, directed verdict is proper. *E.g., McMurray v. Surety Federal Savings & Loan Assoc.*, 82 N.C. App. 729, 348 S.E.2d 162 (1986), *cert. denied*, 318 N.C. 695, 351 S.E.2d 748 (1987).

In order to survive defendant's motion for a directed verdict, plaintiff was required to present some evidence that Wendy's failed to exercise proper care in the performance of some legal duty owed him and that the breach of this duty was the proximate cause of his injury. *E.g., Collingwood v. G.E. Real Estate Equities*, 324 N.C. at 66, 376 S.E.2d at 427. The cause producing the injurious result must be in a continuous sequence, without which the injury would not have occurred, and one from which any person of ordinary prudence would have foreseen the likelihood of the result under the circumstances as they existed. *E.g., Ashe v. Acme Builders, Inc.*, 267 N.C. 384, 386-87, 148 S.E.2d 244, 246 (1966); *Jackson v. Gin Co.*, 255 N.C. 194, 196, 120 S.E.2d 540, 542 (1961).

In the principal opinion for the Court of Appeals, Judge Greene stated that a jury could conclude that a bone like that described by the plaintiff was of a size that ordinarily renders a hamburger injurious to health. Such a determination would prove a violation of N.C.G.S. §§ 106-122 and 106-124 of the North Carolina Food, Drug and Cosmetic Act, which prohibits "the manufacture, sale, or delivery, holding or offering for sale of any food . . . that is adulterated." N.C.G.S. § 106-122(1) (1988). A food is deemed adulterated

> [i]f it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated . . . if the quantity of such substance in such food does not ordinarily render it injurious to health.

N.C.G.S. § 106-129 (1988).

[6] When a statute "imposes upon a person a specific duty for the protection of others, a violation of such statute is negligence *per se*." *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955). The North Carolina Pure Food, Drug and Cosmetic Act imposes upon a restaurateur the general duty not to sell adulterated food, which might include beef bone in hamburger, if the quantity of the bone "ordinarily render[ed] it injurious to health." N.C.G.S. § 106-129 (1988).

But the Act provides no standard by which to comply with that duty. Such a standard of care would presumably be imposed, for example, by state regulations, promulgated pursuant to the Act, that specify the tolerance for bone fragments in ground

meat.[3] A standard of care is also imposed under the law of negligence:

> A keeper of a public eating place, engaged in the business of serving food to customers, is bound to use due care and see that the food served to his customers, at his place of business, is fit for human consumption and may be eaten without its causing injury, and for an injury caused by negligence in failing to observe this duty to his patrons such keeper is liable.

36A C.J.S. *Food* § 61, at 914 (1961). *See also Loyacano v. Continental Insurance Co.*, 283 So. 2d at 305 ("the reasonable expectation of the ordinary consumer is that the processor and vendor of ground meat would exercise the same care as that which a reasonably prudent man skilled in the art of meat handling would exercise in the removal of bones from the meat").[4]

[7] The question whether the verdict was properly directed for Wendy's on plaintiff's negligence claim rests upon the inquiry whether there was evidence in the record from which a jury might determine that Wendy's breached this standard of due care, proximately resulting in plaintiff's injury.

Evidence presented at trial indicated that Wendy's had exercised due care in the preparation of its hamburgers. Wendy's' grinding specifications stated that "acceptable" preparation of its meat was to chop beef free of "all bones" and force it through a one-eighth-inch plate. The specifications stated, however, that the "preferred" preparation was to force such meat through two plates—initially a one-half-inch or three-eighths-inch plate, then a one-eighth-inch plate. Jake Leggett, the owner of GMSC, testified that the grinding process employed for hamburger supplied to Wendy's forces the chopped meat through a three-eighth-inch-diameter hole, then re-chopped by being forced through rapidly spinning knives, then through one-eighth-inch-diameter holes. Mr. Leggett added that

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3. *See, e.g.*, 2 NCAC 52D .0001 (Dec. 1991) (adopting by reference U.S.D.A. rules, regulations, definitions, and standards governing meat and meat products set out in 9 CFR §§ 301 *et seq.* (1992)).

4. There is some authority for holding restaurateurs liable on a theory of strict liability in tort, thus presuming negligence or obviating its proof. *See generally* Restatement (Second) of Torts § 402A (1965). *See also Jim Dandy Fast Foods, Inc. v. Carpenter*, 535 S.W.2d 786 (Tex. Civ. App. Houston (1st Dist.) 1976) (rule of strict liability applies in Texas). Such a theory is neither relied on by plaintiff here nor have we adopted it in North Carolina.

GMSC also uses a "bone collector" device, not required by either North Carolina Department of Agriculture nor U.S.D.A. Regulations, "intended to remove from the meat a lot of the bone and gristle which remains after the grinding process."

That Wendy's took precautions to ascertain the meat used in its hamburger was reliably free of injurious bone fragments is uncontradicted in the record. It is not contradicted by the mere presence of bone fragment as small as the one described by plaintiff. The presence of such a small fragment, standing alone, creates no inference that Wendy's was negligent in its inspection of the hamburger it served to plaintiff. *Norris v. Pig'n Whistle Sandwich Shop, Inc.*, 79 Ga. App. 369, 375, 53 S.E.2d 718, 722 (1949). "To permit an inference of ordinary negligence from the mere presence of a particle of bone in a [hamburger] sandwich would place the seller in a position of a virtual insurer of the perfection of the food." *Id.*, 53 S.E.2d at 722. Even in an action based on breach of implied warranty, the restaurateur is not expected to serve a perfect product, but one within the consumer's "reasonable expectations" for wholesome food.

> [T]he defendant was not required, in the exercise of ordinary care, to discover and eliminate every single particle of bone from the . . . sandwich, and the mere presence of a particle of bone in the sandwich does not authorize an inference of negligence in preparing and furnishing the food to the plaintiff.

Id., 53 S.E.2d at 723. *See also Polite v. Carey Hilliards Restaurants, Inc.*, 177 Ga. App. 170, 170, 338 S.E.2d 541, 542 (1985) (presence of piece of fishbone in portion of fish does not authorize an inference of negligence in preparing and furnishing the food to plaintiff). Consequently, we affirm the mandate of the majority of the Court of Appeals affirming the directed verdict for Wendy's on the issue of Wendy's' negligence.[5]

II. GMSC

In ruling on a motion for summary judgment, the trial court considers the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits to determine the existence

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5. Our holding here does not foreclose the successful prosecution of a negligence action where the injury-causing substance in the food was, because of its size, quantity or nature, so readily detectible that its mere presence in the food creates an inference of negligence on the part of the seller.

of any genuine issue as to any material fact. N.C.G.S. § 1A-1, Rule 56(c) (1990). "[T]he burden is upon the moving party to establish the lack of any triable issue of fact. The papers of the moving party are carefully scrutinized and 'those of the opposing party are on the whole indulgently regarded.' " *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56.15[8], at 2440 (2d ed. 1975)). "The movant may meet this burden by proving an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. at 66, 376 S.E.2d at 427. "The movant is held . . . to a strict standard, and 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' " *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (quoting 6 James W. Moore et al., *Moore's Federal Practice* § 56.15[3], at 2337 (2d ed. 1971)).

[8] A summary judgment motion may progress through two steps: first, the movant must meet the burden of proving an essential element of plaintiff's claim does not exist, cannot be proven at trial or would be barred by an affirmative defense. Only after a moving party meets this burden must the nonmovant "produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. at 66, 376 S.E.2d at 42, *quoted in Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 341 (1992). At this second stage it is not incumbent upon a plaintiff to "present all the evidence available in his favor[,] but only that necessary to rebut the defendant's showing." *Morrison v. Sears, Roebuck & Co.*, 319 N.C. at 300, 354 S.E.2d at 497 (quoting *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981)).

A. Implied Warranty of Merchantability

The elements essential to a claim for breach of implied warranty of merchantability are: (1) the goods bought and sold were subject to an implied warranty of merchantability, (2) the goods were defective at the time of the sale, (3) the defective nature of the goods caused plaintiff's injury, and (4) damages were suffered as

a result. *Morrison v. Sears, Roebuck & Co.*, 319 N.C. at 301, 354 S.E.2d at 497.

As a preliminary matter, GMSC, like Wendy's, relies upon the "foreign-natural" distinction in *Adams* in contending that liability for breach of the implied warranty of merchantability was precluded by the fact that the bone was "natural" to ground beef. As we have made clear, it is the consumer's "reasonable expectations" rather than a distinction based upon the source of the injurious substance that determines whether the food was "defective" for purposes of this cause of action. A meat supplier's implied warranty that its product is merchantable is not foreclosed merely by virtue of the fact that the alleged "defect" resulting in the consumer's injury was "natural" to that product.

[9] To support its motion for summary judgment on plaintiff's implied warranty of merchantability claim, GMSC offered the pleadings and plaintiff's deposition. Plaintiff alleged in his complaint that GMSC was in the business of selling meat to Wendy's for use in the preparation and selling of food products to the general public and as such GMSC was a merchant with regard to those products. GMSC admitted in its answer that it is "a corporation . . . engaged in and operating a meat supply business," "that Greensboro Meat has sold meat products to Wenco Foods, Inc., from time to time," and "that Wendy's used some of the meat products sold by Greensboro Meat to make hamburger patties." In his deposition plaintiff averred that he had eaten approximately one half of his hamburger when he bit into a piece of bone that was "in the [hamburger] meat" and broke off a piece of one or more teeth. Plaintiff also indicated that medical and dental bills resulting from this incident were before the court.

GMSC contends a certain answer in plaintiff's deposition demonstrated that plaintiff could not prove at trial that the hamburger meat he was eating was supplied by GMSC. The answer was in response to a question posed by GMSC's counsel. The colloquy leading to the answer and the answer appear as follows in the deposition:

> Q: Do you have any positive proof that the hard substance was in the meat which was manufactured, processed, or sold by Greensboro Meat Supply Company?
>
> . . . .

A: . . . I believe that since the greater majority of the mass that was in my mouth was cooked meat, that it was in the meat.

Q: But you do not have any way of proving that this substance was in the meat that you spit out of your mouth?

A: That's right.

Q: And you do not have any way of proving that the particular meat that you spit out of your mouth came from Greensboro Meat Supply Company, do you?

A: That's correct.

GMSC relies on the last answer given by plaintiff for its argument that plaintiff's case against it should have been foreclosed at the summary judgment hearing.

We disagree. From the context of the question and answer, particularly the immediately preceding question and answer, the sense of plaintiff's response seems clearly to be that plaintiff had no direct evidence, or as is sometimes said "ocular proof," or as it was put in counsel's earlier question, no proof positive of the fact that the meat he was eating came from GMSC. Such proof would not, of course, be required at trial. Plaintiff had just admitted that he "had no way of proving" the bone came from the meat as opposed to the roll, or the condiments. Yet we know that the source of the bone can be proved by inferences from other facts plaintiff related, *e.g.*, the bone appeared to be a meat bone and most of the substance in plaintiff's mouth at the time of the injury was meat. The source of the meat, like the source of the bone, could be proved at trial by inferences from other facts, some of which are admitted in GMSC's answer to the complaint.

GMSC's admissions in its answer belie plaintiff's assessment of his proofs. At best, plaintiff's testimony and GMSC's admissions create an issue of material fact at the summary judgment stage.

We hold that GMSC's admissions and the facts and inferences stated in plaintiff's complaint and deposition, if true, create a genuine issue of material fact as to each element of plaintiff's claim against GMSC based upon its breach of the implied warranty of merchantability. In light of GMSC's admission that "from time to time" they supplied meat products to Wendy's "to make hamburger patties" plaintiff's testimony on deposition does not foreclose his

ability to prove at trial that GMSC supplied the ground beef to Wendy's from which the hamburger patty containing the bone was made. Neither does the showing at summary judgment foreclose plaintiff's ability to prove at trial that the ground beef was defective at the time of its sale to Wendy's. Finally, plaintiff's deposition statements raise genuine issues of material fact as to whether the defective nature of the ground beef caused plaintiff's injury and resulting damages.

[10] GMSC next argues it was entitled to summary judgment because it could "conclusively establish[ ] a complete defense or legal bar to the nonmovant's claim." *Virginia Electric & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 190-91, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). In *Morrison v. Sears, Roebuck & Co.*, we concluded "an action for breach of implied warranty of merchantability under the Uniform Commercial Code is a 'product liability action' within the meaning of the Products Liability Act if . . . the action is for injury to person or property resulting from a sale of a product." 319 N.C. at 303, 354 S.E.2d at 498. "[I]n products liability actions arising from breaches of *implied* warranties . . . the defenses provided by N.C.G.S. § 99B-2(a) are available to defendants." *Id.* at 303, 354 S.E.2d at 499. It follows that defendants may avail themselves of defenses provided elsewhere in the Products Liability Act.[6]

In its answer GMSC asserted statutory bars to plaintiff's action under two sections of North Carolina's Products Liability Act. The first of these sections provides, in pertinent part:

> (a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury . . . was either an alteration or modifi-

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6. GMSC appropriately does not raise a defense based on plaintiff's lack of privity. This bar was effectively eliminated by the North Carolina Products Liability Act: "A claimant who is a buyer . . . may bring a product liability action directly against the manufacturer of the product involved for breach of implied warranty; and the lack of privity of contract shall not be grounds for the dismissal of such action." N.C.G.S. § 99B-2(b) (1989). *See also* Charles F. Blanchard and Doug B. Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 Wake Forest L. Rev. 172, 179 (1980) (". . . North Carolina courts have often required privity in implied warranty cases. The new North Carolina Products Liability Act, however, ends this requirement. Section 99B-2(b) of the Act expressly states that 'the lack of privity of contract shall not be grounds for dismissal' of implied warranty actions.")

cation of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) The alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) The alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. . . .

N.C.G.S. § 99B-3 (1989). The next section provides that the manufacturer or seller is not liable in a product liability action if the product is used contrary to instructions, warnings, or, in their absence, common sense:

No manufacturer or seller shall be held liable in any product liability action if:

(1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; . . . or

(2) The user discovered a defect or unreasonably dangerous condition of the product and was aware of the danger, and nevertheless proceeded unreasonably to make use of the product and was injured by or caused injury with that product; or

(3) The claimant failed to exercise reasonable care under the circumstances in his use of the product, and such failure was a proximate cause of the occurrence that caused injury or damage to the claimant.

N.C.G.S. § 99B-4 (1989).

GMSC contends that any alteration or modification in the ground beef after the product left its control was not in accord with its instructions or specifications and that such a modification must have been the cause of the alleged defect resulting in plaintiff's injury.

Suffice it to say that there was no forecast of evidence at the hearing on GMSC's motion for summary judgment that would support, factually, GMSC's entitlement to these defenses as a matter of law. GMSC's entitlement to these defenses must be left for determination at trial.

We conclude that GMSC failed to carry its burden as the movant for summary judgment to prove that any essential element of plaintiff's claim for breach of the implied warranty of merchantability is nonexistent or that plaintiff will be unable at trial to produce evidence supporting an essential element or that, as a matter of law, GMSC is entitled to an affirmative defense that would bar plaintiff's claim. The averments and admissions of fact in the pleadings and in plaintiff's deposition, together with their permissible inferences, raise issues of fact material to GMSC's liability for plaintiff's injury on the basis of an implied warranty of merchantability which were not dispelled by GMSC in its motion for summary judgment. We accordingly agree with the decision of the Court of Appeals majority to reverse summary judgment for GMSC on that claim.

B. NEGLIGENCE

In North Carolina, "a manufacturer of a product is under a duty to the ultimate purchaser, irrespective of contract, to use reasonable care in the manufacture and inspection of the article so as not to subject the purchaser to injury from a latent defect." *Terry v. Bottling Co.*, 263 N.C. 1, 4, 138 S.E.2d 753, 755 (1964) (Sharp, J., concurring). In order to prevail in an action to recover for personal injuries resulting from the negligence of a processor or manufacturer, the plaintiff must present evidence tending to show that the manufactured product was defective when it left the manufacturer's plant and that the manufacturer "was negligent in its design of the product, in its selection of materials, in its assembly process, or in inspection of the product." *Sutton v. Major Products Co.*, 91 N.C. App. 610, 612, 372 S.E.2d 897, 898 (1988). The chain of causation cannot have been significantly interrupted

by the intervention of a third party. *E.g., Corprew v. Chemical Corp.*, 271 N.C. 485, 493, 157 S.E.2d 98, 103 (1967).

We again stress that on a motion for summary judgment the burden of proving that there is no genuine issue as to any material fact is on the movant, and if he fails to carry that burden, summary judgment is not proper, whether or not the nonmoving party responds. *See Steel Creek Dev. Corp. v. James*, 300 N.C. 631, 637, 268 S.E.2d 205, 209 (1980). Summary judgment is "a drastic measure, and it should be used with caution." *Williams v. Power & Light Co.*, 296 N.C. 400, 402, 250 S.E.2d 255, 257 (1979). The burden on the movant is particularly heavy when the plaintiff has alleged negligence: "Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial on the issues." *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983), *quoted in Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. at 69, 414 S.E.2d at 435-46 (Frye, J., dissenting).

[11] In its answer GMSC admitted it was a supplier of ground beef to Wendy's restaurant where plaintiff was injured and that some of its meat products were used to make hamburger patties. Plaintiff's complaint and deposition stated that a bone in the hamburger beef injured him and resulted in monetary damages. As we have noted in our analysis of GMSC's motion for summary judgment based on plaintiff's breach of implied warranty claim, GMSC's admission that "Wendy's used some of the meat products sold by Greensboro Meat to make hamburger patties" contributes to and does not eradicate the material factual questions as to whether GMSC manufactured the ground beef from which plaintiff's hamburger was made and whether the beef contained the bone fragment when it left GMSC's plant.

The evidence adduced through discovery and proffered by GMSC at the time of the hearing on GMSC's motion for summary judgment was silent as to GMSC's negligence, or lack of it. GMSC did not proffer evidence of the nature of Jake Leggett's testimony at trial concerning Wendy's' grinding specifications and GMSC's meat processing procedures, nor did it point to any such evidence as having already been adduced through discovery. Therefore, under the authorities previously cited dealing with the evidentiary burdens of the party moving for summary judgment and the opposing party, respectively, GMSC did not meet its initial burden of showing

that plaintiff could not prove GMSC's negligence at trial. Plaintiff was not then required to go forward with an evidentiary forecast of GMSC's negligence. If GMSC had proffered evidence at the summary judgment hearing or pointed to evidence already adduced during discovery tending to show that it had exercised due care in the preparation of its meat products, then plaintiff would have been required to forecast evidence to the contrary, or point to such evidence already adduced during discovery, in order to have survived GMSC's motion.

We therefore hold that GMSC failed to sustain its burden as movant for summary judgment of demonstrating that an essential element of plaintiff's negligence claim was nonexistent or incapable of proof or barred by an affirmative defense. *See Collingwood v. G.E. Real Estate Equities*, 324 N.C. at 66, 376 S.E.2d at 427.

The majority of the Court of Appeals voted to affirm summary judgment for GMSC on the issue of GMSC's negligence. We reverse the Court of Appeals on this issue.

To summarize: As to plaintiff's claims against Wendy's, we affirm the Court of Appeals' decision remanding the implied warranty claim for trial and affirming directed verdict in favor of Wendy's on the negligence claim. As to plaintiff's implied warranty claim against GMSC, we affirm the Court of Appeals' decision reversing summary judgment for GMSC and remanding for further proceedings. As to plaintiff's negligence claim against GMSC, we reverse the decision of the Court of Appeals majority affirming summary judgment for GMSC, and we remand this claim to the Court of Appeals for further remand to the trial court for further proceedings.

Affirmed in part; reversed in part; remanded.

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

STATE OF NORTH CAROLINA v. JAMES MASON GIBSON

No. 488A90

(Filed 18 December 1992)

1. Homicide § 427 (NCI4th)— first degree murder—proximate cause—intervening causation—instructions

There was no prejudicial error in a first degree murder prosecution where the trial court instructed the jury erroneously on intervening causation and correctly on contributing causation and concerted action. If one person inflicts a mortal wound and, before the victim dies, another person kills the victim by an independent act, the former cannot be properly convicted of murder; however, if the same two people acted in concert to kill another according to an agreement among themselves, they both may be properly held accountable for the murder. Here, defendant was convicted of the separate offenses of conspiracy to commit first degree murder and robbery with a dangerous weapon in addition to first degree murder. It is logically implausible that the jury could have found that defendant acted independently for the purpose of the first degree murder, while, on the same facts, it found an agreement between defendant and a co-conspirator in convicting defendant on the conspiracy to murder charge. The erroneous instruction on intervening causation was obviated and rendered harmless because it can be conclusively determined that the jury did not base its decision on the challenged instruction.

Am Jur 2d, Homicide §§ 34, 36, 37.

2. Homicide § 136 (NCI4th)— first degree murder—short form indictment—instruction on assault refused—no error

The trial court did not err in a first degree murder prosecution by refusing to give an instruction on the lesser included offense of assault where defendant was charged with a short form indictment, alleging that he did "unlawfully, willfully and feloniously and of malice aforethought . . . kill and murder Russell Allan Kelly." A murder indictment such as this does not specify a murder accomplished by assault and will not support a verdict of guilty of assault, assault inflicting serious injury, or assault with intent to kill. Although the State has

the exclusive power to word the indictment and may deprive defendant of the opportunity to have the jury consider a lesser included offense, the State takes a risk in using the short form indictment because the State is prohibited on double jeopardy principles from retrying the defendant on the lesser included crimes if the defendant is pronounced not guilty on the indicted offense and set free.

Am Jur 2d, Homicide §§ 216, 535, 544.

3. **Evidence and Witnesses § 1619 (NCI4th)— audio tape recording—references to other crimes—references not excluded—harmless error**

Any error was harmless where the trial court in a murder prosecution allowed into evidence unedited audio tape and a transcript of conversations in which defendant confessed to the crime and made reference to having committed other murders in the past. Although the trial court here did not conduct the required *voir dire* to rule on questions of admissibility and order the tape edited or redacted as necessary, the statements by defendant were admissible because they tended to refute defendant's contention that defendant was acting under duress through fear of retaliation. Even assuming that the evidence served no purpose other than to show defendant's propensity to commit murder or that the danger of undue prejudice outweighed the probative value, any error was harmless because the State introduced overwhelming, competent evidence that defendant planned the murder with his co-conspirator, shot the victim twice, helped chain and sink the victim in a river, and then robbed the victim and deposited the money into a bank account.

Am Jur 2d, Evidence §§ 535, 538.

4. **Evidence and Witnesses § 1619 (NCI4th)— audio tape recording—references to other acts—not edited out—harmless error**

There was no prejudicial error in a murder prosecution where the court admitted an unedited audio recording and transcript in which defendant described, with a racial epithet, an act of fellatio which had been performed on him. Given defendant's introduction of the comment, "I hate to admit it but . . ." and the surreptitious nature of the sexual act he

describes, the jury could reasonably infer that defendant trusted Darnell, the person with whom he spoke, to safeguard his confidences and that in defendant's mind it was safe to be truthful about his involvement in the murder. However, assuming error, there was no reasonable possibility of a different verdict and no prejudice in light of the strength of the evidence of defendant's guilt. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 650.

5. **Evidence and Witnesses § 2898.5 (NCI4th) — cross-examination of defendant — prior convictions — no error**

There was no error in a murder prosecution in the cross-examination of defendant regarding prior convictions where the record contained no indication of bad faith on the part of the prosecutor. The basis for the second question was provided by defendant and was in evidence through a taped conversation involving defendant and, even assuming error with respect to a portion of the first question, there was no possibility of undue prejudice in light of defendant's denial and the overwhelming body and weight of relevant evidence presented by the State. N.C.G.S. § 8C-1, Rule 609(a).

Am Jur 2d, Witnesses §§ 830, 834-836.

6. **Evidence and Witnesses § 2845 (NCI4th) — present recollection refreshed — use of notes — foundation — insufficient recollection**

The trial court did not err in a murder prosecution by allowing a State's witness to use notes he made immediately following his first conversation with defendant. Although defendant contended that the testimony violated N.C.G.S. § 8C-1, Rule 612 because the State failed to provide a foundation for the use of the notes, the contention that Rule 612 requires a witness to establish a foundation for the use of notes to refresh his memory is without merit. Rule 612 stands for nothing other than the requirement that an adverse party is entitled to production of the writing or object which a witness uses to refresh his or her memory. The statute nowhere imposes the requirement that the witness state that he cannot sufficiently recall a matter before he may use the writing.

Am Jur 2d, Witnesses §§ 773, 786.

7. Evidence and Witnesses § 2845 (NCI4th)— present recollection refreshed—use of notes—foundation—insufficient recollection

There was no error in a murder prosecution where a State's witness was allowed to refer to notes made following his first conversation with defendant. Although defendant contended that the witness's use of notes while testifying violated N.C.G.S. § 8C-1, Rule 803(5) because the witness failed to show an inability to remember the conversation recorded in the notes, the witness's use of notes during his testimony falls under the category of "present recollection refreshed" and the foundational questions raised by "past recollection recorded" are never reached.

Am Jur 2d, Witnesses §§ 773, 786.

8. Conspiracy § 14 (NCI4th)— conspiracy to murder—charge against co-conspirator dismissed—not an acquittal

A murder defendant's conspiracy conviction was not set aside where the charge against the only co-conspirator was subsequently dismissed pursuant to a plea bargain. Dismissal of a charge pursuant to a plea agreement does not constitute an acquittal, which would have required that defendant's conviction be set aside.

Am Jur 2d, Conspiracy §§ 24-26.

Prosecution or conviction of one conspirator as affected by disposition of case against coconspirators. 19 ALR4th 192.

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 Currin, J., at the 12 March 1990 Criminal Session of Superior Court, Duplin County, upon a jury verdict finding defendant guilty of first-degree murder, robbery with a dangerous weapon, and conspiracy to commit murder and robbery with a dangerous weapon. Defendant's motion to bypass the Court of Appeals as to his convictions of robbery with a dangerous weapon and conspiracy to commit murder and robbery with a dangerous weapon was allowed by this Court on 30 April 1991. Heard in the Supreme Court on 13 May 1992.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Benjamin Sendor, Assistant Appellate Defender, for defendant-appellant.

LAKE, Justice.

The defendant was indicted on 8 January 1990 for one count of first-degree murder, one count of robbery with a dangerous weapon, and one count of conspiracy to commit murder and robbery with a dangerous weapon. The cases came on for joint capital trial at the 12 March 1990 Criminal Session of Superior Court, Duplin County.

On 29 March 1990 the jury returned verdicts of guilty as charged on all counts, and, following a sentencing hearing, recommended a sentence of life imprisonment for the first-degree murder. Defendant was sentenced to consecutive terms of life imprisonment for first-degree murder, forty years imprisonment for robbery with a dangerous weapon, and ten years imprisonment for conspiracy to commit murder and robbery with a dangerous weapon. Upon consideration of all assignments of error, we find no prejudicial error.

The evidence at trial showed that on 2 July 1989, Douglas Coffey was boating on the Neuse River with his father and seven-year-old son when he found a decomposing naked body with a chain around its waist floating face down in the river. The body of the victim, Russell Allan Kelly, had a number of tattoos on it and one of the hands was missing a little finger.

The evidence further showed that at a Halloween party in October 1988, the defendant met Larry Darnell, a tattoo artist, known to his friends as "Wizard" because he studied various forms of parapsychology, including numerology, palm reading, tarot cards, fortune telling, and ESP. Between October 1988 and June 1989 defendant visited Darnell several times for tattoos and once for Darnell to do a numerology chart on him. Darnell knew defendant by the nickname "Jibo."

In early summer 1989, defendant had a series of conversations with Darnell about the possibility of selling his Harley-Davidson motorcycle to Darnell. Defendant told Darnell he had traded a Chevelle and some money for the motorcycle. A week or so later, defendant asked Darnell if he was interested in trading some tattoo

equipment for a Chevelle. Remembering that defendant had earlier said he had traded the Chevelle for the motorcycle he was trying to sell, Darnell asked defendant how he had both the motorcycle and the car. Defendant responded, "I had to do a dirty deed." Defendant then told Darnell he had shot a guy who was a Marine.

Darnell went home and saw a newscast reporting that a body had been found in the Neuse River. He pondered the matter, then called the police and told them he might know who had killed the person whose body had been found. Darnell told an officer that he would try to get some information from defendant. There followed a series of conversations between Darnell and defendant in which Darnell induced defendant to confess to the crimes in full detail. Darnell told defendant of dreams he had had about a murder. He insinuated details provided to him by the police to build defendant's confidence in his psychic powers. He warned defendant to "watch his back" for fear of "Bob," the ex-Marine with whom defendant acted in concert in the murder. Darnell even promised to kill Bob himself if Bob killed defendant, and further boosted his credibility by saying he had killed two other people previously.

Feeling befriended, defendant told Darnell how he and Bob Jennings, a "crazy Virginia hillbilly," had planned the murder over two weeks prior to committing it and how they carried it out. A friend of Jennings' named Russell Kelly was due to be discharged from the Marines with a lot of money. Jennings and Kelly came to defendant's trailer and the three of them went out in a van, supposedly to buy three motorcycles. On a given signal, defendant was to say that he had to stop to urinate. Defendant sat between Kelly and Jennings so Kelly had to get out of the van to let defendant out. Defendant told Darnell that they did stop the van and that as Kelly got out, defendant shot him with a .357 magnum pistol.

The defendant went on to say that he "freaked out" when Kelly said, "Oh, God, he shot me." At that point, Jennings yelled to defendant to shoot Kelly again, and defendant shot the victim a second time. Defendant got out of the van and stood over Kelly. Jennings also jumped out of the van, grabbed the gun from defendant and told defendant to get Kelly's gun. Defendant said he was concerned that Jennings might shoot him and take all the money, but Jennings placed the gun at Kelly's head at point blank range and pulled the trigger.

Jennings and defendant cut the victim's clothes off, wrapped an old logging chain around his waist and ankles, and dumped the body into the river. They then drove back to defendant's trailer where they washed out the blood, dismantled the gun and drove over the gun barrel. Defendant shot the lock off of Kelly's briefcase and found $6000. They found $250 in the victim's clothing. Defendant also admitted he "must have blowed [the victim's left] little finger off."

A few days after this confession, the police asked Darnell if he would be willing to wear a "wire" and set up another conversation with defendant. Darnell did so, and the State introduced at trial a taped recording of defendant's confession, which was essentially the same as his previous statement. According to the transcript of the taped conversation, defendant told Darnell, "I pulled the . . . hammer back and shot [him] in the head and I'm not too proud of it."

An autopsy of the victim showed two gunshot wounds, one to the chest and one to the left cheek. Most of the tissue of the left little finger was missing. The experts at trial agreed that the wound to the head would have killed the victim within at least a few minutes. There was expert testimony that the victim might have survived the chest wound alone with medical care, but that it probably would have been fatal without medical care.

Dr. Victor Mallenbaum, a clinical psychologist, testified that defendant, a Native American, suffered from alcoholism, "schizotypal personality disorder," a severe neurosis, and had a borderline I.Q. of 77. He also opined that defendant was intellectually capable of fully understanding his actions.

I.

[1] The defendant's first assignment of error concerns the jury instructions given by the trial court regarding proximate cause as it relates to first-degree premeditated and deliberated murder and felony murder. The trial judge instructed the jury on two theories: (1) intervening causation, which defendant challenges in this assignment of error; and (2) contributing causation and concerted action, which is not contested. In essence, defendant contends that based on the submission of both a proper and an improper instruction, the following principle requires this Court to find reversible error:

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

State v. Pakulski, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987). Defendant argues that the intervening causation instruction was erroneous under a long line of precedent, and that it is impossible to determine whether the jury based the conviction on the legally correct instructions regarding contributing causation and concerted action, or the challenged instruction on intervening causation. Therefore, he asserts, the instruction on intervening causation constitutes reversible error.

According to defendant, he fired two shots, one hitting Russell Kelly in the chest and the other one hitting Kelly's little finger. Immediately after these shots by defendant, Bob Jennings shot Kelly in the head from point blank range. Defendant contends that testimony of two forensic pathologists showed that Kelly survived defendant's shots, and although Kelly would have ultimately died, without medical treatment, from the chest wound inflicted by defendant, he was still alive when Jennings shot him in the head. In each set of instructions on first-degree murder and felony murder, the court first used the pattern jury instructions, N.C.P.I.—Crim. 206.10, on proximate causation and then, at the request of the prosecution and over defendant's objection, added the challenged instruction: "Furthermore, if the defendant's act would have caused the victim's death, but for the intervening act of another, then the defendant's act was a proximate cause of the victim's death."

The defendant contends that the rule in this state as it applies to this case is that the conduct of the "independent intervenor," Jennings, terminated the criminal liability of the first assailant, defendant. Thus, by giving the challenged intervening causation instruction in addition to the correct pattern instruction regarding principles of contributing causation and concerted action, the trial court erroneously permitted the jury to find proximate causation even if it found that defendant acted alone in shooting Kelly and that Jennings' conduct was an independent, intervening cause of death. Defendant cites a 19th century case and its progeny as

support for his assertion that the "intervening act" instruction used in the instant case incorrectly stated the law. In that case, the trial court had given substantially the same instruction to the jury as in the present case and this Court stated:

> If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an *independent act*, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case, the two persons could not be indicted as joint murderers, because there was *no understanding, or connection between them.*

State v. Scates, 50 N.C. (5 Jones) 420, 423-24 (1858) (emphasis added). As stated, we agree with defendant that this is the correct statement of the law and that the instruction given was erroneous. However, we do not agree that the error warrants reversal.

We would be compelled to reverse the first-degree murder conviction if the erroneous instruction had been the only instruction given on proximate cause, or if there was insufficient evidence to support a conviction based on the other instruction, or if we were unable to determine which instruction the jury followed in reaching its verdict. However, since the erroneous instruction was not the only instruction given, and as there was sufficient evidence regarding contributing causation and concerted action, we direct our attention to whether it can be conclusively established that the jury's decision was not based on the erroneous instruction.

As noted above in *Scates*, if one person inflicts a mortal wound, and before the victim dies, another person kills him by an independent act, the former cannot be properly convicted of murder. However, if the same two people had acted in concert to kill another according to an agreement among themselves, they both may be properly held accountable for the murder. Here, in addition to first-degree murder, defendant was also convicted by the same jury on the separate offense of conspiracy to commit first-degree murder and robbery with a dangerous weapon. By definition, conspiracy is an *agreement* to commit a crime. In order to find defendant guilty of conspiracy, the jury must necessarily have rejected any assertion that defendant and his cohort, Bob Jennings, acted without agreement. It is logically implausible that the jury could have found that defendant acted independently for the purpose of the first-degree murder conviction while, on the same facts, it found an

agreement between defendant and a co-conspirator in convicting defendant on the conspiracy to murder charge. Thus, defendant's argument that it is impossible to determine on which theory the jury based the first-degree murder verdict is without merit. Since we are able to conclusively determine that the jury did not base its decision on the challenged instruction, but rather on the proper instruction, i.e., the theories of contributing causation and concerted action, we hold the error here was obviated and harmless.

II.

[2] The defendant's second assignment of error is the trial court's denial of his request for a jury instruction on the lesser included offense of assault with a deadly weapon inflicting serious bodily injury. Defendant was charged in this case by way of a short-form murder indictment, alleging that he did "unlawfully, willfully and feloniously and of malice aforethought . . . kill and murder Russell Allan Kelly." As discussed above, defendant contends that the gunshot wounds he inflicted on Kelly were shown at trial not to be the proximate cause of Kelly's death. Moreover, defendant testified at trial that he did not want to kill Kelly, that he shot Kelly under duress in fear of disobeying orders from Jennings, and that he aimed to wound Kelly rather than to kill him. According to defendant, this evidence was sufficient to support the lesser included offense of assault with a deadly weapon inflicting serious injury.

It is well established under North Carolina law that a trial court has the duty to instruct a jury on all lesser included offenses supported by the evidence. *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986). However, in *State v. Whiteside*, 325 N.C. 389, 383 S.E.2d 911 (1989), this Court held that an indictment charging "that defendant 'unlawfully, willfully, and feloniously and of malice aforethought did kill and murder [the victim]' is insufficient to support a verdict of guilty of assault, assault inflicting serious injury or assault with intent to kill" because such murder indictment does not specify a murder accomplished by assault. 325 N.C. at 403, 383 S.E.2d at 919.

Defendant urges this Court to reconsider the holding in *Whiteside*. He contends that although the case on which *Whiteside* relies for precedent, *State v. Rorie*, 252 N.C. 579, 114 S.E.2d 223 (1960), is good authority, this Court misapplied *Rorie* in *Whiteside*. In *Rorie*, the defendant was charged on a short-form murder indictment but was convicted of the lesser included assault offense. The defendant appealed saying that he could not be convicted of an

offense for which he had not been charged. This Court agreed. In *Whiteside*, the roles of the parties were reversed. As in this case, the defendant desired the opportunity to be convicted of the lesser offense, but the court refused to give the requested instruction because the short-form murder indictment did not include the lesser offense. In the case *sub judice*, defendant argues that the rationale of evenhandedly limiting defendant to the indictment, as it had limited the State, resulted in unfairness in this instance since the State, not defendant, has the exclusive power to word the indictment. Defendant contends that this power should not be turned into a weapon to deprive him of the opportunity to have the jury consider a lesser included offense, putting him at the mercy of the prosecutor's drafting decision.

The simple truth is that under our jurisprudence defendant *is* subject to the decision of the District Attorney regarding the crime with which he will be charged. The State takes a risk in using the short-form indictment; if the evidence is insufficient to sustain a verdict of guilty of the crime on which the defendant is indicted, the defendant is pronounced not guilty and set free. In that event, the State is prohibited on double jeopardy principles from retrying the defendant on the lesser included crimes. The defendant can no more dictate what charges he will be indicted on than he can prescribe what evidence the State will introduce at trial. Moreover, it is fundamental to due process that a defendant cannot be convicted of a crime with which he has not been charged. We therefore stand by our holding in *Whiteside* and find no error in the trial court's refusal to give the jury an instruction on the contended lesser included offense.

III.

[3] The third issue defendant raises on this appeal is based on a motion *in limine* made by defense counsel to exclude certain portions of the tape and transcript of the conversations between Larry Darnell and defendant. Defendant asserts in his brief that these statements should have been excluded under Rules 404(b) and 403. By allowing the statements to come into evidence by way of unedited tape and transcript, defendant argues that the aforementioned statements would constitute a denial of due process under both the State and Federal Constitutions, and further the probative value of the statements would be substantially outweighed by their prejudicial effect.

In those conversations, defendant made reference to having committed other murders in the past, having an act of fellatio performed on him, and having burned a building. We note that the evidence concerning the burning of a building by defendant was not discussed in defendant's brief, nor did he raise it in oral argument before this Court. We therefore consider this portion to have been abandoned, and we do not address this evidence herein. N.C. R. App. P. 28(b)(5). The tape recording, including the portions covered in the motion, was played to the jury and copies of a transcript of the tape were published to the jury.

A.

We begin our discussion of this issue by addressing the trial court's refusal to allow a tape recording to be edited to delete certain statements of defendant as to prior killings by him and asserted to be inadmissible or prejudicial. In response to defense counsel's proposal to edit the tape recording to delete any such material the trial court stated:

> THE COURT: Well, let me just say, counsel, years ago I was involved in the prosecution of I don't know how many cases involving—all of which were taped, a lot of taped cases. I don't recall us ever striking any particular line from the tape.
>
> In other words, we played the tape in its entirety. As I recall there were a few things in the tapes that was [sic] sort of off the wall, but nonetheless, we did not go through and edit the tapes.
>
> So my general feeling would be that we would play the entire tape.

The trial court subsequently denied defendant's motion *in limine* having considered it and weighed it in light of Rule 403, finding that the probative value would outweigh any prejudicial effect.

Under the ruling of this Court in *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), once the requisite foundation for introducing taped evidence has been established, it is necessary to delete any improper or inadmissible material before publishing the tape to the jury. According to *Lynch*:

> Upon an objection to the introduction of a recorded statement, in order to ascertain if it meets the foregoing requirements, the trial judge must necessarily conduct a *voir*

> *dire* and listen to the recording in the absence of the jury. "In this way he can decide whether it is sufficiently audible, intelligible, not obviously fragmented, *and, also of considerable importance, whether it contains any improper and prejudicial matter which ought to be deleted.*" *State v. Driver*, 38 N.J. 255, 288, 183 A.2d 655, 672 [1962]. This procedure affords counsel the opportunity to object to any portions of the recording which he deems incompetent and *permits incompetent matter to be kept from the jury in some appropriate manner.*

Id. at 17-18, 181 S.E.2d at 571 (emphasis added).

The defendant is correct in his contention that although N.C.G.S. § 8C-1, Rule 901 relaxed the criteria for establishing authenticity of a tape recording as a threshold issue (*See State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991)), *Lynch* clearly continues to govern the issue of deleting improper material from a tape before it is played to a jury. *State v. Kamtsiklis*, 94 N.C. App. 250, 257, 380 S.E.2d 400, 403, *appeal dismissed, disc. rev. denied*, 325 N.C. 711, 388 S.E.2d 466 (1989). The rule in *Lynch* supports the purpose of our Rules of Evidence to keep out irrelevant, prejudicial or otherwise inadmissible material. We therefore reaffirm the holdings in *Lynch* and *Kamtsiklis* which require the trial court to conduct a *voir dire*, rule on all questions of admissibility and order the tape to be edited or redacted as necessary. However, while it was error for the trial judge not to conduct a *voir dire*, we hold that the substance of the tape was admissible.

Returning to the substance of the present issue, we note that under N.C.G.S. § 8C-1, Rule 404(b), "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 . . . ." Our cases have held that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused. *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986) (quoting 1 Brandis on North Carolina Evidence § 91 (2d rev. ed. 1982))." *State v. Bagley*, 321 N.C. 201, 206, 362 S.E.2d 244, 247 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988). Rule 404(b) is a general rule of inclusion of such evidence. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990).

The portion of the transcript of the tape recording concerning prior killings reads as follows:

GIBSON: Bobby asked me, he said, how many, how many times have you done it like this I said this is my first time . . .

DARNELL: Yeah.

GIBSON: I've strangled . . . and put a blanket over their . . . head and choke them to death or knocked them in the . . . brains with a . . . ball pean [sic] hammer or something and killed them like that. I ain't never point blank shot nobody and . . .

DARNELL: Ever run over a guy with a car?

GIBSON: Oh yeah, I did two years and six months in Canyon City, Coloroda [sic].

The challenged evidence obviously tends to demonstrate defendant's propensity to commit murder. However, under our cases, "even though evidence may tend to show other crimes, wrongs, or acts by the defendant and his propensity to commit them, it is admissible under Rule 404(b) so long as it also 'is relevant for some purpose *other than* to show that defendant has the propensity for the type of conduct for which he is being tried.' " *Coffey*, 326 N.C. at 279, 389 S.E.2d at 54 (quoting *Bagley*, 321 N.C. at 206, 362 S.E.2d at 247).

The statements by defendant are admissible in this case because they tend to refute defendant's contention that defendant was acting under duress through fear of Bob Jennings' retaliation when he shot the victim. In so refuting defendant's contention and defense of duress and fear, these statements relate directly to defendant's state of mind and thus necessarily bear upon and forcefully support key elements of the primary offense charged: malice with specific intent to kill and premeditation and deliberation. *State v. Mitchell*, 288 N.C. 360, 218 S.E.2d 332 (1975), *sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976); *State v. Hamby*, 276 N.C. 674, 174 S.E.2d 385 (1970), *sentence vacated*, 408 U.S. 937, 33 L. Ed. 2d 754, *on remand*, 281 N.C. 743, 191 S.E.2d 66 (1972). These statements in such context clearly relate to "intent" and "preparation" and therefore fall within the inclusionary portion of Rule 404(b). Certainly a boastful recitation of killing other people by strangling, choking or "knock[ing] them in the . . . brains with a . . . hammer" belies any duress or capacity to be coerced.

The primary offense for which defendant was tried was first-degree murder based upon premeditation and deliberation. In response to defendant's testimony concerning duress, premeditation and deliberation necessarily became a strongly contested issue at trial. Therefore, the State was entitled to present evidence on those issues. "Ordinarily, premeditation and deliberation must be proved by circumstantial evidence," which can include the statements of the defendant made after the killing. *State v. Saunders*, 317 N.C. 308, 312-13, 345 S.E.2d 212, 215 (1986). In the instant case, defendant's statements about prior crimes, made less than two weeks after the murder, strongly enhance the State's evidence of specific intent to kill and premeditation and deliberation because they tend to directly refute defendant's contention that he feared Jennings or acted only under duress. Larry Darnell and defendant had a relationship of trust and confidence, as shown by defendant's detailed, repeated confessions to Darnell of the crimes at issue in this case. Defendant had every opportunity to relate to Darnell his fear of Bob Jennings as a circumstance under which these crimes were committed. Instead, he exudes a reminiscence of his exploits in killing without any indication of intimidation or duress in connection with the crimes here at issue. The challenged evidence is thus admissible under the exception in, or inclusionary portion of, Rule 404(b) for evidence tending to prove some aspect of the State's case other than character or propensity to commit the crimes at issue.

Although we have concluded that the tape recorded statements regarding defendant's prior crimes are admissible under Rule 404(b), we are required to determine under Rule 403 whether the probative value of the statements outweighs their prejudicial effect.

> Although admissible under Rule 404(b), the probative value of this evidence must still outweigh the danger of undue prejudice to the defendant to be admissible under Rule 403. *State v. Frazier*, 319 N.C. 388, 390, 354 S.E. 2d 475, 477 (1987). This issue is a "matter within the sound discretion of the trial court, 'and his ruling may be reversed for an abuse of discretion only upon a showing that it "was so arbitrary that it could not have been the result of a reasoned decision." ' " *State v. Jones*, 89 N.C. App. 584, 594, 367 S.E.2d 139, 145 (1988) (citations omitted).

State v. Everhardt, 96 N.C. App. 1, 18, 384 S.E.2d 562, 572 (1989), *aff'd on other grounds*, 326 N.C. 52, 389 S.E.2d 99 (1990). The standard for this "ultimate test of admissibility is whether [the prior incidents] are sufficiently similar and not so remote as to run afoul of the balancing test between probative value and prejudicial effect set out in Rule 403. *State v. Richardson*, 100 N.C. App. 240, 395 S.E.2d 143, *disc. rev. denied*, 327 N.C. 641, 399 S.E.2d 332 (1990); N.C. Gen. Stat. § 8C-1, Rule 403." *State v. West*, 103 N.C. App. 1, 9, 404 S.E.2d 191, 197 (1991). In our view defendant has failed to make the necessary showing of arbitrariness, given the power of the statement from defendant's own mouth that he had killed various people by sundry methods of his own volition in the past.

However, even assuming *arguendo* that this evidence serves no distinct purpose in this case other than to show defendant's propensity to commit murder, and therefore was admitted erroneously under Rule 404(b), or even that the danger of undue prejudice does outweigh the probative value of the evidence, in violation of Rule 403, any such error must necessarily be considered harmless. Defendant has the burden under N.C.G.S. § 15A-1443 of demonstrating that but for the erroneous admission of this evidence, there is a "reasonable possibility" that the jury would have reached a verdict of not guilty. In this case, the State introduced overwhelming, competent evidence at trial that defendant planned the murder with his co-conspirator two weeks prior to committing it, that he himself shot the victim twice, that he helped chain and sink the body in the river, and that he then robbed the victim and deposited the same amount of money into a bank account. Thus defendant fails to show a reasonable possibility that, in light of this entire body of evidence, the jury would have reached a different verdict had it not been for the portion of challenged evidence.

B.

[4] The second piece of evidence targeted by defendant's motion *in limine* was a portion of the taped conversation between defendant and Darnell in which defendant described, with the use of a racial epithet, an act of fellatio that had been recently performed on him. The State contends that defendant's remarks were relevant to show that defendant and Darnell were close friends and confidants, which would explain why the defendant would confide in Darnell about a matter as serious as murder.

Given defendant's introduction of the comment, "I hate to admit it but . . ." and the surreptitious nature of the sexual act he describes, the jury could reasonably infer that defendant trusted Darnell to safeguard his confidences, and that it was therefore, in his mind, safe to be truthful with Darnell about his involvement in the Kelly murder. Thus, rather than pertaining exclusively to defendant's character, this statement is relevant to lend credibility to the State's confession evidence and as such is admissible under Rule 404(b). Further, in light of the predicate to the exclusionary portion of Rule 404(b)—that the evidence was offered "to show that he acted in conformity therewith," it can hardly be said that the statement of this sex act was offered to show defendant committed the murder charged by acting in conformity with whatever this act may tend to show about his character. This portion of Rule 404(b) is therefore inapplicable in this instance.

However, assuming *arguendo* error in the admission of this statement on the basis there is absolutely no correlation or similarity between the fellatio and the murder, the statement is then totally irrelevant and inadmissible on that premise. Rule 403 thus does not come into play, as there is neither relevance nor probative value to this evidence. In view of the entire body and weight of relevant evidence presented by the State against defendant "and the utter irrelevance of [the sex act] to the charges on which defendant was ultimately convicted," we conclude that the erroneous admission of this statement did not constitute prejudicial error. *State v. Fie*, 80 N.C. App. 577, 343 S.E.2d 248 (1986), *rev'd on other grounds*, 320 N.C. 626, 359 S.E.2d 774 (1987).

Further, even though, under such assumption, the admission of this evidence was erroneous, the error must be considered harmless in that defendant has failed to show under N.C.G.S. § 15A-1443 that there was a reasonable possibility that absent such evidence the jury would have reached a different verdict, given the strength of the evidence of his guilt.

We therefore conclude that defendant's third assignment of error is without merit.

IV.

[5] In his fourth assignment of error defendant asserts that the prosecutor exceeded the proper scope of inquiry under N.C.G.S. § 8C-1, Rule 609(a) in cross-examining defendant on prior convic-

tions to impeach his credibility. The record includes the following colloquy:

> Q. All right, what else have you been convicted of?
>
> A. D.U.I. a couple of times.
>
> Q. Did you have your son with you when you were driving drunk?
>
> MR. SMITH: Objection.
>
> THE COURT: Overruled.
>
> Q. Did you have your son with you when you were driving drunk?
>
> A. Not that I recall.
>
> Q. Well, would you remember it if you did or would you not remember it?
>
> A. I don't think I would have him with me.
>
> . . . .
>
> Q. Do you remember, Mr. Gibson, in 1980 in Arapaho County, Colorado where you were convicted of reckless driving in which you attempted to run over somebody?
>
> MR. THOMPSON: Objection, move to strike.
>
> THE COURT: Overruled.
>
> A. I was arrested for—convicted of D.U.I. which was involving a car accident.
>
> Q. What were you charged with on that occasion originally?
>
> MR. THOMPSON: Objection.
>
> MR. ANDREWS: I withdraw it, Judge.

The standard for the scope of permissible inquiry about prior convictions for impeachment purposes, prior to the enactment in North Carolina of the Code of Evidence in 1984, was set forth in *State v. Finch*, 293 N.C. 132, 235 S.E.2d 819 (1977) as follows:

> Strong policy reasons support the principle that ordinarily one may not go into the details of the crime by which the witness is being impeached. Such details unduly distract the jury from

> the issues properly before it, harass the witness and inject confusion into the trial of the case. Nevertheless, where a conviction has been established, a limited inquiry into the time and place of conviction and the punishment imposed is proper. Such examination, so limited in scope, permits the jury to more accurately gauge the credibility of the witness while minimizing the distraction inherent in any collateral inquiry.

293 N.C. at 141, 235 S.E.2d at 824 (citation omitted). The scope of permissible inquiry in this area was expanded by the Court in *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984). In *Murray*, the Court broadened the scope to include inquiry about the circumstances of a prior conviction as long as the question was asked in good faith. The Court stated:

> A criminal defendant who elects to testify in his own behalf is subject to questions relating not only to his convictions for crimes but also to prior acts of misconduct which tend to discredit his character or challenge his credibility. *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977). . . . We have stated that, rather than phrasing questions only in terms of convictions, the prosecutor may ask about the circumstances of a prior conviction in the same way he would ask about any specific prior misconduct. *State v. Mack*, 282 N.C. 334, 193 S.E.2d 71 (1972). In *Mack* this Court ruled that such questions related to matters within the witness's knowledge and, when asked in good faith, were permissible. *See also State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980).

Murray, 310 N.C. at 550-51, 313 S.E.2d at 530.

In the recent case of *State v. Garner*, 330 N.C. 273, 410 S.E.2d 861 (1991), this Court allowed questions regarding prior convictions of the defendant which extended beyond the limits of time, place and punishment, for purposes of impeachment. The ruling in *Garner* was predicated on allowable cross-examination under Rule 404(a)(1) and Rule 405(a) in that, unlike the instant case, defendant injected on direct a pertinent trait of his character and relevant specific instances of conduct. The Court in *Garner* then stated the holding was consistent with "other well-established principles of law," quoting as follows from *State v. Warren*, 327 N.C. 364, 395 S.E.2d 116 (1990):

> Generally, much latitude is given counsel on cross-examination to test matters related by a witness on direct

> examination. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985). The scope of cross-examination is subject to two limitations: (1) the discretion of the trial court; and (2) the questions offered must be asked in good faith. *State v. Dawson*, 302 N.C. 581, 585, 276 S.E.2d 348, 351 (1981). Furthermore, the questions of the State on cross-examination are deemed proper unless the record discloses that the questions were asked in bad faith. *Id.* at 586, 276 S.E.2d at 352.

Garner, 330 N.C. at 290, 410 S.E.2d at 870.

The record in the instant case contains no indication of bad faith on the part of the prosecutor with respect to either of the two questions asked. In fact, the basis for the second question was provided by defendant and was in evidence through the taped conversation between defendant and the State's witness Darnell wherein defendant told Darnell he had served time in Colorado for running over someone with a car. Even assuming, *arguendo*, error with respect to that portion of the first question challenged, relating to defendant's son being with him when he was driving drunk, on the basis this is a totally unrelated act of misconduct, we find no possibility of undue prejudice in light of defendant's denial that his son was present and the overwhelming body and weight of relevant evidence presented by the State. We therefore find no prejudicial error in this cross-examination.

V.

[6] The defendant next contends that error was committed when the State's witness Darnell, during his testimony, was allowed to use notes he made immediately following his first conversation with defendant on 8 July 1989. Defendant argues that Darnell's testimony in this manner was in violation of both N.C.G.S. § 8C-1, Rule 612 and N.C.G.S. § 8C-1, Rule 803(5), because the State failed to provide a foundation for the use of the notes. Defendant's concentration on these two rules obfuscates the real issue which involves present recollection refreshed as discussed in *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1970). Both defendant and the State cite the *Smith* case for support, and we find that it controls the outcome of this issue. Defendant also points out that the trial judge did not rule on the objection by defense counsel to the witness' use of his notes. By allowing the witness to proceed with using his notes the court implicitly overruled the objection.

The portion of Rule 612 which pertains to the facts of this case states:

> If, while testifying, a witness uses a writing or object to refresh his memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.

N.C.G.S. § 8C-1, Rule 612 (1992). Defendant's assertion that Rule 612 requires a witness to establish a foundation for the use of notes to refresh his memory is without merit. Rule 612 stands for nothing other than the requirement that an adverse party is entitled to production of the writing or object which a witness used to refresh his or her memory. Defendant interprets this rule to additionally require the witness to state that he cannot sufficiently recall a matter before he may use the writing. Nowhere does the statute impose this additional requirement. While Rule 612 has a relationship to the use of a writing to refresh one's memory, it has no bearing on the issue presented here.

[7] The defendant also contends that the witness' use of notes while testifying violated Rule 803(5) because the witness failed to show an inability to remember the conversation recorded in the notes, and thus, the State did not satisfy the foundational requirements of the rule. Rule 803(5), an exception to the hearsay rule, defines a "past recollection recorded." It states in relevant part:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly.

N.C.G.S. § 8C-1, Rule 803(5) (1992). Defendant's assertion that the proper foundation was not laid arises from the fact that the witness at no time stated that he had "insufficient recollection to enable him to testify fully and accurately," or words to that effect. We agree that the foundational requirements for the use of the notes as a "past recollection recorded" were not met. If the notes alone had been tendered and admitted into evidence, the lack of a foundational basis for admitting the notes would have constituted error. However, the notes were never proffered as evidence by the State, and this assertion is therefore without merit under the circumstances.

The witness' use of notes during his testimony in this instance falls under the category of "present recollection refreshed," and the foundational questions raised by "past recollection recorded" are never reached. In present recollection refreshed the evidence is the testimony of the witness at trial, whereas with a past recollection recorded the evidence is the writing itself. *In re Messenger*, 32 F. Supp. 490 (E.D. Pa. 1940). To establish a foundation for the introduction into evidence of a past recollection recorded, the witness, "by hypothesis, [must have] *no present recollection* of the matter contained in the writing." *United States v. Riccardi*, 174 F.2d 883, 887, *cert. denied*, 337 U.S. 941, 93 L. Ed. 1746 (1949) (emphasis added). "Under present recollection refreshed the witness' memory is refreshed or jogged through the employment of a writing, diagram, smell or even touch," and he testifies from his memory so refreshed. *State v. Corn*, 307 N.C. 79, 83, 296 S.E.2d 261, 264 (1982). "Because of the independent origin of the testimony actually elicited, the stimulation of an actual present recollection is not strictly bounded by fixed rules but, rather, is approached on a case-by-case basis looking to the peculiar facts and circumstances present." *State v. Smith*, 291 N.C. at 516, 231 S.E.2d at 670-71.

The rule in *Smith* which we hold controls the resolution of this issue states, "Where the testimony of the witness purports to be from his refreshed memory but is *clearly* a mere recitation of the refreshing memorandum, such testimony is not admissible as present recollection refreshed and should be excluded by the trial judge." *Id.* at 518, 231 S.E.2d at 671. Thus, we must determine whether the spirit of the rule of present recollection refreshed has been violated by testimony which was not the product of a refreshed memory, but clearly nothing more than a recitation of the witness' notes.

The witness was initially directed to his notes by the prosecutor. It was at that time that the witness stated that he remembered a statement defendant had made to him and that he made the notes so he "could remember exactly what happened." After further testimony the witness asked if he might look at his notes again, and following another question he said, "It's not in my notes, but it just popped into my head." The fact that the witness asked to look at his notes tends to show that prior to that moment he had not been using them. Once he looked at his notes he was apparently able to testify from his own memory. The record conclusively indicates only that the witness used his notes on more

than one occasion during this portion of his testimony. After reviewing the transcript, we cannot say that the witness' testimony was clearly a mere recitation of the notes he had before him. Thus, we find no error in that the notes did nothing more than refresh the witness' memory, and the resulting testimony was therefore admissible under the doctrine of present recollection refreshed. This assignment of error is without merit.

VI.

[8] The defendant's final assignment of error is that his conspiracy conviction should be vacated because the conspiracy charge against his co-conspirator was subsequently dismissed in a plea agreement with the State. The general rule is that if all participants charged in a conspiracy have been legally acquitted, except the defendant, then the inconsistent charge or conviction against the sole remaining defendant must be set aside. *State v. Raper*, 204 N.C. 503, 504, 168 S.E. 831, 832 (1933). The logic behind this rule is that if all but one have been acquitted of conspiring with the others charged, there are none left with whom the remaining party could have agreed; without an unlawful agreement there is no conspiracy. *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134 (1965).

The defendant urges this Court to conclude that a dismissal of conspiracy charges against the only other conspirator is equivalent to an acquittal when deciding whether consistent verdicts have been rendered against co-conspirators. The Court of Appeals in *State v. Essick*, 67 N.C. App. 697, 314 S.E.2d 268 (1984) rejected essentially the same argument advanced here by defendant. In *Essick*, the defendant and two others were charged with conspiracy to sell and deliver marijuana. The charge against one co-conspirator was subsequently dropped for lack of probable cause. The other co-conspirator testified for the State at the defendant's trial, and afterwards the State accepted his no contest plea to the lesser charge of maintaining a motor vehicle for purposes of keeping controlled substances. *Id.* at 698, 314 S.E.2d at 271. The Court of Appeals held that the disposition of the charges against the two co-conspirators did not constitute a judgment of acquittal against either, and therefore, did not require reversal of the defendant's conspiracy conviction.

We find the reasoning of the Court of Appeals to be sound and equally applicable to plea agreements which result in dismissal of a conspiracy charge altogether. Simply stated, dismissal of a

charge(s) pursuant to a plea agreement does not constitute an acquittal at law. Thus, in the absence of inconsistent verdicts for the same conspiracy, i.e., where all but one of the accused in the conspiracy has received an acquittal, we will not set aside the conviction of the sole remaining conspirator. We therefore find no error as to this assignment.

NO ERROR.

STATE OF NORTH CAROLINA v. JOSEPH TIMOTHY KEEL

No. 457A91

(Filed 18 December 1992)

1. **Criminal Law § 888 (NCI4th)— State's request for instruction—approval by defendant—sufficient objection to instruction given**

The State's request at a charge conference for a pattern jury instruction on first degree murder, approved by defendant and agreed to by the court, satisfied the requirements of Appellate Rule 10(b)(2) and preserved for appellate review the propriety of the different instruction actually given by the court.

Am Jur 2d, Appeal and Error §§ 533, 673; Homicide § 561; Trial §§ 1173, 1174.

2. **Homicide § 39 (NCI4th)— first degree murder—specific intent to kill—showing required**

To show the "specific intent to kill" required to prove first degree murder, the State must show more than an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death.

Am Jur 2d, Homicide §§ 45, 52.

3. **Homicide §§ 39, 55 (NCI4th)— specific intent to kill—first degree murder distinguished**

The "specific intent to kill" requirement is one element which distinguishes first degree murder from second degree

murder and manslaughter, neither of which requires a specific intent to kill.

Am Jur 2d, Homicide § 45.

4. **Homicide § 476 (NCI4th)— first degree murder—specific intent to kill—erroneous instruction—prejudicial error**

The trial court's instruction in a first degree murder case that "[t]he phrase intentionally killed refers not to the presence of a specific intent to kill; the sense of the expression is that the act that resulted in death is intentionally committed" erroneously relieved the State of its burden of proving the specific intent required for first degree murder and violated the defendant's right to due process guaranteed by the U.S. Constitution. The State failed to show that the trial court's error in defining the intent required for first degree murder was harmless beyond a reasonable doubt where defendant's mental state at the time of the crime was at issue in the case.

Am Jur 2d, Homicide §§ 45, 499, 501.

Justice MEYER dissenting.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by Brown, J., at the 12 August 1991 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 5 October 1992.

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

Thomas R. Sallenger for the defendant-appellant.

MITCHELL, Justice.

The defendant presented no evidence at the guilt-innocence determination phase of his capital trial. The State's evidence tended to show the following. On 10 July 1990, at about 10 p.m., the defendant, Joseph Timothy "Timmy" Keel, knocked on the door of Albry Thurman's mobile home. When Thurman answered the door, the defendant told him that John Simmons, the defendant's father-in-law, had been shot. The defendant told Thurman that it had been a drive-by shooting. Thurman testified that the defendant's shirt was covered with blood and that Simmons was outside in

a yellow pickup truck, situated in the passenger side so that he faced the steering wheel. Simmons had a bullet wound in the right side of his head, and the truck's windows were rolled down. Albry Thurman's wife, Shelby Thurman, called 911. Shelby Thurman testified that the defendant told her that Simmons had been shot by a person riding in a red station wagon near the dumpsters on Gay Road.

Edgecombe County Sheriff's Deputy Robert Davis testified that he was called to Baker's Park, the trailer park where the Thurmans' mobile home was located, on the night of 10 July 1990. When he arrived, the rescue squad was already there. The defendant came out of the trailer and met Davis in the yard. The defendant told Davis that he had received a phone call earlier in the evening asking him to go to Shell Bank Farm, the hog farm where the defendant worked. The defendant said that Simmons had driven him to the farm. On the way back, while Simmons was driving, someone in a red station wagon or a large Chevrolet had shot Simmons twice when they were at the intersection of Leggett Road and Gay Road. The defendant appeared to be upset, and his shirt was covered with blood. Deputy Davis examined the pickup truck and found that the windows were rolled down. There was a bullet hole just behind the driver's side window, and there was a small pool of blood in the passenger seat near the window.

Sergeant Donnie Lynn of the Edgecombe County Sheriff's Department also interviewed the defendant on the night of the shooting. The defendant told Sergeant Lynn that he and his wife lived with the victim, Johnny Simmons, and that, on the night of the shooting, Simmons had driven the defendant to Shell Bank Farm after the defendant's boss had called to tell him to check on the hogs at the farm. The defendant stated that he had taken the company truck from the driveway of the farm manager's house and had driven that truck down to the farm while Simmons followed in the yellow pickup truck. The defendant said that after he checked out the farm and found nothing wrong, he took the company truck back to the manager's house and left the farm with Simmons in the yellow truck. Simmons was driving. When they were on Gay Road near some trash dumpsters, a car passed them, and the defendant heard two pops. Simmons slumped over, and the defendant managed to stop the truck. The defendant moved Simmons over to the passenger side of the truck and drove the truck away.

On the night of the shooting, the defendant showed Sergeant Lynn where these events allegedly occurred. Sergeant Lynn testified that he found nothing in the vicinity of the Gay Road dumpsters to indicate that a drive-by shooting had occurred. He testified that he returned to the farm the following day, when he noticed what appeared to be blood outside the farm office and found a .22 caliber shell casing nearby. Inside the building, Sergeant Lynn saw blood spatters on the walls and floors and found a jumpsuit with blood on it. He also found a blood-soaked mop at the back of the building, some .22 caliber bullets in a drawer in the office, and a hole in the window screen of the farm office.

Dr. Louis Levy, the medical examiner for Nash and Edgecombe Counties, testified that the victim had suffered two gunshot wounds, that the shots had been fired from a distance, and that they had been fired from opposite sides of the victim's head. He testified that the victim had died of shock as a result of the gunshot wounds. Dr. Levy's opinion was that neither gunshot wound was consistent with a drive-by shooting.

James Stevey, a co-worker of the defendant, testified that he was the first to arrive at work on the day after the shooting. The key that was usually over the front door of the farm's office building was missing, so Stevey went into the building only after the defendant entered by a side door and opened the front door from the inside. This was not the normal practice, and Stevey had never seen the defendant enter the building in this way. Stevey testified that he had noticed a puddle of blood in front of the building and that the defendant had kicked dirt over the puddle. Once they were inside the building, the defendant went ahead of Stevey into the area of the building in which workers changed their clothes. By the time Stevey went in, the defendant was already running the clothes washer. This was unusual, because another employee usually did the washing. The defendant then began wiping blood off the floor with a rag. When Stevey asked what had happened, the defendant told Stevey that the defendant's father-in-law had been shot. Stevey also testified that he saw a bloody mop outside the building and that generally there was no animal blood in the office building, because hogs were not killed at that location.

Lieutenant Jerry Wiggs of the Edgecombe County Sheriff's Department testified that he interviewed the defendant on 13 July 1990 at the office of the Sheriff's Department. After waiving his

rights, the defendant made a statement, recorded in writing by Lieutenant Wiggs and signed by the defendant, in which he admitted that he had shot his father-in-law at the hog farm on 10 July 1990. He stated that he had called the victim and asked for a ride to the farm. When they arrived at the farm, the defendant picked up the farm truck. He then proceeded to the farm building, driving ahead of the victim. The defendant went into the farm building, and from there, he fired a shot into the victim's truck cab. The victim got out of his truck, saying he was hit, and the defendant made him sit down in the kitchen area of the farm building. The defendant stated that he shot the victim again, because the victim had a knife and was coming after him. The victim fell, but got up again, and the defendant helped him get into the truck. The defendant then drove to Baker's Park to get some help. The defendant stated that he had thrown the rifle into one of the fields in the hog pen and that he did not know why he had shot the victim.

Ceclia Edmondson, the defendant's next-door neighbor, testified that on 9 July 1990, the defendant was standing outside Edmondson's house when the victim accused the defendant of being a woman-beater and asked the defendant what kind of drugs he was taking. The defendant stated, "I'm going to kill that bald-headed, mother-f---ing son-of-a-bitch if he doesn't leave me alone." Edmondson testified that the defendant had been drinking and smelled of alcohol when he made this statement.

[1] The defendant assigns as error the trial court's instruction to the jury on the specific intent element of first-degree murder. We conclude that the trial court erred in its instruction on the intent element of first-degree murder, that this error was prejudicial, and that the defendant therefore is entitled to a new trial.

The State specifically requested during a charge conference that the trial court give N.C.P.I.—Crim. 206.13, and the trial court agreed to give the portion of this pattern instruction relating to first-degree murder. When asked by the trial court if he had any objections to the use of this instruction, defendant's counsel replied that he had no objection. Because the State requested this instruction, and the trial court agreed to give it, the defendant's counsel had no reason to make his own request for this instruction. The State's request, approved by the defendant and agreed to by the trial court, satisfied the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure and preserved this question

for review on appeal. *See State v. Montgomery*, 331 N.C. 559, 570, 417 S.E.2d 742, 748 (1992); *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).

Although the trial court had agreed to give N.C.P.I.—Crim. 206.13, it actually gave the following instruction on the intent element of first-degree murder:

> First degree murder is the unlawful killing of a human being with malice and with premeditation, and deliberation.
>
> For you to find the defendant guilty of first degree murder, the State must prove five things beyond a reasonable doubt.
>
> First, that the defendant, intentionally and with malice, killed Johnny Ray Simmons with a deadly weapon.
>
> *The phrase intentionally killed refers not to the presence of a specific intent to kill; the sense of the expression is that the act that resulted in death is intentionally committed.*
>
> . . . .
>
> The third, that the defendant intended to kill Johnny Ray Simmons.
>
> Intent is a mental attitude seldom provable by direct evidence.
>
> It must ordinarily be proved by circumstances from which it may be inferred.
>
> An intent to kill may be inferred from the nature of the assault; the manner in which it was made; the conduct of the parties; and other relevant circumstances.

(Emphasis added.)

The portion of the trial court's charge defining the phrase "intentionally killed" is not a part of the pattern jury instruction dealing with first-degree murder. Rather, this portion of the trial court's instruction comes from a footnote in the pattern instruction dealing with second-degree murder. This footnote begins with the following language:

> "Neither second-degree murder or voluntary manslaughter has as an essential element an intent to kill. In connection with

> these two offenses, the phrase 'intentional killing' refers *not* to the presence of a specific intent to kill, but rather to the fact that the *act* which resulted in death is intentionally committed."

N.C.P.I.—Crim. 206.13 n.8 (quoting *State v. Ray*, 299 N.C. 151, 158, 261 S.E.2d 789, 794 (1980)).

[2] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986) (citing *State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979)), *cert. granted and judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987); N.C.G.S. § 14-17 (Supp. 1991). The specific intent to kill is a necessary component of deliberation; deliberation requires "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." *Jackson*, (citing *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984); *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982)). To show the "specific intent to kill" required to prove first-degree murder, the State must show more than an intentional act by the defendant resulting in the death of the victim; the State also must show that the defendant intended for his action to result in the victim's death.

[3, 4] The "specific intent to kill" requirement is one element which distinguishes first-degree murder from second-degree murder and manslaughter, neither of which requires a specific intent to kill. The trial court's instruction to the jury in the present case that "[t]he phrase intentionally killed refers not to the presence of a specific intent to kill; the sense of the expression is that the act that resulted in death is intentionally committed," entirely relieved the State of its burden of proving the specific intent required for first-degree murder. While the trial court's instruction would have been correct in an explanation of the intent required for a conviction of second-degree murder or of voluntary manslaughter, the trial court erred in using such a definition of intent in its instruction on first-degree murder.

The trial court's subsequent instruction to the jury that the State must prove "that the defendant intended to kill Johnny Ray Simmons" did not correct this error, because the court already had defined the phrase "intended to kill" as meaning that only

the act resulting in death—not death itself—must be intended. Further, even if the subsequent instruction could be interpreted to be correct, and therefore contradictory to the trial court's prior definition of the intent required for first-degree murder, the instructions still would include error requiring a new trial. When two instructions are contradictory, we must presume that the jury followed the erroneous instruction. *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976); *State v. Carver*, 286 N.C. 179, 183, 209 S.E.2d 785, 788 (1974).

Due process requires that the State prove every element of a crime beyond a reasonable doubt before an accused may be convicted. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 375 (1970). The trial court's improper instructions on the intent element of first-degree murder in the instant case relieved the State of its burden of proving each element of first-degree murder beyond a reasonable doubt and violated the defendant's right to due process guaranteed by the Constitution of the United States. Therefore, we follow the constitutional harmless error standard set forth in N.C.G.S. § 15A-1443(b) in determining whether the trial court's error was harmless. The State must "demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (1988).

In the present case, the defendant's closing argument emphasized to the jury that the defendant contended that he had lacked the requisite state of mind for first-degree murder. The jury heard evidence of the defendant's statement in which he admitted shooting the victim, but stated that he had no reason to shoot the victim and did not know why he had done so. Several witnesses testified that the defendant attempted to get help for the victim after he had shot him. One of the defendant's co-workers testified that he and the defendant had been drinking after work on the day of the shooting and that the defendant had consumed at least two or three beers. A neighbor of the defendant testified that, although the defendant made threatening comments about the victim after the two of them had argued the day before the shooting, the defendant was drunk at the time. Because the defendant's mental state at the time of the crime was at issue in the present case, the State has failed to show that the trial court's error in defining the intent required for first-degree murder was harmless beyond a reasonable doubt. We conclude that the trial court committed prejudicial error by improperly instructing the jury as to the intent

element of first-degree murder. Therefore, the defendant must receive a new trial.

The State's motion to expand the record is denied.

New trial.

Justice Meyer dissenting.

I concede that the trial court's first-degree murder jury instruction in this case was erroneous and that the error is one of constitutional dimension. However, contrary to the majority, I believe that the evidence against the defendant was so overwhelming that the error was harmless beyond a reasonable doubt.

A violation committed at trial that infringes upon a defendant's constitutional rights is presumed to be prejudicial and entitles defendant to a new trial unless the error committed is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967); *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). The overwhelming evidence of guilt may render error of constitutional dimension harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250, 23 L. Ed. 2d 284 (1969); *State v. Autry*, 321 N.C. 392, 400, 364 S.E.2d 341, 346 (1988).

In *Chapman*, the United States Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 17 L. Ed. 2d at 710-11. The Court said that, although "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless, . . . [not] all trial errors which violate the Constitution automatically call for reversal." *Id.* at 23, 17 L. Ed. 2d at 710. An error involving the denial of a federal constitutional right can be deemed harmless in a state criminal proceeding if the reviewing court is satisfied beyond a reasonable doubt that the error complained of did not contribute to the defendant's conviction. *Id.* at 18, 17 L. Ed. 2d at 705.

Applying the foregoing standard to the facts in this case, I have no doubt that the evidence against defendant, even in view of the erroneous instruction given, is so overwhelming that the

error was harmless beyond a reasonable doubt. The impact of the tainted instruction on the mind of an average juror in the face of the overwhelming evidence of guilt was "so unimportant and insignificant" that it must be deemed harmless. *See Chapman*, 386 U.S. at 22, 17 L. Ed. 2d at 709.

First-degree murder is the intentional and unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (1989); *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991). Premeditation means that the defendant formed the specific intent to kill the victim some period of time, however short, before the actual killing. *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 61 (1991). Deliberation means an intent to kill executed by the defendant in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose, and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *Bonney*, 329 N.C. at 77, 405 S.E.2d at 154. A specific intent to kill is subsumed within the elements of premeditation and deliberation, and therefore, proof of premeditation and deliberation is also proof of intent to kill. "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. Thomas*, 332 N.C. 544, 560, 423 S.E.2d 75, 84.

Because premeditation and deliberation relate to processes of the mind, they are rarely susceptible to proof by direct evidence. *State v. Olsen*, 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.

The evidence presented at defendant's trial clearly showed that he committed a murder that was premeditated and deliberated.

First, the victim in no way provoked defendant to commit the crime in question. The victim was asleep in his bed when defendant called the victim's house and asked the victim for a ride to Shell Bank Farm, where defendant worked. After giving defendant a ride to the farm, the victim remained outside in his truck while the defendant went into the office. While sitting in the truck, the victim was shot through the left side of the head by defendant, who was inside the office. The victim managed to get out of the truck and walk into the office. Defendant alleges that the victim then picked up a knife in the kitchen and began to go after the defendant, but no knife was ever found at the scene. Jennifer Simmons, the victim's wife, testified that her husband was not carrying a knife on the night in question and that he never carried a knife. While the victim was in the office, defendant, not content with the fact that the victim already had one bullet in the left side of his head, shot the victim again in the right side of the head in the cheek area. There is no evidence of provocation on the part of the victim in this case.

Second, the evidence presented at defendant's trial showed a ruthless killing committed by a man who had devised an elaborate plan to kill his father-in-law. Ceclia Edmondson testified that on 9 July 1990, she was on the porch of her house, which was next door to the victim's house. Defendant was sitting on the hood of a car in her driveway. Edmondson heard the victim accuse defendant of being a wife beater and ask defendant what kind of drugs he was taking. After the victim went inside his house, defendant stated, "I'm going to kill that bald headed, mother-f---ing-son-of-a-b---- if he doesn't leave me alone."

During work on 10 July 1990, defendant asked Kerney Harrison, a fellow employee, for a ride to work the next day. Defendant had never before asked Harrison for a ride to work because either his mother-in-law or his father-in-law drove him to work in the morning. At approximately 8:00 p.m. on 10 July, defendant called Gary Stambaugh, the manager who lived at the farm, and asked if he could borrow the farm truck to go fishing that night. Defendant then called the victim's house at approximately 9:00 p.m. and asked the victim if he would give him a ride to the farm. Defendant told the victim that the lights had gone out at the farm and that

Hanns-Deerter Alhusen, the owner of the hog farm, had called defendant and asked him to check on the farm. As Alhusen later testified, neither he nor anyone else at the farm had called defendant to check on the lights at the farm. Defendant went to the victim's house, and they drove out to the hog farm, which was approximately three-fourths of a mile off of Highway 97. Upon arriving at the farm, defendant had the victim stop at Stambaugh's house so that defendant could pick up the farm truck. It was common knowledge at the farm that a .22-caliber rifle was kept in the farm truck. The victim then followed the defendant, who was in the farm truck, to the farm office. After going into the office, defendant went into the room where the .22-caliber bullets were kept, loaded the rifle, aimed out the window, and shot the victim in the head while the victim was waiting in the truck for the defendant. Defendant's plan to kill his father-in-law was almost successful at that point, but his father-in-law survived the bullet wound to his head and managed to get out of his truck and walk into the office. At this point, defendant again shot his father-in-law in the head. This time he was successful in his plan to kill his father-in-law.

Defendant, in his confession, claimed that he then went to get help for the victim. Defendant claimed that he first drove the farm truck, with the victim following him with two bullets in his head, four-tenths of a mile from the farm office and then left the farm truck there. Defendant then proceeded to take the victim, in the victim's truck, seven to eight miles to the house of defendant's brother, who lives in Baker's Trailer Park. All of defendant's actions were taken under the pretense of wanting to "help" the victim. Yet, defendant knew that Stambaugh lived at the farm house; in fact, defendant talked to Stambaugh that night before taking the farm truck. Defendant made no attempt to get Stambaugh to call for help nor did he himself call for help. Instead, defendant drove to Baker's Trailer Park, and when his brother would not answer the door, he went to Albry Thurman's mobile home and told Thurman that his father-in-law had been the victim of a "drive-by" shooting and had been shot twice. Not only did defendant not seek available help for his father-in-law, he made up a false story as to what had happened on the night in question in order to cover up his crime.

Third, defendant's confession erases any possible doubt as to the lack of premeditation and deliberation on the part of defendant.

On 13 July 1990 at 5:40 p.m., defendant made the following signed confession to Detective Donnie A. Lynn with the Edgecombe County Sheriff's Department:

> My name is Tim Keel.
>
> I shot my father-in-law at the hog farm July 10, 1990.
>
> I made a phone call to 442-7970. I think John answered.
>
> I told him I had to go to work.
>
> Me and Amy [defendant's wife] were at O'Deh's store on Church Street.
>
> We got back to the house.
>
> My father-in-law and I talked to each other.
>
> We arrived at the hog farm.
>
> I got the farm truck; went ahead of him to unit five hundred.
>
> He parked his truck beside the building.
>
> I went inside the unit and fired a shot into the cab.
>
> The rifle was in the farm truck.
>
> I shot through the window in Johnny's office.
>
> John Simmons [victim] got out of his truck and he was bleeding. He kept saying he was hit.
>
> As he entered the door, I told him [to] sit down in the kitchen area.
>
> I shot again because he had a knife and was coming after me.
>
> He fell down and got up and I helped him into the truck to get him some help.
>
> He got into his truck. He was conscious and kept saying, "Help me. Help me."
>
> I carried him to Baker's Trailer Park and tried to get him some help.
>
> I passed a red car on the way to Baker's Trailer Park.
>
> They were yelling and drinking and riding around.

This is where I got the red car descriptions from.

John Simmons [victim] carried me back to the edge of the path where I left the farm truck.

We went back to the hog house on his truck.

I don't know why I did it. I didn't have any reason for shooting him.

I threw the gun in one of the fields in the hog pen.

In addition, on 11 July 1990, SBI Agent Dennis Honeycutt examined the farm office and the area outside the office. He not only observed blood all over the office, but he also performed luminol and phenolphthalein tests to determine the presence of blood not detectable by the human eye. A large bloodstained area was discovered on the ground outside the front door of the office. Honeycutt also observed a .22-caliber shell casing near the bloodstain. Just outside the front door, blood was also observed on a small cement pad. Upon entering the front door of the office, Honeycutt discovered on the floor three cloth strands from a cloth mop; each strand had bloodstains on it. In the dressing room where the employees change for work, there were a series of blood spatters on the wall. Honeycutt testified that "[a] blood spatter is an area of blood that has been acted on by force. The area of blood would be basically in flight. The blood would be moving through the air striking some object and causing a spatter." Bloodstains were also noted in the shower. Honeycutt further found bloodstains on the washing machine in the laundry room, one on top of the washer and another under the lid. Also in the laundry room was a pair of coveralls that had a large bloodstain on the bottom of the pants leg. On the floor near the shower area was a shoe pattern in blood. The door leading from the laundry room into the kitchen also had four blood spatters on it. Blood spatters were also noted on the bottom portion of the refrigerator in the kitchen, as well as on the walls. On the back porch, Honeycutt also observed a cloth mop with bloodstains on it. Further cloth strands with bloodstains on them were also found in the trash can in the kitchen. James Stevey, an employee at Shell Bank Farm, testified that when he left work on 10 July 1990 he did not see any blood in the office.

Furthermore, Dr. Louis Levy, pathologist and medical examiner for Nash and Edgecombe Counties, testified that he conducted an

autopsy of the victim's body on 11 July 1990. Upon external examination, Dr. Levy found bruises, contusions, abrasions, and lacerations on the left side of the body. In addition, there were two gunshot wounds to the head. One gunshot wound was in the right cheek at ear level and was identified as an entrance wound. There was a second entrance wound behind the left ear. The two bullet paths came from opposite sides of the head. Dr. Levy testified that, in his opinion, both bullets that struck the victim were fired from a distant range.

Finally, defendant clearly tried to cover up the fact that he had committed a murder. After shooting his father-in-law, defendant went to Albry Thurman's mobile home and told Thurman that the victim had been shot during a drive-by shooting. Shelby Thurman corroborated her husband Albry's testimony, adding that defendant stated that the drive-by shooting had occurred from a red station wagon at the Gay Road dumpsters.

Deputy Robert Davis with the Edgecombe County Sheriff's Department testified that he went to the Thurmans' mobile home and talked to defendant on the night in question. Defendant told Davis that earlier in the evening he had received a phone call to go to Shell Bank Farm. Defendant's father-in-law, the victim, drove defendant out to the farm; on the way back, with the victim driving, defendant stated that someone in a red station wagon had shot the victim twice near the intersection of Leggett Road and Gay Road.

Sergeant Donnie Lynn also interviewed defendant at the mobile home. Defendant told Lynn a similar story but added that when he and the victim passed the red station wagon, defendant heard two pops, after which the victim slumped over and defendant managed to stop the truck. Defendant stated that he managed to pull the victim over to the passenger side of the truck and that he then drove the truck to Baker's Trailer Park. Lynn testified that defendant showed him where all of these events occurred but that they did not go inside the farm office because defendant said it was locked and he did not have a key.

James Stevey, an employee at Shell Bank Farm, testified that on 11 July 1990, the day after the murder, he noticed a puddle of blood in the sandy gravel in front of the office door. He stated that when defendant stepped outside the front door of the office,

defendant went straight to the puddle of blood and kicked soil over it. Defendant said nothing while he did this.

Ceclia Edmondson testified that she went to the hospital the night that the victim was shot. While at the hospital, Edmondson saw defendant, who stuck his bloodied shirt in her pocketbook. She took the shirt home and washed it for him.

In conclusion, although I concede that the trial court erred in its first-degree murder instruction to the jury, I strongly believe that the trial court's error was harmless beyond a reasonable doubt. The evidence presented at trial could leave no doubt in any reasonable juror's mind that defendant committed a murder with premeditation and deliberation; therefore, defendant had the necessary specific intent to commit first-degree murder. It is for this reason that I dissent from the majority's opinion.

Justice Lake joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. WARREN S. BRONSON

No. 123A92

(Filed 18 December 1992)

1. **Criminal Law § 838 (NCI4th)-- murder—defense expert—clinical psychologist—instructions**

The trial court did not err in a murder prosecution in its instruction regarding defendant's expert clinical psychologist where defendant did not object to the instructions and the assignment of error was considered under the plain error rule. The jury heard testimony outlining the witness's academic credentials and work experience, heard the trial judge accept the witness in the field of clinical psychology, the witness was able to provide the jury with the factual basis and reasoning for his opinion, and the judge's instructions to the jury clearly provided that the witness was an expert who could present opinions in the field of clinical psychology that a lay witness could not present. The jurors would have reached the same result had they been told that they could consider

the witness's training, qualifications and experience in addition to the usual considerations of credibility.

Am Jur 2d, Trial §§ 1405 et seq.

2. **Evidence and Witnesses § 2641 (NCI4th)— murder—cross-examination of defendant—communications with attorney—no objection—privilege waived**

A defendant in a murder prosecution waived the attorney-client privilege when he did not object and voluntarily answered the prosecutor's questions regarding his communications with his attorney.

Am Jur 2d, Witnesses §§ 350-352.

Party's waiver of privilege as to communications with counsel by taking stand and testifying. 51 ALR2d 521.

3. **Evidence and Witnesses § 3157 (NCI4th)— murder—expert witness—opinion on defendant's credibility—no plain error**

There was no plain error in a murder prosecution in permitting defendant's clinical psychologist to express an opinion on defendant's credibility where defendant did not object to the form of the questions or to the answers given by the psychologist. Assuming that these questions were improper and that the responses were subject to more than one interpretation, given the evidence the jury would not have reached a different verdict absent this testimony.

Am Jur 2d, Expert and Opinion Evidence § 191.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR3d 684.

4. **Evidence and Witnesses § 2049 (NCI4th)— murder—testimony of neighbor—victim belittling defendant**

There was no plain error in a murder prosecution in allowing a witness to testify that defendant's wife constantly complained and belittled him where the State's question (whether the witness knew of anything the victim had done or anything about the victim that would justify the shooting) was asked in an attempt to ascertain if the witness had any factual basis

for an implication that the victim may have provoked the shooting and not to have the witness render a legal conclusion.

Am Jur 2d, Expert and Opinion Evidence § 27; Witnesses § 747.

5. **Evidence and Witnesses § 2873 (NCI4th)— murder—cross-examination—last rites for victim—no error**

There was no reversible error and no abuse of discretion in a murder prosecution where the prosecutor asked defendant's priest on cross-examination whether the last rites sometimes produced a sense of peacefulness and whether people killed in their sleep, as was this victim, were denied that chance.

Am Jur 2d, Trial § 500; Witnesses § 831.

6. **Evidence and Witnesses § 672 (NCI4th)— murder—hearsay—identical evidence admitted without objection—waiver**

There was no plain error in a murder prosecution where the trial court allowed inadmissible hearsay from two witnesses but defendant waived any possible objection by eliciting virtually identical testimony.

Am Jur 2d, Evidence §§ 494, 1103.

7. **Constitutional Law § 374 (NCI4th)— first degree murder—mandatory life sentence—not cruel and unusual**

The mandatory imposition of a life sentence for a first degree murder, tried noncapitally, was not cruel and unusual punishment and neither a proportionality review nor a sentencing hearing following the same guidelines provided for other felonies was required.

Am Jur 2d, Criminal Law §§ 527, 626, 627.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Stevens (Henry L., III), J., at the 15 July 1991 Criminal Session of Superior Court, Pender County. Heard in the Supreme Court 8 October 1992.

Lacy H. Thornburg, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Nora Henry Hargrove for defendant.

FRYE, Justice.

On 10 September 1990, defendant, Warren S. Bronson, was indicted by a Pender County grand jury for the 2 August 1990 first-degree murder of his wife, Sherry Bronson. Defendant pled not guilty and was tried noncapitally. The jury found defendant guilty, and the trial judge imposed the mandatory sentence of life imprisonment. Defendant filed written notice of appeal to this Court on 29 July 1991.

Defendant brings forward seven assignments of error. After a thorough review of the record, we conclude that defendant received a fair trial free of prejudicial error.

The State presented evidence tending to show the following facts and circumstances. On 2 August 1990, at approximately 5:00 a.m., Pender County Deputy Sheriff Edwin Simpson received an emergency telephone call from defendant. Defendant told Simpson that an intruder had broken into his home and shot him and his wife. Defendant allegedly fired two shots at the intruder as the intruder fled defendant's home.

Deputy Sheriff Charles M. Marshall responded to defendant's call. When Marshall arrived at defendant's home, he walked around both sides of the house to make sure no one was there. Heavy dew was on the ground, but Marshall found no disturbance to the dew or evidence of a trail leading from the house made by an escaping intruder. When Marshall entered defendant's home, he found defendant sitting in the middle of the living room floor holding his twenty-one-month-old son. Defendant's left leg was bleeding from a gunshot wound. Defendant told Marshall that an intruder shot his wife with a shotgun and then shot him when he struggled with the intruder. Defendant also told Marshall that he wrestled with the intruder and gained control of the shotgun as he fell wounded to the kitchen floor.

There were numerous boxes in the house because defendant and his family were in the process of moving from their Jacksonville home to a house located in Pender County. However, none of the boxes were knocked over, scattered, or disturbed. Marshall found Sherry Bronson, defendant's wife, lying on her right side between a bed and dresser in the master bedroom. She had been shot twice in the chest and was dead. A pump-action shotgun, an empty shotgun shell, and an open box of shells were lying on the floor nearby.

Once additional police officers and medical personnel arrived, defendant was taken to Pender Memorial Hospital where he received pain medication and was transported to the Naval Hospital at Camp Lejeune for surgery. After searching the house and the surrounding area, officers were unable to find any evidence of forced entry on the windows or doors. There were no footprints in the heavy dew around the outside of the house, and search dogs were unable to pick up the scent of the alleged intruder.

The police found two shotgun blast holes inside the house. There was one hole in the back door and a second in a wall near the door jamb of the back door. The holes were approximately four feet above the floor and angled slightly downward from the inside to the outside of the house. This evidence tended to contradict defendant's later story that he fired at the intruder while defendant was lying on the floor.

State Bureau of Investigation Agent Bruce Kennedy interviewed defendant at the Naval Hospital. During the interview, defendant related the following events. He awakened at 4:45 a.m. and let his dogs out of the house. His wife was asleep, and their son was asleep in a separate bedroom. As defendant left the bathroom, he saw a man standing at the foot of his wife's bed. The man shot defendant's wife with a shotgun, turned, and pointed it toward defendant's chest. Defendant grabbed the muzzle of the shotgun and it fired, hitting him in the leg. Defendant then fell backward onto the kitchen floor, he wrestled the shotgun from the intruder, and as the intruder ran out of the back door, defendant fired two shots at him while lying on the floor.

During defendant's interview with Kennedy, Detective Dick Wright of the Pender County Sheriff's Department arrived, and defendant continued to tell his version of what had happened. Kennedy and Wright pointed out the discrepancies in defendant's story, and told defendant that the physical evidence failed to corroborate his version of the events.

Defendant then admitted that there had not been an intruder in the house. According to defendant, after an argument, his wife threatened to leave him and to take his son. She tried to return her wedding ring and then pulled the shotgun and pointed it at his chest. He grabbed the shotgun barrel, and during a struggle he was shot in the leg. Defendant stated that after being shot he lost control of his emotions, took the shotgun from his wife,

and shot her. Once defendant provided this information to the officers, Kennedy stopped the interview and conferred with other police officers at the scene.

After Kennedy's conference with the other officers, he read defendant his *Miranda* rights and the interview continued. Defendant then told the officers that after he awakened on the morning of the shooting, he asked his wife to drive him to work at Camp Lejeune. She refused and told him not to expect her or their son to be home when he returned from work. According to defendant, his wife got the shotgun and loaded it when he left the room to let the dogs outside. When he returned, she shot him while he was in the kitchen, he lost control and shot her after she ran back to her bed. However, before he shot his wife, she mocked him by telling him that he had no guts. Defendant fired shots into the door after shooting his wife, then called police with the intruder story.

After this version of the events, Kennedy told defendant that the police would perform a gunshot residue test on his wife's hands to find out whether she fired the shotgun. Defendant then changed his story and admitted that his wife had not fired the shotgun and that he had shot himself. Defendant explained that he and his wife had been arguing the previous night, and he had awakened at approximately 3:00 a.m., roamed around the house, and then let the dogs outside. Defendant told the officers that he was tired of his wife "hurting." He then stated that he took his shotgun out of its case and loaded it at approximately 4:30 a.m., while he was in the kitchen, but he had thought about killing his wife before he loaded the shotgun. At approximately 5:00 a.m., he shot her while she slept in her bed. Defendant then walked into the kitchen, shot himself in the leg, and shot the back door.

On 7 August 1990, defendant recounted yet another version of the shooting to Detective Wright. Defendant told Wright that the night before the shooting he returned home from work at about 5:30 p.m., and a friend came to his house. According to defendant, his family and the friend went to Jacksonville to have dinner and to get some videotaped movies. After returning home, his friend left and defendant and his wife began to argue. At midnight, defendant and his wife went to bed. Defendant awoke at approximately 3:00 a.m. and roamed the house until 4:45 a.m. He let the dogs outside, loaded the shotgun, walked into the bedroom,

told his wife he loved her, and shot her. Defendant then walked into the kitchen, pointed the shotgun at his chest and considered killing himself, but lost his nerve and shot himself in the leg. Defendant told Wright that he fired two shots at the door because he was mad at himself for not having the courage to kill himself.

During his trial, defendant testified in his own defense. Defendant described how his military career progressed until he met and married his wife. Defendant told the jury that financial problems developed which led to borrowing money from his parents and the deterioration of his marriage. He described how he and his wife argued about their finances and his work schedule. He also described how his wife's physical problems with allergies exacerbated their other problems. Defendant testified that his wife interfered with his military career by repeatedly calling his superiors and demanding that he be allowed to leave work early to take care of her. In April or May 1990, the couple sought marriage counseling, but stopped after only four visits. Defendant testified that his wife had threatened to leave him, take their son, move into a home for unwed mothers, and leave defendant to take care of their mounting bills.

Defendant then proceeded to provide the jury with a fifth version of what occurred on the night his wife was shot. Defendant testified that he and his wife had gone to dinner with a friend and, after returning home, they began to argue about furniture that had to be returned to the store and other financial matters. Defendant's wife tried to return her wedding ring, then the couple went to bed around midnight. Defendant awoke at 3:00 a.m. and let the dogs outside. At 5:00 a.m., he looked at his wife as she lay sleeping in their bed, told her that he loved her, and then shot her. Defendant testified that the shotgun was already loaded because he had loaded it weeks before after a break-in at their Jacksonville apartment shortly before moving to Pender County. Defendant also testified that, after the break-in, he kept the loaded shotgun near his bed.

After shooting his wife, defendant tried to kill himself but the shotgun malfunctioned and failed to fire. However, when he lowered the shotgun, it fired and hit him in the leg. Defendant became angry and fired the remaining two rounds at the back door to empty the shotgun so that no one else could be hurt. When he called the police dispatcher on the morning of the shooting,

he actually believed that an intruder had shot his wife. He stated that on the morning of the shooting, he was not in control of his ability to reason, his mental faculties were impaired, and he was not able to make and carry out plans. Defendant admitted killing his wife, but denied that he planned to kill her.

Defendant presented the expert testimony of Henry Tonn, a clinical psychologist. Mr. Tonn testified that the tests that he gave defendant indicated that defendant took the tests honestly and that under sufficient amounts of stress he could develop some emotional problems. Mr. Tonn was of the opinion that the constant concerns about defendant's career, his marriage and possible break-up, including the loss of custody of his son, put severe stress upon him. In Mr. Tonn's opinion, defendant was suffering from "mental disassociation" during the hours leading to the killing of his wife, which meant defendant felt as if there was a separation between how he felt and what he was doing, almost like he was observing himself carrying out behavior. According to Mr. Tonn, defendant's emotional disturbance and mental condition substantially interfered with his mental faculties and his ability to reason. Mr. Tonn found defendant to be very intelligent and concluded that the fact that defendant gave differing versions of what happened on the morning of the shooting indicated that he was not thinking with a clear mind.

Additional facts will be discussed as they become relevant to a fuller understanding of the specific issues raised on appeal.

[1] In defendant's first assignment of error, he contends that the trial court committed plain error by failing to adequately instruct the jury regarding defendant's expert witness. Defendant contends that "[t]he trial court so truncated the pattern jury instructions on the consideration of expert testimony as to deprive the defendant of his right to present a defense." Defendant argues that Mr. Tonn's testimony made sense of all of the evidence, *e.g.*, the position of Sherry Bronson's arms, indicating that she may well have been awake and arguing, and the varying statements made by defendant.

At the conclusion of all the evidence, the jury was instructed regarding the testimony of an expert witness as follows:

> Now in holding Henry Tonn to be an expert in the field of clinical psychology, the Court does not mean by this that you are bound by his testimony. That is, you will treat him just as you would any other witness in determining whether or

not his testimony is acceptable to you. However, in this particular field, the witness is, in law, permitted to express an opinion that he would not otherwise be permitted to express were he not held to be an expert in the area of, in this case, clinical psychology.

Defendant contends that the party offering expert testimony is entitled to have the jury instructed on the use of the expert testimony. *State v. Rose*, 323 N.C. 455, 373 S.E.2d 426 (1988). Defendant further contends that it is error for the court to either undercut or overemphasize that testimony. *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E.2d 861 (1966). Therefore, defendant argues that "[t]he instructions given in the present case fails (sic) to instruct the [jurors] that in determining the testimony of an expert witness, aside from the usual considerations of the witness's credibility, they can consider the witness's training, qualifications and experience."

Defendant did not object to the instructions, therefore this assignment of error must be considered under the plain error rule. *State v. Jeune*, 332 N.C. 424, 436, 420 S.E.2d 406, 413 (1992). Under the plain error rule, a new trial will be granted for an error to which no objection was made at trial only if a defendant meets a heavy burden of convincing the Court that, absent the error, the jury probably would have returned a different verdict. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983).

In the present case, the jury heard testimony outlining Mr. Tonn's academic credentials and work experience. The jury also heard the trial judge accept Mr. Tonn as an expert witness in the field of clinical psychology. In addition, Mr. Tonn was allowed to provide the jury with the factual basis and reasoning for his expert opinion that defendant was under so much stress on the morning of the murder that he was not in control of his mental and emotional faculties. The judge's instructions to the jury clearly provided that Mr. Tonn was an expert witness who could, as a matter of law, present opinions in the field of clinical psychology that a lay witness could not present.

We are convinced that had the jurors been told that they could consider Mr. Tonn's training, qualifications and experience, in addition to the usual considerations of a witness' credibility, the jury would have reached the same result in this case. Thus,

defendant cannot show error under the plain error rule. This assignment of error is without merit.

[2] Defendant next contends that the prosecutor's questions regarding his communications with his attorney were misleading, prejudicial, and exceeded the scope of proper cross-examination. Defendant testified that his trial testimony was the correct version of the events. However, the prosecutor attempted to show that defendant's versions of the crime given shortly after the murder differed in significant detail from the version he presented to the jury which challenged the State's contention that defendant killed his wife after premeditation and deliberation. The prosecutor asked defendant if he had discussed the concepts of premeditation and deliberation with his attorney before trial. Without objection, defendant testified that he had discussed premeditation and deliberation with his attorney. Defendant also testified that he had known what premeditation and deliberation meant prior to discussing the same with his attorney because he had worked briefly with the military police.

Defendant concedes that the prosecutor had the right to impeach him with questions about the different versions of the events and about whether he knew the meaning of premeditation and deliberation. But, defendant argues that it was improper to ask such questions in the context of his conferences with his attorney.

It is well settled that communications between an attorney and a client are privileged under proper circumstances. *State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990). The attorney-client privilege belongs to the defendant and may be waived by him. *Id.* at 152, 393 S.E.2d at 805. In the instant case, defendant failed to object to the questions and did not raise the attorney-client privilege, but voluntarily answered all of the prosecutor's questions. Therefore, defendant waived the attorney-client privilege. We reject this assignment of error.

[3] In his third assignment of error, defendant contends that certain questions asked of defendant's expert witness permitted Mr. Tonn to express an opinion on defendant's credibility which invaded the fact-finding province of the jury. Mr. Tonn, an expert in clinical psychology, testified that he administered several psychological tests to defendant, and one of the tests, the Minnesota Multiphasic Personality Inventory (MMPI), had a "lie scale" that indicates to a trained psychologist whether the test taker truthfully answered

the test questions and that "the MMPI indicated that he [defendant] took it honestly and didn't show that he had any psychological flaws in his personality."

During cross-examination, the prosecutor asked Mr. Tonn the following questions:

> Q. Are you familiar with what we refer to as the fourth story, that is the story that he [defendant] finally, the last story that he told Mr. Kennedy in the emergency room?
>
> A. Yes, I am.
>
> Q. And in your opinion was that truly what happened?
>
> A. That would be my opinion, yes.
>
> Q. All right, sir. That's all.

Defendant did not object to the form of the questions and did not object to the answers given by the psychologist. Nevertheless, defendant now contends that the expert witness was asked to decide which of the various statements made by defendant was in fact true, a question of credibility solely for the jury.

The State contends that the questions were related to the underlying data which served as the facts or basis of the expert's opinion and the expert's responses were not an opinion on defendant's credibility. *See* N.C.G.S. § 8C-1, Rule 705 (1992).

Assuming, *arguendo*, that these questions were improper and that the responses were subject to more than one interpretation, we are convinced that absent this testimony the jury would not have reached a different verdict, given the other evidence in this case. Thus, defendant is not entitled to a new trial under the plain error rule. *See State v. Mitchell*, 328 N.C. 705, 711, 403 S.E.2d 287, 290 (1991) (before granting a new trial under the plain error rule, the appellate court must be convinced that, absent the alleged error, a jury probably would have reached a different verdict).

[4] In defendant's next assignment of error, he contends that the trial court committed plain error when it allowed a witness to impermissibly testify to a legal conclusion. Dorothy Richardson, defendant's neighbor, testified that defendant's wife constantly complained and belittled him. During cross-examination, the prosecutor asked the witness:

Q. Do you know of anything that Sherry Bronson ever did or anything about Sherry Bronson that would justify her husband shooting her twice in the heart with a shotgun at close range?

A. Well, all I know is she said she was going to take the baby and that can be a breaking point for some people.

Q. Question, do you know of anything she ever did or anything about her character that would justify her husband shooting her twice in the heart with a shotgun at close range? Yes or no?

A. When a person belittles . . .

THE COURT: No ma'am, listen.

A. No.

THE COURT: Answer the question if you can. You may explain your answer if you desire to do so.

A. No, I don't know a reason why but I do know that when a person cuts a person low continuously for so long and then threatens to take the very thing they hold dearest to them, you just, you can just reach a breaking point. It happens.

The State contends that the question was asked by the prosecutor in an attempt to ascertain if the witness had any factual basis for the implication that the victim may have provoked the shooting. The question was not asked to have the witness render a legal conclusion. We agree. The witness' response indicated that her testimony was based on an impression of the defendant's relationship with his wife, and not based on any specific instances of provocative conduct by Sherry Bronson.

In addition, there was no objection at trial to the challenged questioning, therefore any error must be reviewed under the plain error rule. N.C. R. App. P. 10(b). Defendant cannot meet the burden of proving that the cross-examination of Ms. Richardson resulted in an error so grave as to cause the jury to reach a decision it would not have reached if the testimony had been excluded. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375. Thus, defendant's fourth assignment of error is rejected.

[5] In defendant's fifth assignment of error, he contends that the prosecutor's questions regarding last rites were highly improper, inflammatory, irrelevant and unfairly prejudicial to him. Defend-

ant's priest, Father John Mott, testified that defendant told him that he was under great stress, that he planned to kill his wife and himself, but lost his nerve after he shot her and could not take his own life. During cross-examination, Father Mott was asked the following:

> Q. And Father Mott, have you had occasion to administer last rites or to counsel with people who knew that death was imminent?
>
> A. Yes.
>
> Q. When you do that, and they have chance (sic) to do that, have you been able to observe a peacefulness that has come over them?
>
> A. Sometimes.
>
> Q. Of course, usually it makes that person feel somewhat better, doesn't it?
>
> A. I think so.
>
> Q. And of course, if you're killed in your sleep, you don't get a chance to do that.
>
> A. That is right.

Defendant failed to object to this line of questions, and now argues that the prosecutor's questions improperly excited the prejudices of the jury and turned their attention from the evidence and toward sympathy. We disagree.

The bounds of cross-examination are limited by two general principles: 1) the scope of the cross-examination rests within the sound discretion of the trial judge; and 2) the questions must be asked in good faith. *State v. Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990) (citations omitted). A prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith. *State v. Dawson*, 302 N.C. 581, 586, 276 S.E.2d 348, 351 (1981). Abuse of discretion is generally found when a prosecutor affirmatively places before the jury an incompetent and prejudicial matter by injecting his own knowledge, beliefs, or personal opinions or facts which are either not in evidence or not admissible. *Id.* at 585-86, 276 S.E.2d at 351.

In the instant case, the prosecutor did not place before the jury his own opinions or inadmissible evidence, and there is nothing tending to show that the testimony was elicited in bad faith or that the questioning exceeded the scope of permissible cross-examination. Thus, we find no abuse of discretion on the part of the trial court and no reversible error.

[6] In his next assignment of error, defendant contends that the court committed plain error in allowing inadmissible hearsay testimony from two witnesses. During defendant's treatment at the emergency room, Dr. Michael Hawkins and nurse Sherry Gurganus overheard defendant speaking on the phone to his parents. Dr. Hawkins testified that he overheard defendant tell someone during a telephone conversation that he did not know how his wife was doing. Nurse Gurganus testified that she overheard defendant tell his parents that "someone had broken into their house and there had been an accident." During the trial, defendant elicited virtually identical testimony from his parents concerning their recollection of the telephone conversation. Defendant's mother testified that when defendant called her from the emergency room, he told her that "there had been an accident and that someone had broken in and shot Sherry and him." Defendant's father testified that when he spoke with defendant, "he [defendant] said there had been an accident . . . that Sherry had been shot and she wasn't doing so well and he had been shot, but he was all right."

By eliciting this testimony, defendant waived any possible objection to the testimony at issue. *See State v. Hunt*, 325 N.C. 187, 381 S.E.2d 453 (1989) (references to defendant's home as "Fort Apache" was not error when no objection was made to earlier reference); *see also* 1 *Brandis on North Carolina Evidence* § 30 (3d ed. 1988) (when evidence is admitted over objection but the same evidence has theretofore been or is thereafter admitted without objection, the objection is waived). Defendant cannot meet his burden of establishing error under the plain error rule when virtually identical evidence is elicited by defendant from his own witnesses. This assignment of error is without merit.

[7] In defendant's final assignment of error, he contends that his sentence of life imprisonment constitutes cruel and unusual punishment. Defendant requests that this Court conduct a proportionality review and find that the automatic imposition of the life sentence in this case was cruel and unusual. In the alternative, defendant

requests that the Court hold that the statute providing for the automatic imposition of a life sentence is unconstitutional and remand his case to the superior court for a new sentencing hearing, following the same guidelines provided for other felonies. We decline both requests and reject defendant's final assignment of error.

This Court has held that neither imposition of a life sentence nor imposition of consecutive life sentences for first-degree murder constitutes cruel and unusual punishment. *State v. Ysaguire*, 309 N.C. 780, 786, 309 S.E.2d 436, 441 (1983); and *State v. Atkinson*, 298 N.C. 673, 686, 259 S.E.2d 858, 866 (1979). In *Ysaguire*, the Court noted that, in a noncapital case, it is exceedingly rare for an appellate court to be able to conclude that a sentence imposed is so grossly disproportionate as to violate the Eighth Amendment proscription of cruel and unusual punishment and that it is not required to conduct factual comparisons to different non-capital cases to determine whether a given sentence is constitutional. *Ysaguire*, 309 N.C. at 786 n.3., 309 S.E.2d at 441 n.3. In addition, this Court has rejected similar arguments made concerning mandatory life sentences in first-degree rape and first-degree sexual offense cases. *State v. Peek*, 313 N.C. 266, 328 S.E.2d 249 (1985) (first-degree rape); and *State v. Holley*, 326 N.C. 259, 388 S.E.2d 110 (1990) (first-degree sexual offense). We find our precedents both persuasive and controlling.

In defendant's trial, we find no prejudicial error.

No error.

STATE OF NORTH CAROLINA EX REL. WILLIAM W. COBEY, JR., SECRETARY DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES v. VIVIAN ANNE SIMPSON

No. 56PA92

(Filed 18 December 1992)

1. Waters and Watercourses § 7 (NCI3d)— remedial provisions of CAMA—effect of 1992 amendment of statute

The 1992 amendment to N.C.G.S. § 113A-126(a) entitled "An Act to Clarify the Development, Delegation, and Injunctive Relief Provisions of the Coastal Area Management Act"

was intended by the legislature to clarify, not change, the meaning of that statute.

Am Jur 2d, Waters §§ 430-435.

2. **Waters and Watercourses § 7 (NCI3d)— area of environmental concern—unauthorized development—violation of CAMA and rules—restoration required**

When there has been unauthorized development in an area of environmental concern sufficiently inconsistent with the Coastal Area Management Act (CAMA) and the Coastal Resources Commission rules promulgated pursuant thereto to have warranted denial of a permit had defendant applied to the Commission for a permit, CAMA and the Commission rules require restoration of the resources to the predevelopment condition.

Am Jur 2d, Waters §§ 430-435.

3. **Waters and Watercourses § 7 (NCI3d)— Coastal Resources Commission rule—restoration to "fullest extent practicable"**

The Coastal Resources Commission rule requiring restoration to the "fullest extent practicable" consistent with the need to avoid additional damages to the resources means practicable in an environmental and engineering sense, not an economical one. Moreover, in enacting CAMA, the General Assembly has established its priorities through a comprehensive regulatory scheme, and it is inappropriate for the courts to attempt to balance the private costs of restoration against the benefits of the coastal wetlands environment.

Am Jur 2d, Waters §§ 430-435.

4. **Waters and Watercourses § 7 (NCI3d)— fill materials in coastal wetlands—CAMA violation—entire removal required**

Once the trial court determined that fill materials deposited by defendant in coastal wetlands violated CAMA, the court should have ordered that defendant remove all of the fill materials rather than only a portion thereof where there was no evidence that partial removal would effect natural restoration of the filled wetlands over time, and defendant adduced no evidence that removal of all of the fill materials was impracticable.

Am Jur 2d, Waters §§ 430-435.

5. Waters and Watercourses § 7 (NCI3d)— retaining wall and bulkhead addition—CAMA violations—entire removal required

Once the trial court determined that a retaining wall and a capboard addition to an existing bulkhead were built in violation of CAMA, the trial court should have ordered defendant to remove the capboard addition to the bulkhead and the entire retaining wall instead of ordering defendant to remove the capboard and only part of the retaining wall in order to achieve compliance with the CAMA mandate to restore the resources. The removal of all structures or parts thereof constructed in violation of CAMA or the rules promulgated pursuant thereto is necessary to accomplish the purpose of the Act; otherwise, the permit-letting provisions of CAMA would be read as mere guidelines rather than strict requirements.

Am Jur 2d, Waters §§ 430-435.

6. Waters and Watercourses § 7 (NCI3d)— fill in wetlands—CAMA violation—small area affected—restoration required

There was no merit to defendant's contention that restoration of her property to predevelopment condition was not required because the unauthorized filling of wetlands on her property covered an area of only 5,000 square feet and did not significantly disrupt the adjacent marshlands, since CAMA does not merely regulate significant development but regulates all development in our coastal wetlands.

Am Jur 2d, Waters §§ 430-435.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a published decision of the Court of Appeals, 105 N.C. App. 95, 411 S.E.2d 616 (1992), affirming a judgment entered by Manning, J., in the Superior Court, Carteret County, on 21 September 1990, finding that defendant had violated the Coastal Area Management Act, N.C.G.S. §§ 113A-100 to -128 (1989 and Supp. 1992), and the Dredge and Fill Act, N.C.G.S. § 113-229 (1990), and ordering removal of some of the unauthorized structures and fill materials. Heard in the Supreme Court 6 October 1992.

Lacy H. Thornburg, Attorney General, by J. Allen Jernigan and Daniel F. McLawhorn, Special Deputy Attorneys General, for the State-appellant.

Bennett, McConkey, Thompson & Marquardt, P.A., by Thomas S. Bennett, for defendant-appellee.

Conservation Council of North Carolina, by John D. Runkle, General Counsel, amicus curiae.

WHICHARD, Justice.

The issue is whether defendant must remove fill material which she caused to be deposited in coastal wetlands, a retaining wall and an addition to an existing bulkhead containing the fill material, which she also caused to be constructed in violation of the Coastal Area Management Act of 1974 ("CAMA"), N.C.G.S. §§ 113A-100 to -128 (1989 & Supp. 1992), and the Dredge and Fill Act of 1969 ("DFA"), N.C.G.S. § 113-229 (1990). The trial court ordered removal of only sixty feet of the upper level of the retaining wall and excavation of the adjacent fill dirt back therefrom at an upward slope for a distance of thirty inches, reasoning that such actions would achieve compliance with CAMA and DFA by allowing natural restoration of the filled wetlands over time. The Court of Appeals affirmed, construing only the remedial provisions of CAMA. The Court of Appeals held that the language of section 113A-126(a) vested virtually complete discretion in the trial court to fashion an appropriate remedy, and that the trial court had not abused its discretion. *State ex rel. Cobey v. Simpson*, 105 N.C. App. 95, 411 S.E.2d 61 (1992). On 21 April 1992, this Court allowed plaintiff's petition for discretionary review.

The State argues that once the trial court found defendant to be in violation of CAMA or DFA, it had no option but to order restoration of the affected site to pre-violation conditions. We hold that because the violations were proved, the court must order removal of the unauthorized development, both structures and fill materials. Accordingly, we reverse.

The General Assembly enacted DFA in 1969 and CAMA in 1974 to protect, preserve, manage and provide for the orderly development of one of North Carolina's most valuable resources, the coastal estuarine system. N.C.G.S. § 113A-102(a) (legislative findings and goals). In particular, coastal wetlands, or marshlands, historically considered wastelands that should be reclaimed or put to productive use, have been recognized by the General Assembly as integral to the entire estuarine system—"unique, fragile, and irreplaceable." *See Adams v. Dept. of N.E.R.*, 295 N.C. 683, 692-93,

249 S.E.2d 402, 407-08 (1978); Thomas Schoenbaum, *The Management of Land and Water Use in the Coastal Zone: A New Law Is Enacted in North Carolina*, 53 N.C. L. Rev. 275, 277-78, 280 (1974); Thomas Earnhardt, *Defining Navigable Waters and the Application of the Public-Trust Doctrine in North Carolina: A History and Analysis*, 49 N.C. L. Rev. 888, 888-92 (1971). Within the comprehensive management plan established by CAMA, and applicable to DFA, "[h]ighest priority of use [is given] to the conservation of existing coastal wetlands." 15A NCAC 7H. 0205(d) (Nov. 1991).

The central mechanism for implementation of the management program established by CAMA applies only to lands and waters designated an area of environmental concern ("AEC"). Coastal wetlands (or marshlands, as defined in DFA, N.C.G.S. § 113-229(n)(3), terms herein used interchangeably) have been designated AECs pursuant to N.C.G.S. § 113A-113(a) and (b)(1). CAMA requires that a permit be obtained before any "development" is undertaken in an AEC. N.C.G.S. § 113A-118(a). DFA similarly requires that a permit be obtained before any dredging or filling project is begun in, *inter alia*, marshlands. N.C.G.S. § 113-229(a). (Permit issuance under DFA is coordinated by the Coastal Resources Commission, which is created by and authorized to administer CAMA, so that a single, expedited permitting process exists for CAMA and DFA. N.C.G.S. § 113-229(e)). "Development" is broadly defined to include any activity "involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping; . . . bulkheading; . . . [or] clearing or alteration of land as an adjunct of construction." N.C.G.S. § 113A-103(5)a. Permits will be granted only if the development, so defined, is consistent with CAMA and the rules, guidelines or local land-use plans promulgated pursuant thereto. N.C.G.S. § 113A-120(a)(8). The coastal wetlands guidelines, for example, require that bulkheads or other shore stabilization measures "be constructed landward of significant marshland or marshgrass fringes" and aligned with approximate mean high water or normal water level. 15A NCAC 7H. 0208(b)(7)(A) and (B) (Nov. 1991).

During a routine surveillance flight on 17 May 1984, personnel of the Department of Environment, Health and Natural Resources ("DEHNR"), successor to the Department of Natural Resources and Community Development, observed construction of a bulkhead on property defendant owned in Carteret County near Stella, adjacent to Cales Creek (locally known as Neds Creek), a tributary

of the White Oak River. During a subsequent site inspection on 21 May 1984, five marshlands species were found growing landward of the bulkhead: saw grass (*Cladium jamaicense*), bulrush (*Scirpus spp.*), saltwater cordgrass (*Spartina alterniflora*), salt grass (*Distichlis spicata*), and salt meadow grass (*Spartina patens*). Clippings and debris ("rack" material), brought in by the tides, were found accumulating at the highest tide mark, and marshlands landward of the bulkhead were the same elevation as the adjacent marshlands outside the bulkhead. The presence of such vegetation, and the occurrence of regular or occasional flooding by tides, define "coastal wetlands" protected under the statutes. N.C.G.S. § 113A-113(b)(1); N.C.G.S. § 113-229(n)(3). DEHNR, however, did not deem the bulkhead a violation of CAMA because it replaced a bulkhead built prior to the effective date of the statute. 15A NCAC 7J. 0210 and .0211 (Nov. 1991).

On a subsequent flight on 17 September 1985, DEHNR personnel observed that a retaining wall through the marshlands had been constructed perpendicular to the bulkhead and extending from the bulkhead, through the marshlands, towards high ground. An inspection on 16 October 1985 showed that fill material now covered the marshgrass landward of the bulkhead. The bulkhead had been capped with an additional piece of timber, raising it another eight inches. An inspection on 24 January 1986 showed that the retaining wall had been extended to high ground and the area had been seeded with rye grass.

On 30 January 1986, DEHNR served defendant with a notice of violation requiring her to cease and desist her fill activity and requesting that personnel be allowed on her property to dig post holes to determine the dimensions of the affected wetlands to be restored. Defendant refused to comply. On 18 March 1986, DEHNR personnel took core samples on the site, which indicated that a substrate of identifiable marsh species underlay an approximately five thousand square foot area covered by topsoil and sand fill materials. Based on these findings, DEHNR prepared a restoration agreement, pursuant to 15A NCAC 7J. 0410 (Dec. 1991), which plan, referencing the notice of violation, was served on defendant on 21 March 1986. Defendant refused to restore the area. On 9 April 1986, DEHNR served defendant with a notice of continuing violation, again requesting her to cease and desist her unauthorized activities and restore the area. Following defendant's continued refusal to restore the area, DEHNR referred the matter to the

Attorney General, who instituted this action pursuant to CAMA section 113A-126(a) and DFA section 113-229(1).

In its complaint dated 11 June 1986, the State alleged that defendant placed fill material on marshlands subject to regulation under CAMA and DFA without obtaining the requisite permits. The State sought, *inter alia*, preliminary and permanent mandatory injunctions compelling defendant to restore the area to its condition prior to the unauthorized development. In the alternative, the State would restore the area, and it sought damages equal to the cost of such restoration. The State did not request that the court impose civil penalties on defendant.

On a prior, interlocutory appeal, this Court determined that defendant was not entitled to a trial by jury. *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989). On remand, the trial court, sitting without a jury, concluded, in pertinent part, that defendant or her agents violated CAMA section 113A-118(a) by constructing the retaining wall, enlarging the existing bulkhead, and depositing fill in marshlands or coastal wetlands duly designated an area of environmental concern and therefore subject to regulation pursuant to CAMA and DFA, without first obtaining the requisite permit. It further concluded that defendant or her agents violated DFA section 113-229(a) by placing fill materials in marshlands without first obtaining the requisite permit. The destruction of existing coastal wetlands by such development is inconsistent with the State guidelines, 15A NCAC 7H. 0205, and therefore could not be permitted under either CAMA or DFA. N.C.G.S. § 113A-120(a)(8) (permit to be denied if development is inconsistent with State guidelines); N.C.G.S. § 113-229(e) (permit may be denied upon finding of significant adverse effect on water, etc.).

Notwithstanding its finding of these violations, the trial court concluded that removal of the unauthorized fill materials, the one-hundred-seventy-five foot retaining wall, and eight by eight inch timber placed atop the bulkhead, was not required to achieve compliance with CAMA, DFA, or the rules promulgated pursuant thereto, *i.e.*, 15A NCAC 7J. 0410. Rather, it concluded that removal of sixty feet of the upper level of the unpermitted retaining wall which defendant or her agents placed within the coastal wetlands AEC, and excavating the adjacent fill dirt back therefrom at an upward slope for a distance of thirty inches, would achieve compliance with CAMA, DFA, and the rules promulgated pursuant

thereto, by allowing such natural restoration of the filled wetlands as may occur over time. It accordingly ordered this course of action.

The State appealed to the Court of Appeals and, as noted, the Court of Appeals affirmed the trial court's order. Referring to *Adams*, 295 N.C. at 702, 249 S.E.2d at 413, the court acknowledged that DEHNR is authorized to prepare and adopt guidelines which require restoration to conditions prior to unauthorized development, *e.g.* 15A NCAC 7J. 0410, but held it is unable to compel this remedy in court, statutory violations notwithstanding. *Simpson*, 105 N.C. App. at 97, 411 S.E.2d at 618. The Court of Appeals reasoned that the specific language of the remedial provision of CAMA section 113A-126(a) bestowed virtually complete discretion in the trial court to fashion an appropriate remedy. *Id.* at 97-98, 411 S.E.2d at 618. Further, it held that this specific grant of broad discretion in the trial court creates an abuse of discretion standard of appellate review, and referring to the expert testimony, as well as the trial court's visit to the site, it found no abuse of discretion. *Id.* at 98, 411 S.E.2d at 618. The court concluded that "[t]he legislature has created an ecological watchdog without the teeth necessary to protect its charge." *Id.* at 97, 411 S.E.2d at 618.

On this appeal, the State basically argues (1) that the courts below misinterpreted legislative intent with regard to the remedial provisions of both CAMA and DFA, and (2) that the trial court's order amounted to an after-the-fact *de jure* variance violating the Separation of Powers Clause of the North Carolina Constitution. N.C. Const. art. 1, § 6. Because we hold that the remedial provisions of CAMA require the court to order the mandatory injunctive relief the State seeks, we need not address the constitutional question or construe the remedial provisions of DFA.

[1] The only issue, then, involves interpretation of the remedial provisions of CAMA, section 113A-126(a), and application of these provisions, properly interpreted, to the facts of the case. A recent enactment amending the provision facilitates our interpretation. *Burgess v. Your House of Raleigh*, 326 N.C. 205, 216, 388 S.E.2d 134, 141 (1990) ("Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of the prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve.").

At the time defendant enlarged the existing bulkhead, constructed a retaining wall, and filled the wetlands, CAMA section 113A-126 read, in pertinent part:

> **§ 113A-126. Injunctive relief and penalties.**
>
> (a) Upon violation of any of the provisions of this Article or of any rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for *injunctive relief to restrain the violation and for such other or further relief in the premises as said court shall deem proper.*

N.C.G.S. § 113A-126(a) (1989) (emphasis added). Effective 2 July 1992, section 113A-126 was amended. 1991-92 N.C. Sess. Laws ch. 839, § 3. That amendment was contained in an act entitled "An Act to Clarify the Development, Delegation, and Injunctive Relief Provisions of the Coastal Area Management Act." *Id.* Section 113A-126(a) now reads, in pertinent part:

> **§ 113A-126. Injunctive relief and penalties.**
>
> (a) Upon violation of any of the provisions of this Article or of any rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice in the name of the State upon the relation of the Secretary for *injunctive relief to restrain the violation and for a preliminary and permanent mandatory injunction to restore the resources consistent with this Article and rules of the Commission. If the court finds that a violation is threatened or has occurred, the court shall, at a minimum, order the relief necessary to prevent the threatened violation or to abate the violation consistent with this Article and rules of the Commission.*

N.C.G.S. § 113A-126(a) (Supp. 1992) (emphasis added).

The language upon which defendant focuses, "for such other or further relief in the premises as said court shall deem proper," was deleted by the recent enactment, and language which clearly

and unambiguously mandates issuance of an injunction, once a violation has been proved, was added. Defendant argues that the General Assembly changed, rather than clarified, the prior law, notwithstanding the title of the amendment. *See, e.g., Pipeline Co. v. Neill*, 296 N.C. 503, 509, 251 S.E.2d 457, 461 (1979) (in construing a statute with reference to an amendment, it is presumed that the legislature intended either to change the substance of the prior act or to clarify it) (citing *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 483 (1968)). We disagree.

In matters of statutory interpretation, the task of the Court is to ascertain and adhere to the intent of the legislature. *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 587, 281 S.E.2d 24, 33 (1981). To ascertain legislative intent with regard to the recent enactment, we presume that the legislature acted with full knowledge of prior and existing law and its construction by the courts. *Lumber Co. v. Trading Co.*, 163 N.C. 314, 317, 79 S.E. 627, 628-29 (1913). We therefore cannot, as defendant would have us do, ignore the title of the bill.

> [T]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the Act. . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered.

State v. Woolard, 119 N.C. 779, 780, 25 S.E. 719, 719 (1896); *accord, e.g., Pipeline Co. v. Neill*, 296 N.C. at 508, 251 S.E.2d at 461; *Sykes v. Clayton*, 274 N.C. 398, 406, 163 S.E.2d 775, 781 (1968). The amendment here was entitled "An Act to *Clarify* the Development, Delegation, and Injunctive Relief Provisions of the Coastal Area Management Act." 1991-92 N.C. Sess. Laws ch. 839, § 3 (emphasis added). In holding that the legislature intended to clarify, not change, the meaning of CAMA section 113A-126(a), we follow the rule that "[i]n construing a statute it will be assumed that the legislature comprehended the import of the words employed by it to express its intent." *Upchurch v. Funeral Home*, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965).

The recent revision of section 113A-126(a) authorizes the Secretary of DEHNR to institute an action for certain injunctive relief and necessarily vests jurisdiction in the courts to order that

relief. N.C.G.S. § 113A-126(a) (Supp. 1992). *See, e.g., Board of Education v. Dickson*, 235 N.C. 359, 361, 70 S.E.2d 14, 17 (1952) (meaning of statutes is to be found in what they necessarily imply as much as in what they specifically express). Further, it mandates issuance of an injunction once a violation of CAMA has been proved, as here, and declares that the purpose of mandatory injunctive relief is to "restore the resources" in accordance with CAMA and the rules of the Coastal Resources Commission ("Commission") promulgated pursuant to CAMA. N.C.G.S. § 113A-126(a) (Supp. 1992). To that end, section 113A-126(a) expressly references the rules of the Commission so that the courts may determine the "relief necessary to abate the violation." *Id.*

[2, 3] When there has been, as here, unauthorized development, sufficiently inconsistent with CAMA and the Commission rules to have warranted denial of a permit, had defendant applied to the Commission for a permit, CAMA and the Commission rules require restoration of the resources. In particular, the Commission rules state that:

> Any violation involving development which is inconsistent with guidelines for development within AECs (*i.e.*, wetland fill, improper location of a structure, etc.) must be corrected by restoring the project site to pre-development conditions upon notice by the Commission or its delegate that restoration is necessary to recover lost resources, or to prevent further resource damage.

15A NCAC 7J. 0410 (Restoration/Mitigation). The State recognizes, as a general proposition, that restoration to pre-development conditions is not always possible. The Commission rules elsewhere qualify that requirement. "In all cases [of development sufficiently inconsistent with CAMA or the Commission rules to have warranted denial if the permits application process had been followed], restoration shall be required to the fullest extent practicable consistent with the need to avoid additional damage to the resources . . . ." 15A NCAC 7J. 0409(f)(4)(B) (Dec. 1991). Basic rules of statutory construction compel us to construe the term "fullest extent practicable" as practicable in an environmental and engineering sense, not an economic one. *See State v. Tew*, 326 N.C. 732, 739, 392 S.E.2d 603, 607 (1990) (words and phrases of a statute must be construed as part of a composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit). The modifying phrase, "consist-

ent with the need to avoid additional damage to the resources," connotes only concern about the environment. Moreover, in enacting CAMA, the General Assembly has established its priorities through a comprehensive regulatory scheme, completely prohibiting, *e.g.*, construction of bulkheads and other stabilization structures in wetlands, or the filling of wetlands therein, as happened in the case at bar. In that context, it is inappropriate, under the statute and the rules promulgated pursuant to it, for the courts to attempt to balance the private costs of restoration against the benefits of the coastal wetlands environment. The General Assembly has performed that balancing task.

[4] Applying these rules to the evidence here, we conclude that there was no evidence that excavation of only the fill materials adjacent to and back thirty inches from the retaining wall, rather than removal of the sixteen inches of fill defendant deposited over the wetlands, contravening both CAMA and DFA, would effect natural restoration of the filled wetlands over time. The State's experts testified that the wetlands defendant altered and damaged could only be restored by removing approximately sixteen inches of fill to the elevation of the adjacent wetlands outside the bulkhead and retaining wall, thus allowing the wetlands species to revegetate. These wetlands species would not reestablish the damaged wetlands if the area were left alone because the elevation differential between wetlands inside and outside the bulkhead and retaining wall allows ponding. Ponding, the resultant stagnation of water, and increased salt concentrations prevent the wetlands species from reestablishing, either from below or seeded above from rack accumulations. Defendant's own expert in soil science opined that the dominant species in the adjacent wetlands, *e.g.*, black needlerush (*Juncus roemerianus*), would grow again only if the fill materials were removed. Otherwise, only the more salt tolerant wetlands species would survive in the area. Defendant adduced no evidence that removal of the sixteen inches of fill materials was impracticable. For these reasons, we hold that, once the trial court found that the sixteen inches of fill materials deposited violated CAMA, it should have ordered such fill materials removed.

[5] An ancillary question is whether the entire length of the retaining wall and the capboard enlarging the bulkhead, which construction contravened CAMA, must be removed to achieve compliance with the CAMA mandate to restore the resources. The trial court found that removal of only the upper level of sixty

feet of the retaining wall would facilitate inundation of the damaged and altered wetlands, inundation that would presumably effect, over time, natural restoration of the site. The court therefore ordered defendant to remove only that part of the retaining wall, instead of the entire one-hundred-seventy-five foot length, and the capboard enlarging the existing bulkhead.

To answer that question, we look to the Commission rules, which were expressly authorized and given mandatory effect by the recent re-enactment of CAMA section 113A-126(a). Rule 7J. 0409(f)(4)(B)(v) specifically requires that "[a]ny structure or part of a structure that is constructed in violation of . . . the Act, or the Commission's rules[,] shall be removed or modified as is necessary to correct the violation . . . ." 15A NCAC 7J. 0409(f)(4)(B)(v) (Dec. 1991). The bulkhead and the retaining wall are "structures" within the meaning of the Act and the rules. *See* 15A NCAC 7H. 0208(b)(7)(D) ("bulkhead" described as "structure employed for shoreline stabilization"); 15A NCAC 7J. 0102(10) (Apr. 1990) ("structure" defined as including, but not limited to, buildings, bridges, piers, wharves and docks, timber breakwaters, mooring pilings, pile clusters, navigational aids, net stakes, or concrete, steel, or wood boat ramps); *Webster's Third New International Dictionary* 2267 (1986) ("structure" defined as something constructed or built). Further, removal of all structures or parts thereof, constructed in violation of CAMA or the rules promulgated pursuant thereto, is necessary to accomplish the purpose of the Act; otherwise, the permit-letting provisions of CAMA would be read as mere guidelines rather than strict requirements. *See, e.g., Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979) (legislative intent may be determined from the language as well as the nature and purpose of the act and the consequences which would follow from a construction one way or another, and the court should always construe the provisions of a statute in a manner which will tend to prevent it from being circumvented). For these reasons, we hold that the court should have ordered removal of the retaining wall and the eight by eight inch capboard enlargement to the bulkhead, once it found that these structures were built in violation of CAMA.

[6] Finally, defendant suggests that the unauthorized filling of wetlands on her property did not so significantly disrupt the adjacent marshlands that the court should order restoration. Defendant refers to the site as postage-stamp sized. CAMA does not merely regulate significant development, however, but all development in

our coastal wetlands, so as to "insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation." N.C.G.S. § 113A-102(b)(3).

For the reasons stated, we hold that the trial court erred in ordering only partial removal of the structures defendant erected and the fill deposited therein, in violation of CAMA and DFA, and the Court of Appeals erred in affirming the trial court. Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals with instructions to remand to the Superior Court, Carteret County, for entry of an order consistent with this opinion enjoining defendant to remove all structures and fill violative of CAMA and DFA.

REVERSED AND REMANDED.

TIMOTHY S. HOLLOWAY, JR. v. WACHOVIA BANK & TRUST COMPANY, N.A. AND WACHOVIA BANK & TRUST COMPANY, N.A. v. MARCIA CRISP COLEMAN

No. 11PA92

(Filed 18 December 1992)

1. **Uniform Commercial Code § 28 (NCI3d)— certificate of deposit—not a negotiable instrument under UCC**

A certificate of deposit issued by a bank was not a negotiable instrument under the UCC because it was payable "to the Registered Holder, or to the duly registered assignee hereof" and not payable to "order" or to "bearer," and because it was ". . . assignable only by registration on the books of the Bank," terms precluding transfer. N.C.G.S. § 25-3-104(1)(d); N.C.G.S. § 25-3-104(1)(b).

Am Jur 2d, Banks §§ 457, 458.

2. **Gifts or Donations § 12 (NCI4th)— certificate of deposit—donative intent—delivery**

The essential elements of a gift *inter vivos* were present in a certificate of deposit issued to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr., Agent" where Timmy was a six-year-old minor and Crisp's grandson. Crisp clearly expressed his

intent to give the underlying funds to Timothy when he transformed the funds into a certificate of deposit in Timothy's name, with himself listed merely as agent for Timothy. This indicates donative intent because Crisp did not merely place the funds in a bank account with Timothy's name on the passbook, but took the further step of transferring the account into a certificate of deposit which stated on its face that Timothy was the payee, and because Crisp placed himself on the certificate as agent, not as co-owner or as grandfather. It does not matter whether Crisp established a legally binding agency relationship; by naming himself as Timothy's agent, Crisp indicated an intent to relinquish control and dominion over the funds. As to delivery, there may be a delivery notwithstanding the maker keeps the instrument in his possession where it is apparent that he intended to hold it for the benefit and as the agent of the payee; further, the evidentiary purpose of the formality of delivery is met when a certificate of deposit is made in a name other than the depositor's, as the courts can rely on the contract between the bank and the depositor, evidenced by the certificate, as proof of the gift. Relaxing the technical requirements as to gifts is justified by the certainty of transfer and ownership that the form of a certificate of deposit affords and where an adult donor may not choose, for practical reasons, to physically deliver a large sum of money to a young child.

Am Jur 2d, Gifts §§ 20, 70, 71, 96, 97.

3. Banks and Other Financial Institutions § 48 (NCI4th)— certificate of deposit—contract—terms violated

The trial court erred by granting summary judgment for Wachovia in an action for the value of a certificate of deposit plus interest where the certificate was to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr. Agent"; Timmy was a six-year-old minor and Crisp's grandson; the certificate was found in Crisp's safe deposit box after his death; Wachovia paid the proceeds then due on the certificate to Marcia Coleman, Timothy's mother, and to Louise Crisp, Crisp's widow and Timothy's grandmother, upon an endorsement reading "Timothy S. Holloway, Jr., by Estate of George R. Crisp, Sr., Marcia Coleman, Adminx., Louise D. Crisp, Adminx."; on the same date and on a subsequent occasion Coleman rolled over the proceeds into a certificate of deposit in the name of "Timmy S. Holloway, Jr. by Marcia

Coleman"; Coleman thereafter presented the certificate for payment while Timothy was a minor; she does not remember what she did with the proceeds; no court had appointed her as Timothy's guardian with authority to receive the funds; and Timothy brought this action after attaining his majority. When Crisp deposited the $20,000 with Wachovia, a debtor-creditor relationship was established in which Wachovia became the owner of the money and the debtor of Crisp. The terms of the contract are contained in the certificate of deposit and, in order to pay the certificate according to its terms, Wachovia had to pay the certificate to Timothy or to someone authorized to accept payment on his behalf. Because Timothy was a minor, Wachovia's only legally permissible option was to pay the funds to a legally appointed guardian for Timothy.

Am Jur 2d, Banks §§ 460-462.

4. Uniform Commercial Code § 28 (NCI3d)— certificate of deposit—wrongful payment—liability of bank

Although a certificate of deposit was not negotiable, it would have been wrongfully paid under the UCC where the certificate was to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr., Agent"; Timmy was a six-year-old minor and Crisp's grandson; the certificate was found in Crisp's safe deposit box after his death; Wachovia paid the proceeds then due on the certificate to Marcia Coleman, Timothy's mother, and to Louise Crisp, Crisp's widow and Timothy's grandmother, upon an endorsement reading "Timothy S. Holloway, Jr., by Estate of George R. Crisp, Sr., Marcia Coleman, Adminx., Louise D. Crisp, Adminx."; on the same date and on a subsequent occasion Coleman rolled over the proceeds into a certificate of deposit in the name of "Timmy S. Holloway, Jr. by Marcia Coleman"; Coleman thereafter presented the certificate for payment while Timothy was a minor; she does not remember what she did with the proceeds; no court had appointed her as Timothy's guardian with authority to receive the funds; and Timothy brought this action after attaining his majority. In order to pay this certificate according to its tenor, Wachovia would have had to pay the proceeds to Timothy or his guardian. While Coleman was executrix of Crisp's estate, Crisp's status as agent for Timothy ended with his death and Coleman could not act on Crisp's behalf as Timothy's agent in accepting payment of the certificate. Coleman effectively converted the

certificate of deposit when, without proper authorization, she presented it for payment and received the proceeds due on it. N.C.G.S. § 25-3-804.

Am Jur 2d, Banks §§ 460-462.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 104 N.C. App. 631, 410 S.E.2d 915 (1991), affirming a judgment entered by Fullwood, J., on 14 December 1990 in Superior Court, New Hanover County. Heard in the Supreme Court 10 September 1992.

Maupin Taylor Ellis & Adams, P.A., by Karon B. Thornton and James E. Gates, for plaintiff appellant.

Stevens, McGhee, Morgan, Lennon & O'Quinn, by Richard M. Morgan, for defendant appellee.

No brief filed by third-party defendant Marcia Crisp Coleman.

WHICHARD, Justice.

On 13 October 1975, Wachovia Bank ("Wachovia") issued a $20,000.00 certificate of deposit to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr., Agent." At the time Timmy ("Timothy") was a six-year-old minor. Crisp died on 5 April 1978. At Crisp's death, the certificate of deposit in Timothy's name with Crisp as agent was found in Crisp's safe deposit box, along with two other certificates of deposit. One was in the name of "Rountree Crisp, agent for Marcia Coleman," and the other was in the name of "Rountree Crisp, Agent for Rountree Crisp, Jr." Wachovia paid the latter two certificates of deposit to Marcia Coleman and Rountree Crisp, Jr., respectively.

Marcia Coleman, Crisp's daughter and Timothy's mother, testified on deposition that her father may have placed certificates of deposit in the names of various people for tax purposes. Coleman also testified that her father was very private about his financial affairs, never told her about the certificate of deposit in Timothy's name, did tell her about the certificate in her name, and paid her the interest on the latter certificate.

As to the certificate of deposit in Timothy's name, on 11 April 1980 Wachovia paid to Marcia Coleman and Louise Crisp, Crisp's widow and Timothy's grandmother, the sum of $26,294.92, pur-

portedly the proceeds then due on the certificate of deposit, upon an endorsement reading "Timothy S. Holloway, Jr., by Estate of George R. Crisp, Sr., Marcia Coleman, Adminx., Louise D. Crisp, Adminx." On the same date and on a second occasion, Coleman rolled over the proceeds of the certificate of deposit into the following certificates of deposit issued by Wachovia: 1) a certificate for $26,294.92 in the name of "Timmy S. Holloway, Jr., by Marcia Coleman," dated 11 April 1980 and 2) a certificate for $26,294.92 in the name of "Timmy S. Holloway, Jr., by Marcia Coleman," dated 17 October 1980.

On 23 October 1981, Coleman presented the 17 October 1980 certificate to Wachovia for payment. Wachovia paid the certificate with a check in the amount of $26,294.92 payable to "Timmy S. Holloway, Jr., by Marcia Coleman." Coleman stated in response to interrogatories that she does not remember what she did with the $26,294.92 proceeds of the 23 October 1981 check. At this time, Timothy was still a minor. No court had appointed Coleman as Timothy's guardian with authority to receive the funds for him. In June 1986, Coleman was appointed Timothy's guardian for purposes of holding real property inherited by Timothy from his grandmother, Louise Crisp.

Timothy attained his majority on 5 September 1987. Shortly before his eighteenth birthday, Timothy's relationship with his mother had deteriorated to the point that he had moved away from her house and to an aunt's house. In the summer of 1988, Timothy was in need of money and his aunt told him about the certificate of deposit left by his grandfather. Timothy then remembered that his grandmother had told him when he was a child that his grandfather had left him money.

On 12 May 1989, Timothy brought this action against Wachovia seeking to recover the original value of the certificate ($20,000.00) plus interest. Both parties moved for summary judgment. The trial court denied Timothy's motion and granted Wachovia's motion. The Court of Appeals affirmed. *Holloway v. Wachovia Bank and Trust Co.*, 104 N.C. App. 631, 410 S.E.2d 915 (1991). On 4 March 1992, we allowed plaintiff's petition for discretionary review. On appeal, the parties agree that no triable issue of fact exists; neither party has disputed that the case is appropriate for summary judgment.

Both lower courts viewed the issue as whether the certificate of deposit which Crisp purchased constituted a completed *inter vivos* gift to Timothy; both held that it did not. We hold that the certificate of deposit does represent a completed *inter vivos* gift from Crisp to Timothy. We further hold that the certificate evidences a contract between Wachovia and Crisp, the terms of which Wachovia violated when it paid the proceeds of the certificate to Coleman. The trial court thus erred in denying Timothy's motion for summary judgment and in granting Wachovia's, and the Court of Appeals erred in affirming the trial court.

[1] Before turning to our gift and contract analysis, we first note that the certificate of deposit in question does not qualify as a negotiable instrument under the Uniform Commercial Code ("UCC"). While the UCC explicitly recognizes that certificates of deposit can be negotiable instruments, N.C.G.S. § 25-3-104(2)(c) (1986), the certificate at issue fails to meet two elements of negotiability under the UCC. First, the certificate is not payable to "order" or to "bearer." N.C.G.S. § 25-3-104(1)(d) (1986). Rather, the certificate is "payable to the Registered Holder, or to the duly registered assignee hereof." While the UCC states that "assigns" language may satisfy the requirement of being payable to order, N.C.G.S. § 25-3-110(1) (1986), this Court has held that language similar to that contained in the certificate lacks the essential words of negotiability. *Trust Co. v. Creasy*, 301 N.C. 44, 51-52, 269 S.E.2d 117, 122 (1980) (a paper which states that "the undersigned hereby absolutely and unconditionally guarantees to you and your successors and assigns the due and punctual payment of any and all notes" is not negotiable under Article Three); *see also Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 54, 191 S.E.2d 683, 690 (1972); *Gray v. American Express Co.*, 34 N.C. App. 714, 716, 239 S.E.2d 621, 623 (1977); *but see Security Pacific Nat'l Bank v. Chess*, 58 Cal. App. 3d 555, 561 and 561 n.7, 129 Cal. Rptr. 852, 856 and 856 n.7 (1976) (indorsement to "Equipment Leasing of California, a corporation, its successors or assigns" makes notes "order" paper under 3-110, not "bearer" paper).

If the certificate of deposit merely lacked "order" or "bearer" language and met all the other requirements of negotiability under the UCC, the UCC would still govern, except there could be no holder in due course of the certificate. N.C.G.S. § 25-3-805 (1986); *Creasy*, 301 N.C. at 52 n.2, 269 S.E.2d at 122 n.2. There is a second aspect of the certificate, however, which places it in a class of

certificates of deposit which are not negotiable by either means under the UCC because they contain terms precluding transfer. *See Estate of Isaacson v. Isaacson*, 508 So. 2d 1131, 1134 (Miss. 1987); Steven L. Harris, *Non-Negotiable Certificates of Deposit: An Article 9 Problem*, 29 U.C.L.A. L. Rev. 330, 333 (1981). Those terms are that the "Certificate is assignable only by registration on the books of the Bank." Courts that have addressed similar restricting language in certificates of deposit and other instruments have held that these instruments are nonnegotiable because they do not contain the unconditional promise to pay required by section 3-104(1)(b) of the UCC. *Isaacson*, 508 So. 2d at 1132-34 (involves three sets of certificates of deposit containing restrictions on transfer, one of which states that no assignment is binding on bank until written notice of assignment by depositor(s) or last registered assignee has been acknowledged in writing by bank); *Citizens Nat. Bank of Orlando v. Bornstein*, 374 So. 2d 6, 12-13 (Fla. 1979) (certificate of deposit does not fall under 3-805 because in the event of assignment, the promise to pay is conditioned upon consent of the bank and reflection of the assignment on the bank's books); *First State Bank at Gallup v. Clark*, 91 N.M. 117, 119, 570 P.2d 1144, 1146 (1977) (promise to pay was not unconditional and note was expressly drafted to render it nonnegotiable by addition of a restriction on the back of the note stating that the note could not be transferred, assigned, or pledged without consent of the maker).

[2] Because the certificate of deposit at issue does not fall under the UCC, we must turn to the common law. We first turn to gift law, as the lower courts did. The essential elements of a gift *inter vivos* are 1) donative intent and 2) delivery, actual or constructive. *Fesmire v. Bank*, 267 N.C. 589, 591-92, 148 S.E.2d 589, 592 (1966). The lower courts agreed with Wachovia that both elements are absent in this case. The Court of Appeals reasoned that donative intent is negated by the presence of the language "Rountree Crisp, Sr., Agent," as that language indicates an intent to retain some control over the certificate of deposit. The Court of Appeals also held that no delivery, actual or constructive, occurred, where neither Timothy nor his mother knew of the existence of the certificate until it was found in Crisp's safe deposit box after his death.

We hold that Crisp clearly expressed his intent to give the underlying funds to Timothy when he transformed the funds into a certificate of deposit in Timothy's name, with himself listed merely as agent for Timothy. *See, e.g., Malek v. Patten*, 208 Mont.

237, 241-43, 678 P.2d 201, 204 (1984); *Kelly v. Huplits*, 103 Pa. Super. 430, 432, 157 A. 704 (Super. Pa. 1931). There are two key aspects of this transaction that indicate donative intent. First, Crisp did not merely place the funds in a bank account with Timothy's name on the passbook. All but one of the cases, most of them quite old, on which Wachovia relies involve mere deposits in bank accounts, not deposits that are further formalized and clarified through the purchase of certificates in the donee's name. *See, e.g., Peters' Adm'r v. Peters*, 224 Ky. 493, 501, 6 S.W.2d 499, 502 (Ky. Ct. App. 1928) (mere act by father of depositing money in a checking account in his adult son's name does not indicate donative intent, as the act did not cause the father to lose control or dominion over it; father had right to change his mind and recover the money up to any point where the son learned of the gift and accepted it); *Getchell v. Biddeford Sav. Bank*, 94 Me. 452, 47 A. 895 (1900) (no gift where husband deposited his own money in a savings account in his wife's name with the passbook in her name). For the other cases relied on by Wachovia, see L. S. Tellier, *Gift or trust by deposit in bank in another's name or in depositor's own name in trust for another, as affected by lack of knowledge on the part of such other person*, 157 A.L.R. 925, at 925-30 (1945, Supp. 168 A.L.R. 1324 (1947)) and 10 Am. Jur. 2d *Banks* § 395 (1963). Donative intent may be less clear when the putative donor merely deposits money in a bank account in another's name. In the case at bar, however, Crisp took the further step of transferring the account into a certificate of deposit, which stated on its face that Timothy was the payee of the deposited funds. "The transfer of the account into the certificate was the vital element in this transaction. It showed the executed purpose to give. The certificate spoke for itself; it asserted on its face that the [donee] was the owner of the deposited money." *Kelly*, 103 Pa. Super. at 432, 157 A. at 704.

Second, Crisp placed himself on the certificate as agent of Timothy, not as co-owner or as "grandfather." *Cf. Guardianship of Coolidge*, 12 Wis. 2d 58, 62, 106 N.W.2d 282, 285 (1960) (opening of savings accounts by a mother in her sons' names "by mother" indicated an intent to control the funds). Wachovia argues that there is no agency relationship because there was no meeting of the minds between Timothy and Crisp that Crisp would be Timothy's agent and, therefore, there was no contract which Timothy could ratify upon attaining his majority. It does not matter whether Crisp succeeded in establishing a legally binding agency relation-

ship. *Cf. Jackson v. Gallagher*, 128 Ga. 321, 332, 57 S.E. 750, 755 (Ga. 1907) (court deemed it unnecessary to discuss the doctrine of appointment and ratification of agents by children in case where uncle deposited money for his niece as the child's agent; uncle "would be in no position to claim that he could afterwards use the money for himself because the child was of tender years, could not contract, and had not formally appointed him an agent to receive the money for her"). The agency language on the certificate is only of interest regarding the question of donative intent. On this point, Wachovia argues, and the Court of Appeals agreed, that by naming himself as agent, Crisp indicated that he did not intend to relinquish all control and dominion over the funds. We hold that the language indicates only that Crisp intended to exercise control over the funds as Timothy's agent. When one acts as another's agent in the payment or delivery of agency funds, the agent may not use the funds as his own and may not deny the title of the principal. *Guarantee v. Ginsberg*, 101 N.H. 218, 222-23, 138 A.2d 456, 458-59 (1958); *Succession of Onorato*, 219 La. 1, 29-30, 51 So. 2d 804, 813 (1951); *cf. Nye v. Lipton*, 50 N.C. App. 224, 228-29, 273 S.E.2d 313, 315-16 (1981) (where lender loaned principal money for which lender took note from principal, principal instructed attorney agent to pay loan from first moneys of principal which came to attorney agent, and attorney agent received moneys for principal and did not pay lender with them, attorney agent's estate was liable for amount of money loaned). Crisp, therefore, by naming himself as Timothy's agent, did indicate an intent to relinquish control and dominion over the funds as his funds.

As to delivery, "[t]here may be a delivery notwithstanding the maker keeps the [instrument] in his possession, where it is apparent that he intended to hold it for the benefit and as the agent of the payee." *Cartwright v. Coppersmith*, 222 N.C. 573, 579, 24 S.E.2d 246, 250 (1943) (quoting 10 C.J.S., p. 513); *cf. Walso v. Latterner*, 140 Minn. 455, 460, 168 N.W. 353, 355 (1918) (court finds completed gift, despite fact that depositor retained possession of passbook of a savings account in depositor's name as trustee for his brother, because depositor would naturally retain possession as trustee); *Collins v. Collins' Administrator*, 242 Ky. 5, 12, 45 S.W. 2d 811, 814 (1932) (when deposit is in the name of donee, possession of passbook by depositor "is not so vital as an element in the transaction and may be explained"); *but see Coolidge*, 12 Wis. at 62, 106 N.W.2d at 285 (no completed gift of deposit of

money in an account in another's name unless depositor delivers passbook). Further, the evidentiary purpose of the formality of delivery is met when a certificate of deposit is made in a name other than the depositor's, as the courts can rely on the contract between the bank and the depositor, evidenced by the certificate, as proof of the gift. *See, e.g., Malek*, 208 Mont. at 243-45, 678 P.2d at 205; 10 Am. Jur. 2d *Banks* § 378, at 343 (1963); 157 A.L.R. at 926. Finally, relaxing of the technical requirements as to gifts is justified by the certainty of transfer and ownership that the form of a certificate of deposit affords and where, as here, an adult donor may not choose, for practical reasons, to physically deliver a large sum of money to a young child. *See, e.g., Leggett v. Rose*, 776 F. Supp. 229, 235 (E.D.N.C. 1991); *Roth v. Roth*, 571 S.W.2d 659, 667 (Mo. Ct. App. 1978) (applying a rebuttable presumption of acceptance by a donee of a beneficial gift); *In re Estate of Paulson*, 219 N.W.2d 132, 136 (N.D. 1974) (applying a presumption of acceptance by a minor donee of a beneficial gift); *Bunt v. Fairbanks*, 81 S.D. 255, 259, 134 N.W.2d 1, 3 (1965) (same); 7 Am. Jur. Proof of Facts 2d, *Gift of Fund on Deposit* § 16 (1975) (same); *cf.* Patricia Cramer Jenkins, Survey of Developments in North Carolina Law, 1987, *North Carolina Enacts The Uniform Transfers to Minors Act*, 66 N.C. L. Rev. 1349, 1349-50 (1988) (statutes, like the Uniform Transfers to Minors Act, which authorize custodial accounts for minors were enacted, in part, in recognition of the hesitation of donors to place large sums of money in the hands of financially irresponsible donees).

[3] Not only does the certificate represent a completed gift, it also evidences a contract between Crisp and Wachovia, the terms of which Wachovia violated when it paid the proceeds to Coleman. When Crisp deposited the $20,000.00 with Wachovia, a debtor-creditor relationship was established in which Wachovia became the owner of the money and the debtor of Crisp. *In re Michal*, 273 N.C. 504, 506, 160 S.E.2d 495, 497 (1968); *Schwabenton v. Bank*, 251 N.C. 655, 656, 111 S.E.2d 856, 857 (1960); *Lipe v. Bank*, 236 N.C. 328, 330-31, 72 S.E.2d 759, 761 (1952). The terms of the debtor-creditor relationship are determined by the contract between the bank and the depositor. *In re Michal*, 273 N.C. at 506, 160 S.E.2d at 497. "Since a deposit is a matter of contract between a depositor and the bank, the depositor may stipulate at the time of deposit as to how or by whom the money may be drawn out . . . . The bank must, in paying out a deposit, comply with its agreement

with the depositor." *Insurance Co. v. Bank*, 39 N.C. App. 420, 427, 250 S.E.2d 699, 704 (1979) (quoting 10 Am. Jur. 2d *Banks* § 494, at 462-63 (1963)).

The terms of the contract between Crisp and Wachovia are contained in the certificate of deposit. "[A] certificate of deposit is a bank's promissory note, payable only according to its terms." *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 337 (Mo. Ct. App. 1991). Those terms are that the sum of $20,000.00 "shall be payable to the Registered Holder, or to the duly registered assignee hereof." "Timmy S. Holloway, Jr. by Rountree Crisp, Sr., Agent" is listed in the blank for "registered holder." In order to pay the certificate according to its terms, therefore, at the time Coleman presented it, Wachovia had to pay the certificate to Timothy or to someone authorized to accept payment on his behalf. Because Timothy was a minor at the time Wachovia paid the certificate, Wachovia's only legally permissible option was to pay the funds to a legally appointed guardian for Timothy. *Parker v. Moore*, 263 N.C. 89, 90-91, 138 S.E.2d 821, 822 (1964). Rather than following the only legally authorized procedure—*i.e.*, ascertaining whether Coleman was in fact Timothy's legally appointed guardian, "deriving [her] authority from the action of a competent court, evidenced by a proper record," 10 Am. Jur. 2d *Banks* § 462, at 433—Wachovia improperly paid the certificate of deposit to Coleman, who was not Timothy's legally appointed guardian at the time. *Cf. Champion Int. Corp. v. Union Nat'l Bank*, 73 N.C. App. 147, 149-50, 325 S.E.2d 656, 658, *disc. rev. denied*, 313 N.C. 597, 332 S.E.2d 177 (1985) (when bank had knowledge that certificates had been confiscated by SBI in connection with fraud investigation, bank should have held the funds until a court of law determined the ownership of the certificates). It is thus liable to Timothy for having paid the instrument other than according to its terms.

[4] The result would be the same under the UCC had the certificate been negotiable. A "certificate of deposit" is defined by the Code as "an acknowledgment by a bank of receipt of money with an engagement to repay it." N.C.G.S. § 25-3-104(2)(c) (1986). In engaging to repay a certificate of deposit, a bank, as maker of the instrument, engages to pay it "according to its tenor." N.C.G.S. § 25-3-413(1) (1986); *Champion*, 73 N.C. App. at 149, 325 S.E.2d at 657-58. The bank's liability on the certificate is "unconditional and absolute." James J. White & Robert S. Summers, *Uniform Commercial Code* § 13-6, p. 556 (3d ed. 1988); *accord Whiteside v. Douglas*

County Bank, 145 Ga. App. 775, 776, 245 S.E.2d 2, 3 (1978). As explained above, in order to pay this certificate according to its tenor, Wachovia would have had to pay the proceeds to Timothy or his guardian.

If the UCC applied to this case, Wachovia would not be able to claim satisfaction or payment of the certificate under N.C.G.S. § 25-3-603(1) (1986) because liability of a party is only discharged under this provision by payment or satisfaction to a "holder." *Champion*, 73 N.C. App. at 149, 325 S.E.2d at 657-58. Coleman was not a "holder" because the certificate was not "drawn, issued, or indorsed to [her] or to [her] order or to bearer or in blank." N.C.G.S. § 25-1-201(20) (1986); *Champion*, 73 N.C. App. at 149, 325 S.E.2d at 657-58. While Coleman was executrix of Crisp's estate, Crisp's status as agent for Timothy on the certificate ended with his death. *Holloway*, 104 N.C. App. at 634, 410 S.E.2d at 917; 3 Am. Jur. 2d *Agency* § 57, at 559 (1986). Coleman, therefore, could not act on Crisp's behalf as Timothy's agent in accepting payment of the certificate.

Had Timothy been able to sue under the UCC, he would not have sued as "holder" of the certificate because he did not have possession of the original certificate of deposit. *See Haupt v. Coldwell*, 500 S.W.2d 563, 565 (Tex. Ct. App. 1973). Rather, he would have had to bring his action pursuant to N.C.G.S. § 25-3-804 (1986), which permits an owner of an instrument to "maintain an action in his own name and recover from any party liable" upon an instrument when the instrument has been lost, destroyed, or stolen. Coleman effectively converted the certificate of deposit when, without proper authorization, she presented it for payment and received the proceeds due on it.

For the reasons stated, we hold that the Court of Appeals erred in affirming the trial court's denial of Timothy's motion for summary judgment and granting of Wachovia's motion for summary judgment. The decision of the Court of Appeals is therefore reversed, and the cause is remanded to that court for further remand to the Superior Court, New Hanover County, for entry of summary judgment for plaintiff.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. JAMES F. POPE, III

No. 556A88

(Filed 18 December 1992)

1. **Evidence and Witnesses §§ 631, 645 (NCI4th)— suppression hearing—transcript of hearing in another case—incorporation of prior findings in order**

The trial court in a Durham County murder case did not err by considering the transcript of a suppression hearing in a Wake County murder case in ruling on defendant's motion to suppress and by incorporating the findings of fact in the Wake County order in its order denying defendant's motion to suppress where the motions in both cases involved the suppression of defendant's in-custody statements and a handgun found by police as a result of those statements; the issues and evidence in both cases were substantially the same except that in the Durham County case the State presented evidence that the handgun would have been inevitably discovered; the trial court made its own independent findings as to this additional issue; defendant was given the opportunity to present additional evidence in the Durham County hearing; and defendant was represented at the Durham County suppression hearing by counsel who was also present and cross-examined the State's witnesses in the Wake County hearing. Even if the trial court's actions were erroneous, any error was harmless beyond a reasonable doubt.

Am Jur 2d, Evidence §§ 425-427.

2. **Evidence and Witnesses § 1255 (NCI4th)— custodial interrogation—invocation of right to counsel—further interrogation**

When a defendant has invoked his Fifth Amendment right to counsel during custodial interrogation, an officer may not further interrogate the defendant about the crime for which defendant has been arrested or any other crime unless his attorney is present or the defendant himself initiates the interrogation.

Am Jur 2d, Evidence §§ 555-557.

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.

3. Evidence and Witnesses § 1250 (NCI4th)— invocation of right to counsel—subsequent police-initiated interrogation—incriminating statements inadmissible

Where defendant had invoked his right to counsel during custodial interrogation on two occasions, his subsequent inculpatory statements made without counsel as a result of interrogation initiated by the police were inadmissible in his trial for murder and armed robbery even though defendant waived his right to remain silent and to have an attorney present before making each inculpatory statement, and even though defendant's request for an attorney involved interrogation about a break-in during which a handgun used in the murder and robbery was stolen.

Am Jur 2d, Evidence § 556.

What constitutes assertion of right to counsel following Miranda warnings—state cases. 83 ALR4th 443.

4. Searches and Seizures § 32 (NCI3d)— unlawful interrogation—discovery of handgun—inevitable discovery exception to exclusionary rule

A handgun found by police as a result of an unlawful interrogation and the results of ballistic and fingerprint tests performed on it were admissible under the inevitable discovery exception to the exclusionary rule where the evidence showed that the defendant had placed the handgun under the seat of a truck owned by an acquaintance who dealt in used vehicles; a detective told the truck owner that he was looking for a handgun that the defendant may have used in a robbery and a murder and searched the owner's home for the weapon; the handgun was later found by the officers in the truck after defendant told them where it was located; the truck was sold before the commencement of defendant's trial; the truck owner testified that when he sold a vehicle he looked "in every crack and crevice" to make sure there was nothing of value left in the vehicle and that if he had found the handgun he would have delivered it to the officers; and the handgun thus would

have been inevitably discovered and made available to the officers if they had not discovered it through the interrogation of the defendant.

Am Jur 2d, Evidence § 416.5.

What circumstances fall within "inevitable discovery" exception to rule precluding admission, in criminal case, of evidence obtained in violation of Federal Constitution. 81 ALR Fed 331.

Justice FRYE concurring in part and dissenting in part.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Hight, J., at the 19 September 1988 Criminal Session of Superior Court, Durham County. Heard in the Supreme Court 14 October 1991.

The defendant was charged in Durham County with first degree murder and robbery with a dangerous weapon. He made a motion to suppress statements he made to police officers and to suppress from the evidence a .45 caliber handgun which the officers found as the result of their interrogation of the defendant. He also moved to suppress evidence of ballistic and fingerprint tests made on the handgun.

A hearing was held on the defendant's motion on 12 August 1988. The evidence showed that in addition to the charges in Durham County, the defendant had been indicted for another murder in Wake County. A suppression hearing involving the same matters had been held in Wake County at the 6 June 1988 criminal session of superior court. In addition to evidence taken at the Durham County hearing, the court considered the transcript of the Wake County hearing and adopted most of the findings of fact from the order on the hearing in Wake County.

The court found facts, including the facts adopted from the Wake County order, which are not in dispute. These facts were to the following effect. There was a break-in in July 1987 at the Spanish Trace Apartments in Raleigh at which a .45 caliber handgun was stolen. The police were suspicious that the defendant had committed the break-in, but they did not have enough evidence to arrest him at that time. On 30 August 1987, a Domino's Pizza

business in Durham was robbed. The operator was shot to death with a .45 caliber handgun. On 9 September 1987, the operator of the Wolfpack Buy Kwik in Raleigh was killed with a .45 caliber handgun.

On 16 September 1987, the defendant was arrested in Raleigh on warrants for felonious larceny and for failing to appear in court. One purpose of this arrest was for the Raleigh officers to question the defendant about the Raleigh and Durham homicides. Shortly after the arrest, the defendant was interrogated by two detectives with the City of Raleigh Police Department. He waived his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), but did not make an incriminating statement.

On 17 September 1987, while the defendant was still in custody, he was interviewed by a detective of the Durham Police Department. The defendant told the detective that he did not want to answer any questions at that time, but he might be willing to make a statement after he had talked to a lawyer. On 18 September 1987, the defendant was charged with the Durham homicide. All charges then pending against the defendant in Wake County were dropped in order to facilitate the removal of the defendant to Durham County. The defendant was moved to the Durham County jail and Thomas H. Eagen, a member of the Durham County bar, was appointed to represent him. Mr. Eagen advised the defendant not to talk to any law enforcement officers unless Mr. Eagen was present. Mr. Eagen also advised the members of the Durham and Raleigh police departments, the district attorney in Durham, and the jail personnel of Durham and Wake Counties that he did not want any law enforcement officers to talk to the defendant.

The detectives of the City of Raleigh Police Department, on 2 October 1987, procured a warrant charging the defendant with the felonious breaking or entering of the Spanish Trace Apartments and the defendant was returned to the Wake County jail. When the defendant was returned to Wake County, a detective with the Raleigh Police Department interviewed him on 2 October 1987. The detective told the defendant he wanted to question him in regard to the break-in at the Spanish Trace Apartments. The defendant told the detective he did not want to talk about this incident until he had conferred with his attorney.

On 4 October 1987, Raleigh detectives again interviewed the defendant. One of the detectives warned the defendant of his con-

stitutional rights to remain silent and to be represented by an attorney. The defendant told the detectives that Mr. Eagen had advised him not to talk to any law enforcement officers without the presence of his attorney, but any decision to talk to them would be made by him, James Pope. The defendant was questioned for approximately four hours and he did not make an incriminating statement during that time.

On 5 October 1987, the defendant was again questioned by the detectives who told him they wanted to interview him in regard to the Spanish Trace break-ins. Andy Gay, a member of the Wake County bar, had been appointed on that day to represent the defendant on the Spanish Trace breaking or entering charges. On that day, Mr. Gay advised the defendant not to talk to the officers about anything. On 7 October 1987, Mr. Gay again told the defendant not to talk to any of the officers and told the defendant this was also the advice of Mr. Eagen.

On 8 October 1987, the Raleigh detectives again interviewed the defendant. He told them at that time that Mr. Gay had advised him not to talk to any officers, but said he would make his own decision as to whether to talk to them or not. The officers asked the defendant about the .45 caliber handgun that was taken from the Spanish Trace Apartments. The defendant told the detectives he knew they "had figured out" that he had taken the gun and that the gun was in a safe place. The detectives then asked the defendant if the pistol was used to kill the man at the Wolfpack Buy Kwik. The defendant then said, "I can imagine in my mind it was" and that the handgun would "tell the tale." The detectives told the defendant they would talk to him later.

On 10 October 1987, the Raleigh detectives again interviewed the defendant. He told the officers he would waive his constitutional rights to remain silent and to have an attorney present. He then told them where the handgun was located and made an inculpatory statement. The detectives found the gun at the place at which the defendant said he had put it.

On 11 October 1987, the officers interviewed the defendant who made another incriminating statement. On 12 October 1987, the defendant again made an inculpatory statement. On each occasion at which the defendant made an inculpatory statement, he was removed from the Wake County jail by the detectives with the City of Raleigh Police Department and carried to police head-

quarters for questioning before he made a statement. The defendant never requested the officers to come to the jail. On each of these occasions he was advised of his constitutional rights pursuant to *Miranda* and on each occasion he told the detectives that he would waive his rights to remain silent and to have an attorney present.

The court concluded that the defendant knowingly, voluntarily and understandingly waived his rights pursuant to *Miranda* and knowingly, voluntarily and understandingly told the detectives where the pistol was located and made inculpatory statements. It ordered that the pistol, the results of the tests performed on the handgun, and the statements be admitted into evidence.

The defendant was convicted of first degree murder and robbery with a firearm. The court imposed the death penalty on the murder conviction and arrested judgment on the robbery charge. The defendant appealed.

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

Thomas H. Eagen for defendant appellant.

WEBB, Justice.

[1] By his first assignment of error, the defendant contends that the trial court erred by receiving into evidence the transcript of the suppression hearing conducted in the Wake County murder case, and by incorporating that court's order into its own order denying the defendant's motion to suppress. The defendant's objection to the trial court's procedure was overruled.

The Wake County motion was heard during the 6 June 1988 criminal session of superior court. The motion in this case was heard 12 August 1988. The issues in both cases, and the evidence presented thereon, were substantially the same except that in the present case the State presented evidence that the .45 caliber handgun would have been inevitably discovered. As to this additional issue, the trial court made its own independent findings. Although the trial court did read the transcript of the Wake County case and incorporate findings in that order into its own, the court allowed the defendant to call witnesses and to present additional evidence.

The defendant contends that the trial court's procedure violates the hearsay rule. We find no error in the trial court's actions. The trial judge, having read the transcript from the first hearing, apparently concluded that the evidence before him was essentially the same as the evidence before the Wake County court and therefore adopted that court's findings as his own. Even if the trial court's actions were erroneous, any error was harmless beyond a reasonable doubt. The defendant concedes that the issues before the two courts were the same and does not suggest how he was prejudiced by the court's actions. The defendant was represented at the suppression hearing in this case by counsel who was also present at the Wake County hearing and who cross-examined the State's witnesses at the first hearing. The defendant was again given the opportunity to cross-examine the State's witnesses and to present evidence additional to the evidence presented in Wake County. We, therefore, overrule this assignment of error.

[2] The defendant next assigns error to the admission into evidence of his incriminating statements. This assignment of error has merit. Although it seems clear that the defendant made the incriminating statements freely, voluntarily and understandingly after he had been fully advised of his rights, decisions of the United States Supreme Court require us to hold that the statements should have been excluded from the evidence. We base our decision on *Minnick v. Mississippi*, 498 U.S. 146, 112 L. Ed. 2d 489 (1990); *Arizona v. Roberson*, 486 U.S. 675, 100 L. Ed. 2d 704 (1988); and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). These cases establish a rule that when a defendant has invoked his Fifth Amendment right to be free from interrogation unless assisted by counsel, an officer may not initiate any further interrogation of the defendant. Even if the defendant has consulted an attorney, an officer may not further interrogate the defendant unless his attorney is present or the defendant himself initiates the interrogation. The rule prohibits interrogations in regard to crimes other than the crimes for which a defendant has been arrested. A violation of this rule requires that such incriminating statements be suppressed from the evidence.

This case is distinguishable from *McNeill v. Wisconsin*, --- U.S. ---, 115 L. Ed. 2d 158 (1991). In that case, the defendant invoked his Sixth Amendment right to counsel at a court appearance. An officer interrogated the defendant at a later time in regard to a separate crime and the Supreme Court of the United States

held the statements made by the defendant during this interrogation were admissible against him. The Supreme Court made a distinction between the invocation of a defendant's Sixth Amendment right to counsel and a Fifth Amendment right to counsel. The Sixth Amendment provides that all criminal defendants have the right to the assistance of counsel for their defenses. If a defendant invokes this right to counsel, officers may interrogate him in regard to other offenses. The Fifth Amendment has been interpreted by the United States Supreme Court to mean that a person has the right to counsel during a custodial interrogation by officers. When a Fifth Amendment right to counsel is invoked, officers may not initiate any interrogation of a person about the offense with which he has been charged or any other offense.

[3] In this case, there is no question that the defendant invoked his Fifth Amendment right to an attorney before he made an inculpatory statement. He did so on 17 September 1987 when he told the detective with the Durham Police Department that he did not want to answer any questions at that time, but he might be willing to make a statement after he had talked to a lawyer. He also did so on 2 October 1987 when he told a detective with the City of Raleigh Police Department that he did not want to talk about the incident until he had conferred with an attorney.

Under the rule of the above cases decided by the United States Supreme Court, the inculpatory statements made to the detectives should have been excluded from the evidence because they were made at a time when the defendant's attorney was not present. It makes no difference that the defendant may have requested an attorney in regard to questions in regard to charges involving a break-in at the Spanish Trace Apartments. When this request was made, the detectives could not initiate any interrogation in regard to any other crimes.

We cannot hold beyond a reasonable doubt that this error was harmless. N.C.G.S. § 15A-1443(b) (1988). For this error, there must be a new trial.

[4] The defendant also assigns error to the admission into evidence of the .45 caliber handgun that was found at the place the defendant told the detectives it was located, as well as evidence of ballistic and fingerprint analyses performed on the weapon. When evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the "fruit"

of that unlawful conduct should be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L. Ed. 319 (1920). The defendant contends the .45 caliber handgun was found as the result of an unlawful interrogation, so that it was error not to exclude from the evidence the handgun and the ballistic and fingerprint tests performed on it.

The State contends the pistol and the test results were properly admitted under the inevitable discovery exception to the exclusionary rule. We agree. The United States Supreme Court in *Nix v. Williams*, 467 U.S. 431, 81 L. Ed. 2d 377 (1984), held that evidence which would otherwise be excluded because it was illegally seized may be admitted into evidence if the State proves by a preponderance of the evidence that the evidence would have been inevitably discovered by the law enforcement officers if it had not been found as a result of the illegal action. This Court held to the same effect in *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992).

The State made a motion prior to trial that the court determine whether the handgun would have been discovered inevitably if the defendant had not told the officers where it was located. This motion was made so that in the event the interrogation of the defendant was at some time held to be unlawful, there would be an alternative rule under which this evidence could be admitted.

A hearing was held on this motion. The evidence at this hearing showed that the defendant had placed the handgun under the seat on the driver's side of a 1953 model Ford truck owned by Alan Eastridge, which was sitting on blocks in the yard of Mr. Eastridge. Mr. Eastridge was unaware that the pistol was in the truck. When the defendant was arrested he had in his possession bank checks issued to Mr. Eastridge. A detective went to the home of Mr. Eastridge and told him he was looking for a handgun that the defendant may have used in a robbery and a murder. Mr. Eastridge had known the defendant for several years and on 12 September 1987, Mr. Eastridge saw the defendant walk from the back of Mr. Eastridge's house. Mr. Eastridge gave the detective permission to search the premises but the handgun was not found. Mr. Eastridge searched his home, but did not find the handgun. Mr. Eastridge was not at home when the handgun was recovered by the detectives. The truck was sold in January or February of 1988. Mr. Eastridge testified that "[w]hen I sell something, I

look in every crack and crevice of the truck—car or anything—to make sure there's nothing valuable in there or anything left, or even change. I just look, you know, just look good in one." He also testified that if he had found the handgun, he would have delivered it to the detectives.

The court made findings of fact consistent with the evidence including a finding that had the officers not found the handgun, Mr. Eastridge would have found it and given it to the officers. The court concluded that the handgun would have been inevitably discovered and been made available to the detectives if they had not discovered it through the interrogation of the defendant. It ordered that this evidence be admitted at trial.

Mr. Eastridge, who dealt in used automobiles, testified that when he sold a vehicle he looked "in every crack and crevice" to make sure there was nothing of value left in the vehicle. If Mr. Eastridge were speaking the truth, and the court could find by the preponderance of the evidence that he was, it could find the discovery of the handgun could not have been avoided if the handgun had remained under the seat of the truck until the sale of the truck was consummated. The handgun remained in place for several weeks after the defendant put it there until it was recovered by the detectives. The court could find by the preponderance of the evidence that the handgun would have remained in place until found by Mr. Eastridge. The truck was sold before the trial of the defendant commenced so that the handgun and the results of the tests performed upon it would have been available to the State without the discovery of the handgun as a result of the interrogation. This evidence was properly admitted under the inevitable discovery exception to the exclusionary rule.

We do not discuss the defendant's other assignments of error, as the questions they raise may not recur at a new trial.

NEW TRIAL.

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

Justice FRYE concurring in part, dissenting in part.

I concur in the majority's conclusion that defendant is entitled to a new trial. However, for the reasons stated in my concurring

opinion in *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992), I dissent from the Court's conclusion that the handgun was properly admitted into evidence under the inevitable discovery exception to the exclusionary rule.

STATE OF NORTH CAROLINA v. JAMES F. POPE, III

No. 91A89

(Filed 18 December 1992)

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by Stephens, J., at the 9 January 1989 Criminal Session of Superior Court, Wake County. Heard in the Supreme Court 14 October 1991.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Assistant Attorney General, and William N. Farrell, Jr., Special Deputy Attorney General, for the State.

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

EXUM, Chief Justice.

Defendant was convicted of armed robbery and first degree murder on a felony murder theory. The jury recommended the death sentence upon finding two aggravating circumstances: (1) previous conviction of a felony involving violence and (2) defendant's having committed the murder for pecuniary gain. *See* N.C.G.S. § 15A-2000(e)(3) and (6). The jury found no mitigating circumstances. As the State relied upon a theory of felony murder, the trial court arrested judgment on the underlying felony to the offense of robbery with a firearm.

Defendant contends the trial court erred in denying his motion to suppress statements made to Raleigh Police Officers because such statements were made in violation of his right to counsel under the Fifth Amendment of the United States Constitution. This issue is factually intertwined with defendant's conviction of first degree murder in Durham County. *State v. Pope*, 333 N.C.

106, 423 S.E.2d 740 (1992) (hereinafter "*Pope I*"). Indeed, on this issue, the facts in *Pope I* are identical to the facts here. Therefore, we refer to *Pope I* for the facts surrounding the issue of the admissibility of defendant's confession. For the reasons stated in *Pope I*, we hold defendant's confessions are inadmissible in Wake County and their admission constituted reversible error necessitating a new trial.

With regard to the admissibility of the .45 caliber handgun used in commission of the crime, but for the inevitable discovery doctrine, the weapon would not have been admissible for the reasons stated in *Pope I*. In *Pope I* we concluded the inevitable discovery doctrine supported the admission of the weapon. Unlike *Pope I*, however, the State here did not proffer evidence material to, and the trial court did not address, the inevitable discovery doctrine. Whether this exception is applicable is initially a question to be addressed by the trial court; therefore, we do not address it here. We note, of course, that insofar as the evidence offered on remand coincides with the evidence in *Pope I*, our resolution of this issue in *Pope I* will control at trial.

The defendant has set forth additional assignments of error concerning both the penalty phase and sentencing phase of this case. However, because these assignments of error may not arise following defendant's new trial, we decline to address them.

NEW TRIAL.

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

Justice FRYE concurring in part, dissenting in part.

I concur in the majority's conclusion that defendant is entitled to a new trial. However, for the reasons stated in my concurring opinion in *State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992), I dissent from the Court's conclusion that the resolution of the question of the admissibility of the handgun under the inevitable discovery exception to the exclusionary rule will be controlled by *Pope I* insofar as the evidence offered on remand coincides with the evidence in *Pope I*. I believe the handgun should be admitted at defendant's new trial only if the State shows by clear and convincing evidence that the handgun would have been inevitably

discovered by the police or by someone who would have turned it over to the police. Such evidence was not presented in *Pope I*.

STATE OF NORTH CAROLINA v. KAREEM VASHEAN LOCKE

No. 145A92

(Filed 18 December 1992)

1. **Evidence and Witnesses § 2783 (NCI4th)— improper impeachment questions—objections sustained—curative instruction—error cured**

In a prosecution for first degree murder, the trial court's prompt sustention of defendant's objections to questions asked by the prosecutor during cross-examination of defendant concerning his purported expulsion from high school and the court's curative instruction to "disregard" were sufficient to cure any prejudice from the allegedly improper questions. There is no reasonable possibility that the jury's verdict would have been different had the prosecutor not implied that defendant had been expelled from school where the State presented two eyewitnesses to the circumstances of the shooting of the victim, and defendant did not challenge directly the main eyewitness's identification of him as the perpetrator.

Am Jur 2d, Homicide §§ 536, 540; Witnesses §§ 814-815.

2. **Evidence and Witnesses § 728 (NCI4th)— character evidence—purchase of firearms—questions not prejudicial**

Assuming, without deciding, that it was error for the trial court in a first degree murder prosecution to overrule defendant's objection to the prosecutor's question implying that defendant might have been involved in the purchase of guns, there is no reasonable possibility that this information affected the jury's verdict where defendant himself had earlier volunteered information that he knew his father intended to seek and buy a gun when they previously went together to the street where the murder occurred, and it was unlikely that the exposure of the jury to this tangential information changed the outcome of the trial given the properly admitted

evidence of defendant's guilt, including eyewitness testimony identifying him as the perpetrator.

Am Jur 2d, Witnesses §§ 814-816.

3. Evidence and Witnesses § 1694 (NCI4th)— photographs of victim's body—admissibility

The trial court in a first degree murder prosecution did not err in the admission of seven photographs of the victim's body for illustrative purposes where the victim's brother used one photograph to illustrate the location and condition in which he found his brother's body; a police crime technician used three photographs to illustrate his testimony about the condition of the victim and his wounds on the night of the shooting; the examining pathologist used three autopsy photographs of the victim's body to explain his testimony about the victim's wounds and the cause of death; and the photographs, which show that the victim was shot while his back was turned, support the elements of premeditation and deliberation.

Am Jur 2d, Evidence §§ 785-787.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Saunders, J., at the 30 September 1991 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 2 November 1992.

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

Isabel Scott Day, Public Defender, by Robert L. Ward, Assistant Public Defender, for defendant appellant.

WHICHARD, Justice.

Defendant was convicted of the first-degree murder of Jeffrey Tate. Tate was shot outside his home on the evening of 4 November 1990. The State presented the testimony of two neighbors of the victim who witnessed events of the fatal shooting and its immediate

aftermath. Defendant presented an alibi defense and offered evidence tending to impeach the credibility of the key neighbor-witnesses.

On appeal, defendant contends that the two key issues at trial were identity of the perpetrator and credibility of the witnesses, including himself. In this context, defendant contends that he was unduly prejudiced by questions on the part of the prosecutor containing irrelevant and prejudicial information and by inflammatory and prejudicial photographs of the deceased. We disagree.

The main witness against defendant was William Norman. Norman had seen defendant prior to the night of the shooting driving a black car in the area of Norman's residence. Norman lived in a duplex apartment located at 1516 Cummings Avenue, Charlotte, North Carolina. The victim, whom Norman had known for four years, lived about 245 feet away at 1721 Newland Road with his mother. Between the hours of 10:00 and 11:00 p.m. on the evening of the shooting, Norman, who had been watching television, went out and stood on the front porch of his apartment. Norman saw Tate standing on the sidewalk near a streetlight in front of the house at 1510 Cummings Avenue. Tate was talking to defendant and two other young black men. The group was ten to fifteen feet from Norman.

Norman saw defendant swing at Tate, who ducked and ran. Defendant opened his coat, pulled out a gun and started shooting at the running Tate. Three or four shots were fired at Tate, who fell, got up, and ran behind the house. Norman then saw the three young men get into a black Trans-Am or Camaro car with a gold stripe that was parked in the driveway at 1510 Cummings Avenue. Defendant was the driver; he backed the car into the street and drove away.

The State also presented testimony from Chester Lowery, a resident of 1510 Cummings Avenue, whose sister was married to Tate's brother. Tate had visited Lowery at 1510 Cummings Avenue around 4:45 p.m. on the day of his death. Around 6:00 p.m., Lowery saw Tate again, getting out of a black Camaro driven by defendant and containing two other male passengers. When Lowery heard the shots fired by defendant that night, Lowery came outside his house and saw the same black Camaro, with gold trim, mag wheels, and a "T" shaped spinner, backing out of his yard and driving off in a reckless manner.

The victim's brother, Reginald Jerome Tate, was visiting friends in the 1600 block of Cummings Avenue at the time of the shooting and heard the shots. When he returned home about twenty-five minutes later, he discovered the body of his brother lying in the driveway of his mother's house. Authorities were then alerted.

The officer who responded first interviewed Lowery, who gave a description of the car. Lowery told the officer that Norman had witnessed the shooting. When the officer interviewed Norman, Norman described the shooting but made no identification of the perpetrator. The officer interviewed Norman again on the evening of 15 November and the morning of 16 November. On that morning, Norman selected defendant's photograph from a photographic array and identified him as the perpetrator.

Defendant presented an alibi defense through his and his older brother Robert's testimony. Robert testified he was at home on the evening of 4 November 1990 when defendant, then sixteen years old, came in around 10:00 p.m. and stayed until after midnight. Robert further testified that his father went out sometime that evening in the Camaro. Although several other members of the family were present, according to Robert, no other family member testified in support of defendant's alibi defense.

Besides presenting an alibi defense, defendant also sought to undermine the credibility of the State's witnesses, particularly that of Norman. Norman testified that he was known, among other things, as "Weasel." Norman admitted that after witnessing the shooting, his only action was to go back into his house and continue watching television. He did not call the police. Defendant presented evidence that sometime after the shooting, Norman lost his job, was worried about being able to afford Christmas presents, and had contact with Crimestoppers. Norman admitted talking to Crimestoppers, but denied receiving any reward from that organization or any other.

Defendant also presented evidence that Norman reluctantly talked with the investigating officer on the night of the shooting, "pushed" her out of the house after giving a statement, and explained he did not want to be seen talking to the police. When the officer returned on 15 and 16 November, Norman again repeated that he did not want the neighbors to see him talking to the police.

On appeal, defendant also contends he impeached the credibility of Lowery. Defendant contends that in a pretrial statement to two officers, Lowery described the driver of the black car as a middle-aged, gray-haired man. This description does not meet that of defendant, who was a teenager in 1990. At the trial, defense counsel went through the statement line-by-line and asked Lowery if he remembered making the particular points. Our review of the transcript reveals that Lowery testified as follows:

> Q. And, "You then ran outside and saw a black Camaro Z-28 leaving the scene in a rapid manner." Do you remember telling Officer Hervey and Officer Carpenter that?
>
> A. Uh-huh (yes).
>
> . . . .
>
> Q. And it says, "The reporting person was unable to see who was driving the car at this time, but he had seen the car parked at the dead end of Kenshaw numerous times." Do you remember telling Officer Hervey and Officer Carpenter that?
>
> . . . .
>
> A. Uh-huh (yes).
>
> Q. Then it says, "The driver *then* was a black male approximately forty-five to fifty years old with a gray and black mustache." Do you remember telling them that?
>
> A. Uh-huh (yes).

(Emphasis added).

From our reading of the transcript it appears that Lowery was not referring to a person he saw driving the car on the night of the shooting when he described a middle-aged man; rather, he was referring to a man whom he had seen driving the car on other occasions. We believe this reading is correct, given that just lines before the statement about the middle-aged driver, Lowery had told the officers he did not see who was driving the car on the night of the shooting. Later, defense counsel drove this point home when she had Lowery confirm that there was nothing in his pretrial statement about seeing anyone behind the wheel of the car on the night of the shooting.

[1] In his first assignment of error, defendant contends the trial court erred by failing to strike testimony and issue curative instructions to the jury following inflammatory and irrelevant questions by the State involving defendant's purported expulsion from school and his purported multiple purchase of guns. The first matter under this assignment involves the following exchange between defendant and the prosecutor:

> Q. Now—but when you were in school, you got kicked out of school?
>
> Ms. Weigand: Objection.
>
> Court: Sustained.
>
> Q. Well, have you ever been expelled from school?
>
> Ms. Weigand: Objection. I want to be heard outside the presence of the jury, Your Honor.
>
> Court: Disregard, members of the jury.

Defendant contends the trial court did not properly cure the prejudice of the State's insinuation that defendant was a "bad boy" merely by telling the jury to "disregard." The trial court did not make clear what the jury was to "disregard"—the prosecutor's questions or defense counsel's objections and request to speak outside the presence of the jury.

In its response, the State notes the above exchange occurred on cross-examination after defendant had testified on direct that he attended school and was scheduled to enroll in Harding High School that day. The State contends that having implied on direct that he was a student in good standing, defendant was subject to impeachment showing his school record was otherwise. The State further argues that defendant fails to show prejudice; the prosecutor asked only two questions and the trial court promptly sustained defense counsel's objections and issued a curative instruction.

It is not necessary to determine whether the above questions constituted improper impeachment if the trial court acted promptly to cure any prejudice. We believe it is clear from the context of the exchange, including the fact that the prosecutor immediately pursued a different line of questioning after the trial court issued its instructions, that the jury would have understood that the instruction to "disregard" referred to the prosecutor's implication

that defendant had been expelled from school. We hold that the trial court's prompt actions of sustaining the objections and issuing a curative instruction were sufficient to cure any prejudice. This Court has held consistently that such actions cure any prejudice due to a jury's exposure to incompetent evidence from a witness. *See, e.g., State v. Hill*, 331 N.C. 387, 406, 417 S.E.2d 765, 773-74 (1992). In fact, as the State notes, no incompetent evidence was admitted which the trial court then had to strike; rather, defendant's argument appears to be that the mere questions posed by the prosecutor were prejudicial. The Court applies the same rule when faced with this situation. *Cf. State v. McLean*, 294 N.C. 623, 634-35, 242 S.E.2d 814, 821 (1978) (trial court did not abuse its discretion in denying defendant's motion for mistrial where trial court sustained defendant's objections to a question by the prosecutor containing improper information and instructed the jury to disregard the question).

We are confident defendant was not prejudiced by the implication that he might have been expelled from school. In another first-degree murder case, three different witnesses referred to a defendant's arrest record. *State v. Wilson*, 311 N.C. 117, 316 S.E.2d 46 (1984). One witness testified he had seen the defendant "two days after he got out of prison." A second witness testified she and the defendant "went to pawn some of the stuff [the defendant] had stolen." A third witness testified the defendant had told her he had been charged with three burglaries. The trial court sustained defense counsel's objections and admonished the jury not to consider the evidence. We held that any prejudicial effect from the incompetent evidence was cured by the trial court's actions. *Wilson*, 311 N.C. at 128, 316 S.E.2d at 53.

In doing so, we discussed at length the reasoning in *State v. Aycoth*, 270 N.C. 270, 154 S.E.2d 59 (1967). *Wilson*, 311 N.C. at 127, 316 S.E.2d at 53. In *Aycoth*, the Court stated that " '[i]n appraising the effect of incompetent evidence once admitted and afterwards withdrawn, the Court will look to the nature of the evidence and its probable influence upon the minds of the jury in reaching a verdict.' " *Aycoth*, 270 N.C. at 272, 154 S.E.2d at 60 (quoting *State v. Strickland*, 229 N.C. 201, 207, 49 S.E.2d 469, 473 (1948)). One of the key factors the Court considers in its appraisal is the seriousness or gravity of the incompetent evidence. *Id.* Expulsion from high school is certainly a less serious matter than the commission of three burglaries, the selling of stolen items,

and the existence of the prison record, as in *Wilson*. A second factor the Court considers is the "circumstances of the particular case." *Aycoth*, 270 N.C. at 273, 154 S.E.2d at 61. Here, the State presented two eyewitnesses to circumstances of the shooting. While defendant presented evidence that questioned Norman's motives and his general behavior in the face of a fatal shooting, defendant did not challenge directly Norman's identification of him as the perpetrator. It is notable that in *Wilson* there were no eyewitnesses to the murder. We hold that under the circumstances here, there is no reasonable possibility that the jury's verdict would have been different had the prosecutor not implied that defendant had been expelled from school. *See Wilson*, 311 N.C. at 128, 316 S.E.2d at 53.

[2] Defendant also objected to the following exchange:

> Q. So, when you buy your guns, where'd you get the gun from?
>
> Ms. Weigand: Objection.
>
> Court: Overruled.
>
> A. Well, I wouldn't even know that side of town.

Defendant contends the question suggested ongoing criminal conduct on his part. He further contends the implication that he was a gun dealer was prejudicial because his credibility was a key factor in his defense.

The State argues that the question was just one of a series intended to elicit relevant testimony showing defendant knew where the victim lived. Earlier in his cross-examination, defendant had admitted knowing the victim but had denied knowing where he lived. Defendant then admitted that prior to 4 November 1990 he had driven his car to Cummings Avenue and had talked to the victim in front of 1510 Cummings Avenue. Defendant further admitted driving the victim to that address earlier on the day of the shooting. When the prosecutor tried to establish that defendant had been to the address at night, not just during daylight hours, the following exchange occurred:

> Q. Yes. And it was that night [the night of the shooting], wasn't it?
>
> A. Yes, I've been over before at night.
>
> . . . .

Q. Driving that black and gold Z-28 Camaro?

A. No. When I pulled in at night time, my dad was driving the car.

. . . .

Q. What were you all doing over there then?

A. We wasn't even going over to that side—he was going to see somebody, that I don't know, to buy a gun. I stayed in the car. He got out and did what he had to do, and came back.

. . . .

Q. You guys kinda hang out in front of 1510, isn't that right?

A. No. I never hung out at 1510.

Shortly after the above exchange, the question to which defendant assigns error occurred. The State argues it is clear from the context that defendant was resisting the admission that he knew the victim lived in the neighborhood of 1510 Cummings Avenue. The particular question was just one more attempt to show defendant's knowledge.

Assuming, without deciding, that it was error to overrule defendant's objection, we hold that in light of the properly admitted evidence, there is no reasonable possibility that information defendant might have been involved in the purchase of guns affected the jury's verdict. *State v. Jolly*, 332 N.C. 351, 363, 420 S.E.2d 661, 668 (1992). First, defendant himself had earlier volunteered information that he knew his father intended to seek and buy a gun when they went together to Cummings Avenue. Second, it is unlikely that exposure of the jury to this tangential information changed the outcome of the trial given properly admitted evidence of defendant's guilt, including eyewitness testimony identifying him as the perpetrator. *Id.*

[3] In his second assignment of error, defendant contends the trial court committed prejudicial error in admitting seven photographs of the victim's body. The State counters that the seven photographs were properly admitted to illustrate the testimony of three witnesses. The victim's brother used one photograph to illustrate the location of and condition in which he found his brother's body. Police crime technician Ron Peak used three photographs to illustrate his testimony about the condition of the victim and

his wounds on the night of the shooting. Finally, examining pathologist James Sullivan used three photographs of the victim's body taken during the autopsy to help explain his testimony about the victim's wounds and the cause of death.

The Court comprehensively addressed the issue of admission of photographs of murder victims' bodies in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). That case involved thirty-five gruesome images of the bodies of three victims, two children and their mother. All three victims had suffered multiple stab wounds, the mother had been bound and sexually assaulted, and the bodies had suffered some decomposition. The images were shown to the jury in two forms, slides and photographs. The trial court permitted the construction of a viewing screen large enough to project two images of three feet ten inches by five feet six inches side-by-side on the courtroom wall just over the defendant's head. After showing the slides, large photographs were distributed, one at a time, to the jury. The process of distribution was done in silence and took a full hour.

Under these circumstances, the Court held that the trial court committed prejudicial error in permitting the double admission of the gruesome images, as the macabre nature of the images, their redundancy, and the manner in which they were shown "had potential only for inflaming the jurors." *Hennis*, 323 N.C. at 286-87, 372 S.E.2d at 528. Clearly, we do not have a repeat of the situation in *Hennis* here.

Admissibility of photographic evidence is governed by Rule 403 of the North Carolina Rules of Evidence. *Hennis*, 323 N.C. at 283, 372 S.E.2d at 526. "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." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526.

While photographs of any murder victim may be unpleasant, by definition, the nature of Tate's death and injuries—bruises and a laceration to the face and entry and exit wounds from a single bullet—are not of the gruesome nature of multiple knife wounds, as in *Hennis*. *See State v. Smith*, 320 N.C. 404, 416, 358 S.E.2d 329, 336 (1987). Nor were the photographs particularly repetitious or numerous. *See State v. Rogers*, 323 N.C. 658, 665, 374 S.E.2d 852, 857 (1989) (nine photographs). All were used to illustrate

testimony of witnesses. The photograph used by the victim's brother "illustrated testimony with respect to the crime scene in general, the location and position of the body when found, and the wounds suffered by the deceased." *Smith*, 320 N.C. at 416, 358 S.E.2d at 336. Of the three photographs used by Ron Peak, one showed the face wounds, one showed the entry wound to the back, and one showed an exit wound under the armpit. The three photographs used by Dr. Sullivan illustrated his opinions that the victim was shot with a large caliber gun while his back was turned from the gun. "Photographs may . . . 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 . . . ." *Hennis*, 323 N.C. at 284, 372 S.E.2d at 526; *accord State v. Lester*, 294 N.C. 220, 228, 240 S.E.2d 391, 398 (1978). The fact that the victim was shot while his back was turned, as the photographs show, supports the elements of premeditation and deliberation. *State v. Hunt*, 330 N.C. 425, 428, 410 S.E.2d 478, 481 (1991). Under these circumstances, there was no abuse of discretion in admitting the photographs. *Smith*, 320 N.C. at 416, 358 S.E.2d at 336.

NO ERROR.

STATE OF NORTH CAROLINA v. ERVIN WILLIAMSON

No. 117A92

(Filed 18 December 1992)

1. Homicide §§ 251, 243 (NCI4th)— murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of premeditation and deliberation in a first degree murder prosecution where defendant and two companions, Logan and Baker, were in Wampee, South Carolina several hours before the killing; defendant repeatedly expressed his intent to kill the victim because he was "messing" with defendant's girlfriend and because of statements the victim made about the defendant having oral sex with another girl; after the three men returned to the Arcade in Chadbourn, North Carolina, the victim walked into the Arcade

and defendant told the victim that he would "f--- him up" and then "kill him"; Baker and Logan broke up the argument and the victim left the Arcade; defendant told Baker and Logan that he was going to end up killing the victim; Baker left the Arcade and returned a few minutes later and told defendant that the victim was talking about him; defendant asked where his gun was and stated that he was going over to The Tracks and "f--- this motherf---er up"; someone told defendant his gun was under the seat of a car; defendant drove to where the victim was standing; defendant jumped out of the car with his gun in his hand and asked the victim why he was "running his mouth"; the victim, who was unarmed, told defendant that he had not said anything; defendant then cocked his pistol, raised it, and shot the victim in the chest; the victim fell against a pole, regained his balance, and ran around the building, and defendant ran behind him and shot again.

Am Jur 2d, Homicide §§ 147, 155, 275, 438, 439.

2. Evidence and Witnesses § 758 (NCI4th)— murder—opinion of paramedic—other evidence of same import introduced

There was no prejudicial error in a murder prosecution from the introduction of a paramedic's testimony identifying the wounds on the body of the deceased as an entrance and exit wound where the defendant waived the assignment of error in his brief by admitting that the same evidence was correctly introduced at a later point in the trial and by waiving the assignment of error during oral arguments.

Am Jur 2d, Appeal and Error §§ 652, 670; Homicide § 560.

3. Evidence and Witnesses § 3161 (NCI4th)— statements of witness to SBI agent—noncorroborative testimony—no error

There was no error in a murder prosecution in allowing the introduction of an SBI agent's testimony containing statements made by a witness to the agent where defendant contended that the testimony was noncorroborative. Defendant initially made a general objection to the agent reading his notes, the objection being contingent upon the statement being used for corroborative purposes, the State acknowledged that the statement was being read for corroborative purposes, and the judge instructed the jury that the statement was

being used solely for corroborative purposes. Defense counsel's second objection dealt with a misconception that the agent was inserting his own version of what defendant had meant, but the trial court overruled the objection and gave another instruction on corroborative testimony and the agent clarified the matter when he continued his testimony. Defendant's last objection was on the grounds that a portion of the statement to the agent did not corroborate the witness's testimony, but the agent's reading of the statement clearly corroborated the witness's testimony during cross-examination by defense counsel.

Am Jur 2d, Homicide §§ 493, 496, 519, 539; Trial §§ 1213, 1218, 1288.

4. **Evidence and Witnesses § 688 (NCI4th)— murder—testimony improperly admitted for impeachment purposes—assignment of error based solely on noncorroboration—impeachment issue not properly presented**

A contention that a prior consistent statement was improperly admitted for impeachment purposes in a murder prosecution was not properly presented on appeal because the assignment of error dealing with the testimony was based solely on noncorroboration.

Am Jur 2d, Appeal and Error §§ 515, 654, 655, 670; Witnesses § 1012.

5. **Criminal Law § 553 (NCI4th)— noncorroborative testimony—defendant's false claim of self-defense—mistrial denied**

There was no abuse of discretion in a murder prosecution where the court denied defendant a mistrial after the admission of noncorroborative statements which indicated that defendant wanted to set up a false claim of self-defense. After the trial judge sustained defendant's objection, he recessed the jury while defendant made his motion for a mistrial, correctly pointed out that earlier testimony had indicated that defendant discussed fabricating a defense, and, based on the judge's own observation of the jury, stated that he was not convinced that defendant could not get a fair trial.

Am Jur 2d, Appeal and Error §§ 772, 774; Homicide §§ 147, 539, 560.

6. Criminal Law § 685 (NCI4th)— noncorroborative testimony—mistrial denied—no curative instruction—no request for instruction

The trial court did not err in a murder prosecution by not giving a curative instruction after denying defendant's motion for a mistrial following noncorroborative statements which indicated that defendant wanted to fabricate a defense. A trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense.

Am Jur 2d, Appeal and Error §§ 672, 673, 696; Homicide §§ 496, 519.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment upon defendant's conviction of first-degree murder entered by Fullwood, J., at the 26 August 1991 Criminal Session of Superior Court, Columbus County. Heard in the Supreme Court 2 November 1992.

Lacy H. Thornburg, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

Junius B. Lee, III, for defendant-appellant.

MEYER, Justice.

On 14 May 1990, defendant, Ervin Williamson, was indicted for the first-degree murder of Danny Lee Keel. Defendant was tried noncapitally in the Superior Court, Columbus County, in August 1991 and was found guilty. The trial court thereafter imposed the mandatory life sentence.

The evidence presented by the State at trial tended to show the following. On the afternoon of 3 April 1990, defendant, Tyrone Logan, and Tony Baker drove from Columbus County, North Carolina, to Wampee, South Carolina, in a blue Chevrolet Chevette owned by defendant's brother, Waylon Williamson. While in Wampee, defendant expressed animosity towards Danny Lee Keel, the victim. Defendant told Logan that "he was going to kill [the victim]" because the victim was "messing" with his girlfriend. Just after dark, the three men decided to drive back to Chadbourn, North Carolina, to defendant's family business, Williamson's Arcade ("the Arcade"), located in a part of town called The Tracks.

While defendant, Logan, and Baker were playing pool, the victim walked into the Arcade. Defendant approached the victim, and the two men began arguing. The argument centered around a statement that the victim supposedly made about defendant's engaging in oral sex with someone other than his girlfriend. Defendant told the victim that he was going to "f--- him up" and then "kill him." The victim then left the Arcade and walked across the railroad tracks to a building on the other side of the street. Baker also left the Arcade but returned a few minutes later and told defendant that "Danny over there talking s--- about you." Defendant responded, "Where my gun at? . . . I'm going over there and f--- this motherf---er up." After an unidentified person told defendant that his gun was under the seat in the blue Chevette, he jumped in the car and drove across the railroad tracks to where the victim was standing near a building. Logan and Baker followed defendant across the railroad tracks and saw him get out of the car.

Defendant had a 9-millimeter pistol in his hand and said to the victim, "Man, why are you over here talking, running your mouth." At this point, defendant raised the weapon and shot the victim in the chest. The victim fell back against a pole and then ran around the building. Defendant ran after the victim and fired another shot at him. Defendant then returned to the Arcade. After running up to the front yard of a mobile home, the victim knocked on the door and told the owners that he was hurt and to call the police. The victim then died in the front yard. Upon arriving at the scene, investigating officers found a 9-millimeter pistol and a belt pouch containing fifty-eight vials of crack cocaine near the victim's body.

An autopsy of the victim's body revealed that the victim bled to death as the result of a gunshot wound to the chest. The bullet entered the victim's chest approximately two inches from the midline in the left upper-chest area and exited about five inches from the midline in the left shoulder blade area.

Defendant presented evidence directly contrary to that of the State. He testified that he left the Arcade solely to get something to eat and that he coincidentally saw the victim across the railroad tracks. Defendant and a witness for defendant, Kenneth R. McDougald, testified that defendant went across the tracks to make amends with the victim because of their prior argument at the Arcade. Defendant approached the victim and asked him if he were

going to let a woman come between them. Both defense witnesses testified that as defendant turned to leave, the victim reached in his pocket and removed a gun. Defendant further testified that at this point, Logan screamed to defendant, "Look out, Ervin, he's fixing to shoot you, man." McDougald also testified that Logan similarly warned defendant. Defendant turned and started to pull his gun, which he testified he carried for protection when he worked at the Arcade. As defendant turned around, he slipped and the pistol fired. He testified that he fired a second time because the victim was pointing a gun at defendant. Defendant fled to safety at the Arcade. McDougald testified that he heard defendant's gun fire twice and that Logan also fired his own gun. McDougald stated that defendant never chased the victim and that the victim had also fired his pistol.

Defendant denied starting the argument at the Arcade and testified that the victim actually started an argument with Logan. Defendant stated that the argument was about Logan's girlfriend, not his own, and that he only became involved as the argument became more heated.

Additional facts will be discussed as necessary for the proper disposition of the issues raised by defendant.

[1] Defendant first argues that the trial court erred in submitting a possible verdict of first-degree murder to the jury because there was no showing of premeditation and deliberation. According to defendant, the evidence that defendant made statements to Logan regarding his intent to kill the victim had no causal relationship with the events leading up to the victim's death and were separated in time to such a degree as to make their relevance suspect. We disagree.

In reviewing challenges to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the State, and any contradictions or discrepancies are properly left for the jury to resolve. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). To establish premeditation, the State must prove that the killing was thought out beforehand for some length of time, however short, but no particular length of time is necessary. *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991). To establish deliberation, the State must prove that the defendant intended to kill, that the killing was carried out in a "cool state of blood" in furtherance of a fixed design for revenge, or that

the killing was carried out to accomplish an unlawful purpose, not under the influence of a violent passion suddenly aroused by lawful or just cause or legal provocation. *Id.* However, in determining whether deliberation was present, the term "cool state of mind" does not require a total absence of passion or emotion. *State v. Vause*, 328 N.C. 231, 238, 400 S.E.2d 57, 62 (1991).

The evidence presented in this case was clearly sufficient to allow the jury to find that defendant killed the victim with premeditation and deliberation. Several hours before the killing, when defendant, Logan, and Baker were in Wampee, South Carolina, defendant repeatedly expressed his intent to kill the victim because he was "messing" with defendant's girlfriend and because of statements the victim had made about the defendant having oral sex with another girl. After the three men returned to the Arcade in Chadbourn, North Carolina, the victim walked into the Arcade; when defendant saw the victim, he told him that he would "f--- him up" and then "kill him." Baker and Logan broke up the argument, and the victim then left the Arcade. Defendant also told Baker and Logan that he was going to "end up killing [the victim]." Baker then left the Arcade and returned a few minutes later and told defendant that the victim was "over there talking s--- about [him]." The defendant asked where his gun was and stated that he was going over to The Tracks and "f--- this motherf---er up." Someone told defendant that his gun was under the seat in the blue Chevette. Defendant proceeded to get into the Chevette and drive across The Tracks to where the victim was standing. Defendant jumped out of the car, with the gun in his hand, and asked the victim why he was "running [his] mouth." The victim, who was not armed, told the defendant that he had not said anything. Defendant then cocked the 9-millimeter, raised it, and shot the victim in the chest. The victim fell back against a pole, regained his balance, and ran around the building; defendant ran behind him and shot at him again.

This evidence, when viewed in the light most favorable to the State, is more than sufficient to support the jury's findings of premeditation and deliberation. Defendant's contention to the contrary is without merit.

In his second assignment of error, defendant argues that the trial court erred in allowing the State to introduce, over defendant's

objection, two photographs of the victim's body. During oral arguments, defendant conceded that this assignment was groundless and waived this assignment of error.

[2] Defendant next assigns as error that the trial court committed prejudicial error in allowing the State to introduce lay testimony by the paramedic as to the location of the "entry" and "exit" wounds on the victim's body. Defendant contends that the paramedic's testimony identifying the wounds on the body of the deceased as an entrance and an exit wound was clearly beyond the purview of admissible opinion for that witness. Defendant waives this assignment of error by admitting in his brief that "[s]ince this same evidence was ultimately introduced, correctly, on the testimony of Dr. Robert Leslie Thompson, at a later point in the trial, this error cannot, in good faith, be said to be prejudicial." In addition, defendant also waived this assignment during oral arguments.

[3] Defendant next argues that the trial court committed reversible error in allowing the prosecutor to introduce through S.B.I. Agent Matt White noncorroborative testimony contained in statements made by Tyrone Logan to Agent White. In addition, defendant contends that the admission of these statements as impeachment evidence was improper under Rule 607 of the North Carolina Rules of Evidence because the statements did not, in fact, impeach.

The first basis for defendant's assignment of error involves testimony provided by Agent White, who read from his notes statements made to him by Logan, who was with defendant on the day of the murder. When the State first began questioning Agent White about statements that Logan had made to him, defendant lodged an objection, stating, "unless it's for corroborative purposes." The State acknowledged that it was, and the defendant then obtained a jury instruction on corroborative testimony. The trial judge gave the jury the following instruction:

> Ladies and gentlemen of the jury, the testimony of this witness as to what Tyrone Logan told him is being offered for the purpose of corroborating the testimony of Tyrone Logan. You would consider it for that purpose only.

Agent White then began to read his notes regarding Logan's verbal statement made to White on 26 May 1990 at the Columbus County jail. Agent White read the following from his notes:

> Tyrone Logan stated that on April the 3rd, 1990, he was in the Williamson Arcade shooting dollar pool. Logan stated that Williamson's Arcade was located in Chadbourn, North Carolina. Logan observed Danny Keel walk into the arcade. [Defendant] was already in the arcade. When [defendant] observed Keel, he asked Keel why he was lying on him. [Defendant] meant why Keel was telling lies about [defendant] to his—

Defense counsel interrupted with an objection, suggesting that Agent White was substituting his own impression as to what defendant meant. The trial judge overruled the objection and gave another corroborative testimony instruction. Agent White then clarified this matter by specifically testifying that "Logan stated that [defendant] meant why was Keel telling lies about [defendant] to his girlfriend who lives in Wampee, South Carolina."

Also, while Agent White was reading his notes as to what Logan told him on 26 July 1990, defendant objected on the grounds that Logan's statement did not corroborate Logan's testimony at trial that "[defendant] wanted Logan and Tony Baker to testify that Keel had pulled a gun." The trial judge overruled the objection and gave yet another instruction on corroborative testimony.

The admissibility of alleged noncorroborative testimony has recently been addressed by this Court in *State v. Harrison*, 328 N.C. 678, 403 S.E.2d 301 (1991), and *State v. Benson*, 331 N.C. 537, 417 S.E.2d 756 (1992). These cases establish the rule that prior consistent statements are admissible even though they contain new or additional information so long as the narration of events is substantially similar to the witness' in-court testimony. *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304; *State v. Higgenbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985) (not necessary for evidence to prove precise facts brought out in witness' testimony before evidence deemed corroborative). Furthermore,

> "[i]n a noncapital case, where portions of a statement corroborate and other portions are incompetent because they do not corroborate, the defendant must specifically object to the incompetent portions."

Benson, 331 N.C. at 548, 417 S.E.2d at 763 (quoting *Harrison*, 328 N.C. at 682, 403 S.E.2d at 304).

Defense counsel objected three times during Agent White's direct examination by the State. Defense counsel initially made

a general objection to Agent White's reading his notes as to Logan's statement of 26 May 1990. This qualified objection was contingent upon the statement being used for corroborative purposes. The State acknowledged that the statement was being read for corroborative purposes, and the judge instructed the jury that the statement was being used solely for corroborative purposes.

Defense counsel's second objection dealt with a misconception that Agent White was inserting his own personal impression of what defendant had meant or actually said rather than reading from his notes a statement from Logan. The trial judge overruled the objection and gave another instruction on corroborative testimony to the jury. When Agent White continued his testimony, he clarified this matter by specifically reading from his notes Logan's statement "that [defendant] meant why was Keel telling lies about [defendant] to his girlfriend who lives in Wampee, South Carolina." Thus, Agent White conclusively rebutted defense counsel's suspicion that White was interjecting his own personal impression rather than reading from Logan's statement.

Also, while Agent White was reading from his notes of Logan's statement of 26 July 1990, defendant again objected, on grounds that the statement that "[defendant] wanted Logan and Tony Baker to testify that Keel had pulled a gun" did not corroborate Logan's verbal testimony. Agent White's reading of the statement clearly corroborated Logan's in-court testimony during cross-examination by defense counsel. When defense counsel asked Logan during cross-examination why his testimony in court was different from what he told defense counsel in his office, Logan stated that defendant had told him to "say it like this [that Keel pulled a gun] here; told me—tried to give me another way to tell it." The two statements of Agent White and Logan, although not exactly the same, are substantially similar. Again, the trial judge correctly overruled the objection and gave yet another instruction on corroborative testimony to the jury.

The only portions of Agent White's testimony regarding Logan's statements that are now subject to review, for anything other than plain error, are those specifically objected to at trial. *State v. Benson*, 331 N.C. 537, 417 S.E.2d 756; *State v. Harrison*, 328 N.C. 678, 403 S.E.2d 301. We find that those portions of Agent White's testimony regarding Logan's statements that were objected to were properly admitted.

[4] Defendant's contention that Agent White's testimony was improperly admitted for impeachment purposes is without merit. The assignment of error regarding Agent White's testimony was based solely on noncorroboration of the testimony, and the Rule 607 argument was not raised at trial. 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). Because no assignment of error corresponds to the issue presented, this matter is not properly presented for our consideration.

[5] As his final argument, defendant contends that the trial judge abused his discretion in denying defendant's motion for mistrial based on the admission of noncorroborative statements which tended to indicate that the defendant wanted to set up an issue of self-defense. Agent White continued to read from his notes of Logan's statement as follows:

> [Defendant] wanted Logan and Tony Baker to testify that Keel had pulled a gun on [defendant] first and that his attorney . . . was going to try and show this. [Defendant] stated that his defense was going to be Keel pointed a weapon first and that [defendant] shot him in self-defense.

The trial judge then, *sua sponte*, sustained the objection to that portion of the statement which dealt with a false self-defense theory. Defendant, relying on N.C.G.S. § 15A-1061, asserts that the trial judge must declare a mistrial "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). Defendant argues that defense counsel was made to appear to have calculatingly designed a defense, and thus, the admission of Agent White's statement irreparably prejudiced his case.

It is well established that the decision as to whether substantial and irreparable prejudice has occurred lies within the sound discretion of the trial judge and that his decision will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Black*, 328 N.C. 191, 400 S.E.2d 398 (1991). The decision of the trial judge is entitled to great deference since he is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable. *State v. Hightower*, 331 N.C. 636, 643, 417 S.E.2d 237, 248 (1992).

Applying these principles to the case at bar, we reject defendant's contention that the trial judge should have granted a mistrial. After the trial judge sustained defendant's objection, he recessed the jury while defense counsel made his motion for mistrial, claiming that the challenged testimony made it appear as if the self-defense theory were fabricated. The trial judge, however, correctly pointed out that earlier testimony from Logan had already indicated that defendant discussed fabricating a defense. Furthermore, based on his own close observation of the jury, the trial judge stated that he was "not convinced that . . . the defendant can't get a fair trial, that this defendant still can get a fair trial, and for that reason I am denying the motion." These findings are clearly supported by the record, and we therefore find that the trial judge did not abuse his discretion.

[6] Finally, we disagree with defendant's argument that the trial judge should have given the jury a curative instruction to provide some relief to the defendant if he were not going to grant a mistrial. A trial court does not err by failing to give a curative jury instruction when, as here, it is not requested by the defense. *See State v. Locklear*, 322 N.C. 349, 359, 368 S.E.2d 377, 383 (1988) (trial court did not err by failing to instruct the jury to disregard the emotional display by murder victim's widow, when defendant did not request a curative instruction). Defense counsel could well conclude that a curative instruction would do more harm than good by highlighting the matter in the jury's eyes. *Id.* This assignment of error is overruled.

We have conducted a thorough review of the transcript of the trial and sentencing proceeding, the record on appeal, and the briefs of defendant and the State. We find no error in defendant's trial warranting reversal of defendant's conviction. We further find that the trial court committed no error in the sentence imposed for defendant's noncapital conviction.

NO ERROR.

JACK PERKINS, CPA v. CCH COMPUTAX, INC.

No. 185PA92

(Filed 18 December 1992)

Venue § 1 (NCI3d)— forum selection clause—out-of-state defendant—valid

A forum selection clause in a software purchase contract which specified Los Angeles, California as the forum for any related action was valid. Recognizing the validity and enforceability of forum selection clauses in North Carolina is consistent with the North Carolina rule that recognizes the validity and enforceability of choice of law and consent to jurisdiction provisions. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. Language in *Gaither v. Motor Co.*, 182 N.C. 498, is disavowed to the extent that it can be read to condemn forum selection clauses as depriving North Carolina courts of jurisdiction. The trial court retains the authority to hear the case when it determines that the forum selection clause was the product of fraud or unequal bargaining power or that the clause would be unfair or unreasonable.

Am Jur 2d, Venue §§ 7, 8.

Validity of contractual provision limiting place or court in which action may be brought. 31 ALR4th 404.

Justice MITCHELL dissenting.

Justices FRYE and WEBB join in this dissenting opinion.

On discretionary review of a decision of the Court of Appeals, 106 N.C. App. 210, 415 S.E.2d 755 (1992), affirming the order entered by Jenkins, J., on 21 October 1991 in Superior Court, Wake County. Heard in the Supreme Court 2 November 1992.

Law Offices of J. Kenneth Edwards, by J. Kenneth Edwards, for plaintiff-appellee.

Patton, Boggs & Blow, by Kenneth J. Gumbiner and Julie A. Davis, for defendant-appellant.

MEYER, Justice.

In this case, we address the question left unanswered by this Court in *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992), and decide the validity of a forum selection clause contained in a contract for the purchase of software, executed by the parties, Jack Perkins, CPA, and CCH Computax, Inc. Defendant, CCH Computax, contends that the Court of Appeals erred in concluding that forum selection clauses were unenforceable in North Carolina. We agree and therefore reverse the Court of Appeals.

Plaintiff is a certified public accountant and practices in Raleigh, North Carolina. Defendant is a California software company located in Torrance, California. On 2 February 1990, plaintiff, Jack Perkins, CPA, and defendant, CCH Computax, Inc., entered into a license and service agreement for a computer software program. Plaintiff paid $700.00 for the software.

The contract executed by plaintiff and defendant contains the following pertinent language:

> D. This Agreement shall be governed by and interpreted in accordance with the law of the State of California.
>
> E. This Agreement shall be treated as though it were executed in the County of Los Angeles, State of California, and were to have been performed in the County of Los Angeles, State of California. Any action relating to this Agreement shall only be instituted and prosecuted in courts in Los Angeles County, California. Customer/Licensee [plaintiff] specifically consents to such jurisdiction and to extraterritorial service of process.

Paragraph D is a choice of law clause that we have recently addressed and found to be valid in North Carolina. *Rouse*, 331 N.C. 88, 414 S.E.2d 30. Paragraph E contains both a consent to jurisdiction clause, which we also found valid in *Rouse*, and a forum selection clause, which we did not address in *Rouse*.

Plaintiff and defendant also entered into three other service agreements, each of which is two pages in length. Each of these three service agreements, initialled by plaintiff, contains a forum selection clause requiring the prosecution of actions arising from the agreements to be instituted in the courts of Los Angeles County, California.

On 13 May 1991, plaintiff filed a complaint in Wake County District Court seeking damages from defendant for unfair and deceptive trade practices, breach of warranty of merchantability, breach of implied warranty of fitness, breach of express warranty, negligence, and breach of contract. On 10 July 1991, defendant, relying in part on the forum selection clause contained in its contract with plaintiff, filed a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b) on the grounds that there was a lack of subject matter jurisdiction, that the action was brought in an improper venue, and that the complaint failed to state a claim upon which relief can be granted. On 13 August 1991, the case was transferred to Wake County Superior Court. On 29 August 1991, plaintiff amended his complaint, stating an additional cause of action for fraud. On 21 October 1991, the trial court entered an order denying defendant's motion to dismiss.

The Court of Appeals affirmed the trial court, reasoning that this Court in *Gaither v. Motor Co.*, 182 N.C. 498, 109 S.E. 362 (1921), had previously addressed the question of whether parties may select the forum for an action by agreement. The Court of Appeals reasoned that despite numerous developments in the law regarding forum selection clauses, it was without authority to overrule this Court's decision in *Gaither. Perkins*, 106 N.C. App. at 214, 415 S.E.2d at 758.

Defendant contends that, contrary to the Court of Appeals' decision, *Gaither* is not controlling here. We agree. The Court in *Gaither* did consider a choice of forum clause; however, it dealt solely with venues within North Carolina. The Court refused to enforce a provision in a contract entered into by a car dealer located in Richmond County and a distributor located in Mecklenburg County which provided that "any action that may be taken against the distributor shall be brought in the city of Charlotte." *Gaither*, 182 N.C. at 498, 109 S.E. at 363. The Court in *Gaither* reasoned that "the general policy of the courts is to disregard contractual provisions to the effect that an action shall be brought

either in a designated court or in a designated county to the exclusion of another court or another county in which the action, *by virtue of a statute*, might properly be maintained." *Id.* at 499, 109 S.E. at 363 (emphasis added). The *Gaither* decision is correct on its facts but is distinguishable from this case. There is a difference between attempting to fix the venue by contract within the State of North Carolina, where the North Carolina legislature provides for venue in all cases (chapter 1, subchapter IV, "Venue," article 7 of the North Carolina General Statutes), and attempting to fix the venue by contract in another state. *Gaither* involved an attempt to fix the venue within North Carolina in contravention of the North Carolina statutory provisions on venue. In this case, the parties agreed by contract to change the venue to another state, and there are no statutory provisions in North Carolina which provide that venue cannot be changed to another state by contract.

The question of whether forum selection clauses that purport to fix the venue of an action in another state are enforceable in North Carolina is one of first impression. Historically, forum selection clauses have not been favored in American courts. Courts refused to enforce these bargained-for agreements, believing them to be "contrary to public policy" or improper attempts to "oust the jurisdiction" of the court. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9, 32 L. Ed. 2d 513, 520 (1972); Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action may be Brought*, 31 A.L.R.4th 404, 409 (1984).

Contrary to the assertion of the dissent, honoring forum selection clauses in contracts will *not* "allow private parties to determine whether North Carolina's courts will exercise their jurisdiction over cases involving citizens of this state." Generally, courts no longer view forum selection clauses as ousting the courts of their jurisdiction. Forum selection clauses do not deprive the courts of jurisdiction but rather allow a court to refuse to exercise that jurisdiction in recognition of the parties' choice of a different forum. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 12, 32 L. Ed. 2d at 521 (the contention that forum selection clauses oust the courts of jurisdiction "is hardly more than a vestigial legal fiction"); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 495, 551 P.2d 1206, 1208, 131 Cal. Rptr. 374, 376 (1976) (parties may not deprive courts of their jurisdiction by private agreement, but courts possess discretion to decline to exercise jurisdiction where parties have chosen a different forum); *Funding*

Sys. Leasing Corp. v. Diaz, 34 Conn. Supp. 99, 101, 378 A.2d 108, 109 (1977) (forum selection clauses are no longer seen as affecting the jurisdiction of the courts; a court retains the right to hear the case but is not bound to exercise that right); *Manrique v. Fabbri*, 493 So. 2d 437, 439-40 (Fla. 1986) (forum selection clauses do not oust courts of their jurisdiction but provide them with a reason not to exercise that jurisdiction). While *Gaither* was a case involving "venue" as opposed to "jurisdiction" and can be distinguished on that basis from the present case, as we have done, there is language in *Gaither* that blurs the two concepts. To the extent that the language in *Gaither* can be read to condemn forum selection clauses as depriving North Carolina courts of jurisdiction, that language is disavowed. *Gaither*, 182 N.C. at 500, 501.

In recent years, there has been an abundance of state and federal cases enforcing forum selection clauses. The leading case in this area is *Bremen*. In *Bremen*, the United States Supreme Court enunciated a standard for the enforceability of forum selection clauses. The Court held that forum selection clauses are "prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10, 32 L. Ed. 2d at 520. The Court further held that the forum selection clause in the contract should be enforced "absent a strong showing that it should be set aside . . . [, a] show[ing] that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Id.* at 15, 32 L. Ed. 2d at 523. Additionally, the Court held that a forum selection clause should be invalid if enforcement would "contravene a strong public policy of the forum in which suit is brought." *Id.* Although *Bremen* is an admiralty case, its holding with regard to forum selection clauses has been the basis for numerous federal and state court opinions not involving admiralty. *See Mercury Coal & Coke v. Mannesman Pipe & Steel*, 696 F.2d 315, 318 (4th Cir. 1982); *In re Fireman's Fund Ins. Cos.*, 588 F.2d 93, 95 (5th Cir. 1979); *Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294, 1296-97 (1st Cir. 1974); *Anastasi Bros. Corp. v. St. Paul Fire & Marine Ins. Co.*, 519 F. Supp. 862, 863 (E.D. Pa. 1981); *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 495, 551 P.2d 1206, 1208, 131 Cal. Rptr. 374, 376;[1]

1. As we have noted, the contract at issue in this case contains a clause that provides that the agreement "shall be governed by and interpreted in accord-

Dyersburg Mach. Works, Inc. v. Retenbach Eng'g Co., 650 S.W.2d 378 (Tenn. 1983); *Paul Business Sys. v. Canon U.S.A., Inc.*, 240 Va. 337, 341, 397 S.E.2d 804, 807 (1990).

Plaintiff here is not the first software purchaser to attempt to overcome a forum selection clause in a contract entered into with CCH Computax. There are two federal cases of particular interest which involve CCH Computax as defendant and follow the *Bremen* line of reasoning with regard to the forum selection clauses that were contained in the respective contracts. In *Hoffman v. Burroughs Corp. & CCH Computax Sys., Inc.*, 571 F. Supp. 545 (N.D. Tex. 1982), the United States District Court for the Northern District of Texas transferred an action filed in Texas to the United States District Court for the Southern District of California because the parties had agreed in the license agreement to litigate in San Diego. The court in *Hoffman*, applying the *Bremen* standard, held that the forum selection clause should be enforced because the inclusion of the clause was not the result of fraud; the plaintiffs were experienced businessmen who could read; and because CCH Computax was based in San Diego, trial in California was at least as convenient for the action as Texas. *Id.* at 549-50. In *D'Antuono v. CCH Computax Sys., Inc.*, 570 F. Supp. 708 (D. R.I. 1983), the United States District Court for the District of Rhode Island applied the law as set out in *Bremen* and subsequent cases and recognized that in applying the *Bremen* standard, federal courts have "synthesized and refined" the rule. *Id.* at 712. The court in *D'Antuono* adopted a totality of the circumstances approach and held that the plaintiff fell "far short" of carrying his burden of demonstrating that the forum selection clause was unreasonable. *Id.* at 715.

Recently, the Virginia Supreme Court upheld the validity of a forum selection clause and stated that in doing so it was embracing the modern view. *Paul Business Sys. v. Canon U.S.A., Inc.*, 240 Va. at 341, 397 S.E.2d at 807. Relying on *Bremen* and its progeny, the court adopted a more simplified and restrictive test which requires a greater showing to invalidate a forum selection

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ance with the law of the State of California." We have held such choice of law provisions to be valid in North Carolina. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30. Assuming California law were to apply to this case, we observe that the California Supreme Court has held that forum selection clauses are valid absent a showing that enforcement would be unreasonable. *Smith, Valentino & Smith, Inc.*, 17 Cal. 3d at 495-96, 551 P.2d at 1208-09, 131 Cal. Rptr. at 376-77.

clause than *Bremen* initially enunciated. The court held that the plaintiff, who did not contend that the clause at issue was the product of fraud or unequal bargaining power, had failed to establish that enforcement of the forum selection clause would be "unfair or unreasonable." *Id.* at 343, 397 S.E.2d at 808. The court reasoned that its view "comports with traditional concepts of freedom of contract and recognizes the present nationwide and worldwide scope of business relations which generate potential multi-jurisdictional litigation." *Id.* at 342, 397 S.E.2d at 807.

Plaintiff contends that enforcement of forum selection clauses would contravene the public policy of North Carolina. We disagree. Recognizing the validity and enforceability of forum selection clauses in North Carolina is consistent with the North Carolina rule that recognizes the validity and enforceability of choice of law and consent to jurisdiction provisions. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30. For the foregoing reasons, we embrace the modern view and hold that forum selection clauses are valid in North Carolina. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of a forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. The dissent argues that this Court's decision in this case "place[s] tens of thousands of our citizens at the mercy of those who will take advantage of them by the use of forum selection clauses." We disagree. Under our decision, the trial court retains the authority to hear the case when it determines that the forum selection clause was the product of fraud or unequal bargaining power or that the clause would be unfair or unreasonable.

We therefore reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Wake County, in order that plaintiff here may have the opportunity to make such a showing that he meets the burden set forth herein.

REVERSED AND REMANDED.

Justice MITCHELL dissenting.

One effect of the majority's election to honor and enforce forum selection clauses in contracts is to allow private parties to determine whether North Carolina's courts will exercise their jurisdiction over cases involving citizens of this state, often when those citizens are most helpless. For this and other reasons, I believe that forum selection clauses are contrary to public policy and should not be recognized by this Court as being valid and binding. *See generally* Francis M. Dougherty, Annotation, *Validity of Contractual Provisions Limiting Place or Court in Which Action May be Brought*, 31 A.L.R. 4th 404, 409-414 (1984) (citing cases).

I fear that under the majority's ruling today, this state's citizens will be left helpless to protect themselves from forum selection clauses in many contracts. Admiralty cases involving international contracts between sophisticated multinational business entities, such as *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513 (1972), are not controlling on the issue of state law presented here and are not at all persuasive authority in the more ordinary run of contract cases. For example, contract terms printed in product warranties usually are offered to consumers on a take-it-or-leave-it basis, with consumers having neither an opportunity for bargaining nor the power to bargain. *See, e.g.*, Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw. U. L. Rev. 700 (1992). Further, the release from forum selection clauses that the majority promises if a party carries the burden of demonstrating that a challenged clause is the product of fraud or unequal bargaining power is entirely theoretical and illusory. *Id.* The very citizens who have the least bargaining power and are most apt to be taken advantage of will also be the citizens who will have the fewest resources available for attempting to carry their burden of proving that a forum selection clause is the product of fraud or unequal bargaining power or is otherwise unfair or unreasonable.

"In sum, economic, political, and social interests favor nonenforcement of forum selection clauses in consumer contracts." *Id.* at 730; *See also* John McKinley Kirby, Note, *Consumer's Right to Sue at Home Jeopardized Through Forum Selection Clause in Carnival Cruise Lines v. Shute*, 70 N.C.L. Rev. 888 (1992). By its opinion in the present case, the majority elects to place tens of thousands of our citizens at the mercy of those who will take

advantage of them by the use of forum selection clauses. In my view, it does so without substantially promoting any desirable counterbalancing public purpose.

For the foregoing reasons, I dissent.

Justices Frye and Webb join in this dissenting opinion.

NUCOR CORPORATION v. GENERAL BEARING CORPORATION

No. 378PA91

(Filed 18 December 1992)

1. **Arbitration and Award § 34 (NCI4th)— agreement to arbitrate—no provision for counsel fees—arbitration counsel fees prohibited**

The "agreement to arbitrate" did not include an entire stock purchase agreement but was confined to a section thereof captioned "Arbitration." Thus, where the arbitration section of the agreement contained no reference to counsel fees, the "agreement to arbitrate" did not "otherwise provide" for the inclusion of counsel fees in the arbitration award, and N.C.G.S. § 1-567.11 prohibited the award of counsel fees for work performed in the arbitration proceeding.

Am Jur 2d, Arbitration and Award §§ 6, 14, 139.

2. **Arbitration and Award § 34 (NCI4th)— arbitration counsel fees—necessity for provision in arbitration agreement**

The language of N.C.G.S. § 1-567.11 clearly reflects the legislative intent that counsel fees are not to be awarded for work performed in arbitration proceedings unless the parties specifically agree to and provide for such fees in the arbitration agreement.

Am Jur 2d, Arbitration and Award §§ 6, 139.

3. **Statutes § 5.8 (NCI3d)— general and specific statutes—control by specific statute**

Where one statute deals with a particular subject or situation in specific detail, while another statute deals with the

subject in broad, general terms, the particular, specific statute will be construed as controlling absent a clear legislative intent to the contrary.

Am Jur 2d, Statutes § 257.

4. **Arbitration and Award § 34 (NCI4th)— arbitration counsel fees—applicable statute**

Since N.C.G.S. § 6-21.2 is a statute of general applicability while N.C.G.S. § 1-567.11 is a specific statute relating solely to arbitration, N.C.G.S. § 6-21.2 does not apply to arbitration proceedings. Thus, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying only N.C.G.S. § 1-567.11 in determining whether counsel fees should be or were properly awarded in an arbitration proceeding.

Am Jur 2d, Arbitration and Award §§ 6, 139; Statutes § 257.

5. **Arbitration and Award § 34 (NCI4th)— arbitration award—no increase by court for counsel fees**

There is no provision or authority in N.C.G.S. § 1-567.11 or elsewhere in the Arbitration Act allowing a court to increase an arbitration award by adding counsel fees not contained in the award.

Am Jur 2d, Arbitration and Award §§ 6, 139.

On defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31(a) of an opinion of the Court of Appeals, 103 N.C. App. 518, 405 S.E.2d 776 (1991), affirming the judgment awarding plaintiff's attorneys fees pursuant to the provisions of N.C.G.S. § 6-21.2, entered by Griffin, J., on 2 May 1990 in Superior Court, Mecklenburg County. Heard in the Supreme Court on 11 May 1992.

DeLaney and Sellers, P.A., by Ernest S. DeLaney III, for plaintiff-appellee.

Kennedy Covington Lobdell & Hickman, by Raymond E. Owens, Jr. and Alice C. Richey, for defendant-appellant.

Baer Marks & Upham, by Anthony De Toro, for defendant-appellant.

LAKE, Justice.

This case arises out of an arbitration proceeding pursuant to North Carolina's codification of the Uniform Arbitration Act, specifically N.C.G.S. § 1-567.1 to .19. The essential question raised is whether our Arbitration Act, or our general law, permits an arbitration award, duly made under the Act, to be expanded by the court of jurisdiction on confirmation to include attorneys' fees for work conducted in the arbitration proceeding. The answer requires analysis of the several sections of our Arbitration Act and a comparison of the specific language of N.C.G.S. § 1-567.11 with the general statutory authority allowing the award of attorneys' fees under certain contractual arrangements as provided in N.C.G.S. § 6-21.2. As such, this case, in essence, presents to this Court an issue of first impression.

On or about 1 December 1986, General Bearing Corporation (General Bearing) entered into a Stock Purchase Agreement with Nucor Corporation (Nucor) under the terms of which Nucor agreed to purchase from General Bearing all of the outstanding stock of General Bearing's subsidiary, Genbearco Manufacturing Company, Inc., located in Wilson, North Carolina. Nucor is a manufacturer of steel and steel fabricated products, with its corporate headquarters in Charlotte, North Carolina. General Bearing is a manufacturer of bearings, with its corporate headquarters in Blauvelt, New York. The Agreement obligated General Bearing to pay Nucor the value of Genbearco's obsolete inventory and to pay any deficiency in the warranted net worth of Genbearco. The Agreement also required General Bearing to secure its various obligations by an irrevocable letter of credit in the amount of $1,500,000 and to put $1,000,000 of the purchase money received in escrow pending its full performance.

Section 23 of the Stock Purchase Agreement provided for the submission to arbitration of any dispute arising in connection with the Agreement. The Agreement further provided that choice of law governing would be the laws of North Carolina and that expenses of arbitration would be divided equally between the parties. Section 9 of the Agreement, captioned "Indemnification," provides for reasonable attorneys' fees under certain conditions to each of the parties, but only with respect to indemnification for liabilities incurred to third parties. This is the only section in the Agreement which refers to attorneys' fees.

In 1989, General Bearing defaulted and Nucor requested arbitration hearings. Upon General Bearing's refusal, Nucor filed a complaint in Superior Court, Mecklenburg County seeking to compel arbitration. The superior court ruled by order dated 31 August 1989 that the provision in the Agreement providing for arbitration of disputes arising under the Agreement was valid and enforceable and that Nucor was entitled to invoke the aid of the court to enforce such arbitration provision. The superior court ordered that arbitration commence in accordance with the provisions of the Arbitration Act and the court retained jurisdiction of the action to rule on any motions, including a motion to confirm the arbitration award, pursuant to N.C.G.S. § 1-567.12.

On 16 February 1990, the arbitration panel rendered a decision awarding Nucor $1,537,690 for the breach by General Bearing of its obligations to Nucor under the Agreement. The arbitration panel declined to award General Bearing any amount under its counterclaim and further declined to award either party attorneys' fees, noting that although the Stock Purchase Agreement provided for the recovery of legal fees under certain circumstances, the panel "believes that it has no authority to award legal fees." Nucor then filed a motion in the Superior Court, Mecklenburg County to confirm the arbitration panel's award and to award attorneys' fees pursuant to N.C.G.S. § 6-21.2. The superior court by Order dated 27 April 1990 affirmed the panel's award, and, in addition, awarded Nucor attorneys' fees of fifteen percent of the balance that General Bearing owed under the Agreement ($230,653.50), pursuant to N.C.G.S. § 6-21.2.

General Bearing appealed the additional award of attorneys' fees to the Court of Appeals which upheld the award in an opinion filed 16 July 1991. The Court of Appeals ruled that the trial court properly followed the statutory mandate of N.C.G.S. § 6-21.2(2) in awarding attorneys' fees to Nucor of fifteen percent of the outstanding balance owed by General Bearing under the Agreement. General Bearing filed a petition for discretionary review which was allowed by order of this Court on 5 December 1991.

I.

In General Bearing's first assignment of error it contends that the superior court violated North Carolina's Arbitration Act, specifically N.C.G.S. § 1-567.11, and public policy by awarding attorneys' fees. In its second assignment of error it also argues that

the superior court lacked the power to change the arbitrators' award by adding attorneys' fees not contained in the award. We agree with General Bearing on both assignments of error. The arbitration panel was correct in declining to award attorneys' fees, and in its observation that in this case "it has no authority to award legal fees."

The parties hereto agreed, within the Stock Purchase Agreement, to settle any dispute thereunder by arbitration. Section 23, captioned "Arbitration," provides in relevant part: "Upon the request of either Seller or Purchaser, a dispute arising in connection with this Agreement shall be submitted to arbitration. . . . Expenses of arbitration shall be divided equally between the parties. In the event of arbitration, the arbitrator(s) shall pass finally upon all questions, both of law and fact, and his (their) findings shall be conclusive." In so agreeing, to place any dispute into arbitration, the parties as well as the arbitration panel, were thence bound by the terms of "the agreement to arbitrate" and by the Uniform Arbitration Act codified in our statutes as N.C.G.S. Chapter 1, Article 45A.

Only one section within the Act refers to attorneys' fees, and that section provides: "Unless otherwise provided in *the agreement to arbitrate*, the arbitrators' expenses and fees, together with other expenses, *not including counsel fees*, incurred in the conduct of the arbitration, shall be paid as provided in the award." N.C.G.S. § 1-567.11 (1983) (emphasis added). The relevant statute within the Act thus specifically prohibits arbitrators from awarding attorneys' fees unless "the agreement to arbitrate" which compelled the parties to arbitration says otherwise.

[1] In this regard, Nucor understandably argues it is permissible and appropriate to go outside the arbitration section (23) to encompass the entire Stock Purchase Agreement for purposes of showing the "agreement to arbitrate" does provide otherwise and allows for an award of attorneys' fees, *albeit* pursuant to N.C.G.S. § 6-21.2 rather than the Arbitration Act. As above noted, the only mention of attorneys' fees in the entire Stock Purchase Agreement is under Section 9 which deals solely with indemnification of either party in the event of incurred liability or obligation to a third party. "In indemnity contracts the engagement is to make good and save another harmless from loss on some obligation which he has incurred or is about to incur to a third party . . . ." *Casualty Co.*

v. Waller, 233 N.C. 536, 537, 64 S.E.2d 826, 827 (1951), *quoted in Dixie Container Corp. v. Dale*, 273 N.C. 624, 628, 160 S.E.2d 708, 711 (1968). We therefore cannot agree with Nucor that this sole reference to attorneys' fees, within the entire Stock Purchase Agreement, taken in its context, is sufficient to show that the parties' "agreement to arbitrate" does provide otherwise in negating the prohibition and exclusion of counsel fees contained in N.C.G.S. § 1-567.11.

Further, in this regard, we find that the Arbitration Act itself is most instructive on what properly constitutes "the agreement to arbitrate" in making the determination of whether the parties in fact otherwise agreed to *include* counsel fees incident to the arbitration in the award along with "other expenses." N.C.G.S. § 1-567.2(a) provides:

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may *include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract* or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable except with the consent of all the parties, without regard to the justiciable character of the controversy.

N.C.G.S. § 1-567.2(a) (1983) (emphasis added). *See Crutchley v. Crutchley*, 306 N.C. 518, 522, 293 S.E.2d 793, 796 (1982). The wording of this section of the Act, as emphasized, relates precisely to the circumstances in the case *sub judice* and further demonstrates that "the agreement to arbitrate" in this case does not include the entire Stock Purchase Agreement, but rather is confined to Section 23 thereof designated "Arbitration" which contains exclusively the provisions relating to arbitration. Section 23, while providing for equal division of "expenses of arbitration," contains no reference whatever to attorneys' fees. Thus, "the agreement to arbitrate," in the instant case, does not "otherwise provide" for the inclusion of counsel fees, and such fees are not therefore allowable in the award under the express wording of N.C.G.S. § 1-567.11 for legal work performed in an arbitration proceeding.

[2] The specific, uncomplicated language of N.C.G.S. § 1-567.11 clearly reflects the legislative intent that attorneys' fees are not to be awarded for work performed in arbitration proceedings, unless

the parties specifically agree to and provide for such fees in the arbitration agreement. There are important policy considerations supporting this determination not to allow attorneys' fees in arbitration proceedings, unless provided by the parties. These considerations are consistent with the principle legislative purpose behind enactment of the Uniform Arbitration Act: to provide and encourage an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys' fees. *See Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 236, 321 S.E.2d 872, 879 (1984); *McNeal v. Black*, 61 N.C. App. 305, 300 S.E.2d 575 (1983); *Thomas v. Howard*, 51 N.C. App. 350, 276 S.E.2d 743 (1981).

The reliance by Nucor, and heretofore our trial courts and the Court of Appeals, upon N.C.G.S. § 6-21.2 as authority for the proposition that attorneys' fees are awardable by the superior court for work performed in arbitration proceedings, when no agreement for such fees exists and such fees have not been allowed by the arbitrator in the award, is misplaced and is hereby disavowed. As above stated, such proposition is contrary to the specific wording of N.C.G.S. § 1-567.11 and to well settled principles of law including statutory construction. The law is well established in North Carolina that "the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879" and a "successful litigant may not recover attorneys' fees, whether as costs or as an item of damages, unless such recovery is expressly authorized by statute." *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 289, 266 S.E.2d 812, 814 (1980); *Hicks v. Albertson*, 284 N.C. 236, 200 S.E.2d 40 (1973). N.C.G.S. § 6-21.2 represents a substantial exception to that well-established rule. *Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E.2d 578 (1952).

[3] As an exception to the rule, N.C.G.S. § 6-21.2 generally relates to and concerns the subject of attorneys' fees for legal work performed in the collection of indebtedness under various contractual arrangements and, unlike N.C.G.S. § 1-567.11, does not specifically address or relate to the subject of arbitration or attorneys' fees for the resolution of contractual disputes through arbitration. The applicable rule of statutory construction here is that where one statute deals with a particular subject or situation in specific detail, while another statute deals with the subject in broad, general terms, the particular, specific statute will be construed as controlling,

absent a clear legislative intent to the contrary. *Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988). "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985); *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966).

[4] Since N.C.G.S. § 6-21.2 is a statute of general applicability while N.C.G.S. § 1-567.11 is a specific statute relating solely to arbitration, we hold that N.C.G.S. § 6-21.2 does not apply to arbitration proceedings. Thus, in arbitration proceedings, both the arbitrator or arbitration panel and the superior courts upon confirmation are limited to applying only N.C.G.S. § 1-567.11 in determining whether attorneys' fees should be or were properly awarded.

In addition to the foregoing principles, the Uniform Arbitration Act, which as enacted and codified in our statutory law is virtually a self-contained, self-sufficient code, further provides controlling limitations upon the authority of our courts to vacate, modify or correct an arbitration award. "G.S. §§ 1-567.13 and 1-567.14 provide the *exclusive* grounds and procedures for vacating, modifying, or correcting an award." *Crutchley v. Crutchley*, 306 N.C. 518, 523 n.2, 293 S.E.2d 793, 796 n.2 (emphasis added). N.C.G.S. § 1-567.12 provides: "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in G.S. 1-567.13 and 1-567.14." N.C.G.S. § 1-567.12 (1983). N.C.G.S. § 1-567.14 (Modification or correction of award) provides in subsection (a) three specific instances where modification is allowed, none of which are applicable to attorneys' fees, and further provides in subsection (b): "If the application is granted, the court shall modify and correct the award *so as to effect its intent* and shall confirm the award as so modified and corrected. *Otherwise, the court shall confirm the award as made.*" N.C.G.S. § 1-567.14(b) (1983) (emphasis added).

[5] There is no provision or authority in this section or elsewhere in the Act allowing a court to increase an award by adding attorneys' fees not contained in the award. The superior court therefore erred in so doing in the instant case and such award must be reversed.

II.

With regard to General Bearing's third and fourth assignments of error, since we have held that N.C.G.S. § 6-21.2 is not applicable in arbitration proceedings, we do not reach the issue of whether the Stock Purchase Agreement is an "evidence of indebtedness" thereunder, and we likewise do not reach the issue of reasonableness upon awarding attorneys' fees pursuant to N.C.G.S. § 6-21.2.

Accordingly, the decision of the Court of Appeals is

REVERSED.

STATE OF NORTH CAROLINA v. GEORGE FRANKLIN HEATWOLE III

No. 119A89

(Filed 18 December 1992)

1. **Appeal and Error § 75 (NCI4th)— murder—guilty plea—appeal**

A defendant who pled guilty to first degree murder, kidnapping, assault, and discharging a firearm into an occupied building waived all nonjurisdictional errors insofar as they might have affected the guilt proceedings.

Am Jur 2d, Appeal and Error § 271; Criminal Law § 490.

2. **Kidnapping and Felonious Restraint § 14 (NCI4th)— guilty plea—factual basis—release when kidnapper cornered and outnumbered**

There was a factual basis for defendant's plea of guilty to first degree kidnapping where the victim (Garcia) testified that defendant handcuffed her and forced her to accompany him to his parents' house; she was with him when he shot two of his victims; she asked defendant to remove her handcuffs because her arm was bleeding and defendant directed his father to go to the truck for the keys; defendant looked out the sidelights by the door and said he thought someone was out there; defendant's father opened the door while defendant was working on the handcuffs and defendant said, "I'll let that son-of-a-bitch go"; once the handcuffs were removed, defendant put two more bullets in his gun, saying

one was for Garcia and one was for him; Garcia told defendant she did not want to die and to give her the gun; she then threw the gun out the door; and defendant hugged her, said he liked her a lot, and said "I'm sending Kim out." Although defendant argues that his release of the victim was voluntary and that sending her into a yard full of police was tantamount to release in a safe place, releasing a kidnap victim when the kidnapper is aware that he is cornered and outnumbered by law enforcement officials is not voluntary and sending her out into the focal point of their weapons is not release in a safe place.

Am Jur 2d, Abduction and Kidnapping §§ 1, 11, 23; Criminal Law § 489.

3. **Criminal Law § 1352 (NCI4th)— McKoy error—prejudicial**

There was prejudicial *McKoy* error in a murder prosecution where the court instructed the jury that they must unanimously find each mitigating circumstance and the jury found two aggravating circumstances but none of the seven mitigating circumstances. Although the State contends that any prejudice was eradicated by the instruction "Do you unanimously find beyond a reasonable doubt the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the death penalty when considered with the mitigating circumstance or circumstances present from the evidence?", it could not be concluded beyond a reasonable doubt that the erroneous unanimity requirement did not prevent one or more jurors from finding one or more of the submitted mitigating circumstances. Nor could it be concluded that the results would have been the same had one or more of the submitted mitigating circumstances been found and considered by one or more jurors in arriving at defendant's sentence.

Am Jur 2d, Homicide § 514.

4. **Criminal Law § 1273 (NCI4th)— Fair Sentencing Act—honorable discharge from military—not found—contradictory evidence**

The trial court did not err when sentencing defendant for kidnapping, assault, and discharging a firearm into an occupied building by not finding the statutory mitigating factor

that defendant had been honorably discharged from military service where contradictory evidence had been presented in a pretrial hearing regarding whether defendant should continue to be shackled. The sentencing court, having heard this testimony, was free to consider it as evidence conflicting with defendant's evidence on the honorable discharge issue. N.C.G.S. § 15A-1340.4(a)(2)o.

Am Jur 2d, Criminal Law §§ 527, 598, 599; Homicide § 552.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Freeman, J., at the 20 February 1989 Session of Superior Court, Moore County. On 24 August 1990 the Supreme Court allowed defendant's motion to bypass the Court of Appeals on appeals from related convictions for first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon, and discharging a firearm into an occupied building. Heard in the Supreme Court 9 September 1991.

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

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

EXUM, Chief Justice.

At the close of the State's evidence defendant entered pleas of guilty to two counts of murder in the first degree and to one count each of first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon, and discharging a firearm into an occupied building. After a capital sentencing hearing the jury recommended death in the two murder cases. The sentencing court imposed terms totalling eighty years for the noncapital offenses. We find prejudicial error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990), in the sentencing phase of the murder cases entitles defendant to a new sentencing hearing and that error in sentencing for

the noncapital offenses under N.C.G.S. § 15A-1340.4 requires remand for resentencing for those offenses.

Evidence presented by the State at defendant's trial tended to show the following:

At about 11 p.m. on 26 February 1988, defendant went to the home of his former girlfriend, Kim Chavis Garcia. There he shot at Garcia's sister, Vicky Chavis. The shot missed Chavis, but she fell down, feigning death. Garcia and others in the house bolted for the bedroom. Defendant fired two or three shots at two men, Ricky Cummings and Donald Locklear, who were attempting to escape through the bedroom window. One shot wounded Cummings in the left leg below the knee.

Defendant handcuffed Garcia and, taking her with him, drove to the Woodlake subdivision where his father and stepmother lived. At the entrance gate the security guard Edgar John Garrison waved defendant through; but defendant stopped, rolled down the window, and shot Garrison twice, fatally wounding him.

At his father's house defendant put the pistol to his father's head. When defendant's stepmother, Alta Hamilton Heatwole, came out of the bedroom, defendant shot her twice. She fell and made her way back into the bedroom. Defendant followed her to the bedroom where he kicked her several times and shot her twice in the head at close range, fatally wounding her.

When ten law enforcement officers surrounded the front door with their guns drawn, defendant's father ran out the front door with his hands up. Defendant removed the handcuffs from Garcia, gave her the pistol, and sent her out of the house. Garcia either dropped the pistol on police orders or threw the pistol out the door before she exited. Defendant followed Garcia out, lay down, and was arrested.

I.

[1] Defendant raises a number of issues which, but for his plea of guilty on all charges, would have been available for consideration on appeal as affecting both the guilt and sentencing proceedings of this capital prosecution. By his guilty pleas, provided they were properly entered, defendant has waived all nonjurisdictional errors that might have occurred insofar as they might have affected the guilt proceedings. *State v. Caldwell*, 269 N.C. 521, 526, 153 S.E.2d

34, 37-38 (1967). We need discuss, therefore, only those assignments of error relating to the guilty pleas themselves and those necessary to dispose of the appeal of the sentencing proceeding.

II.

[2] Regarding his guilty pleas defendant's only contention on appeal is that the trial court erred in concluding there was a factual basis for defendant's plea of guilty to first-degree kidnapping; therefore, this plea should not have been accepted.

Under N.C.G.S. § 15A-1022(c):

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

Defendant specifically contends there is no factual basis for concluding the kidnap victim, Garcia, "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), either one of which is a requisite element of first-degree kidnapping.

Garcia testified that defendant handcuffed her and forced her to accompany him to his parents' house. She was with him when he shot Garrison and his stepmother. Garcia asked defendant to remove the handcuffs because her arm was bleeding, and defendant directed his father to go to the truck for the keys. When his father returned with the keys, defendant, who was looking out the sidelights by the front door, said he thought somebody was out there. Mr. Heatwole went out the open door while defendant was working on Garcia's handcuffs. Defendant said, "I'll let that son-of-a-bitch go." But once Garcia's handcuffs were removed, defendant put two more bullets in his gun, saying one was for her and one was for him. Garcia told defendant she did not want to die and to give her the gun. When he did, she threw it out the

door. Defendant hugged her, said he liked her a lot, and said, "I'm sending Kim out."

Defendant argues his release of Garcia was voluntary[1] and that sending her into a yard full of police was tantamount to release in a "safe place." The State argues that releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not "voluntary" and that sending her out into the focal point of their weapons is not a "safe place." We agree with the State's position. *See State v. Jerrett*, 309 N.C. 239, 263, 307 S.E.2d 339, 352 (1983) (evidence sufficient to permit the jury reasonably to infer victim was rescued by the presence and intervention of police officer). Inasmuch as there was a factual basis for each element of the offense, there is no reason to upset defendant's guilty plea to first-degree kidnapping on the ground urged by defendant.

III.

[3] With regard to the sentencing proceeding, defendant contends there was reversible error under *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). We agree.

At defendant's sentencing proceeding the jury found two aggravating circumstances: (1) defendant had previously been convicted of a felony involving the use of violence to the person and (2) the murder was part of a course of conduct that included commission by defendant of other crimes of violence against other persons. *See* N.C.G.S. § 15A-2000(e)(3) and (11) (1988). The jury found none of seven nonstatutory mitigating circumstances submitted for its consideration.

In its jury charge on sentencing, the trial court instructed the jurors that they must unanimously find each mitigating circumstance submitted under Issue Two on the Issues and Recommendations as to Punishment form. Issue Two asked: "Do you unanimous-

1. In *State v. Jerrett*, 309 N.C. 239, 262, 307 S.E.2d 339, 351 (1983), this Court observed: "While it is true that N.C.G.S. § 14-39(b) does not expressly state that the defendant must voluntarily release the victim in a safe place, we are of the opinion that a requirement of 'voluntariness' is inherent in the statute. G.S. 14-39(b) provides that in order for the offense to constitute kidnapping in the second degree, the person kidnapped must be released 'in a safe place *by the defendant* . . . .' (emphasis added). This implies a conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety."

ly find from the evidence the existence of one or more of the following [seven] mitigating circumstances?" The jury was also instructed to answer "no" to any mitigating circumstance not unanimously found. The State concedes these instructions constitute constitutional error under *McKoy*, but contends such error was harmless beyond a reasonable doubt.

The State first argues that the trial court's instruction on Issue Four eradicated any prejudice that might have arisen from its instruction on Issue Two. Issue Four asked: "Do you unanimously find beyond a reasonable doubt the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the death penalty when considered with the mitigating circumstance or circumstances present from the evidence?" The trial court proceeded to instruct the jury that in its consideration of "any mitigating circumstances present from the evidence," each juror could include in the final balancing any circumstance he or she considered to have been proved by a preponderance of the evidence, "[e]ven if the jury has not found unanimously the existence of [that] mitigating circumstance."

We rejected this argument in *State v. Johnson*, 331 N.C. 660, 417 S.E.2d 483 (1992), and for the reasons given there, we also reject it here.

The seven mitigating circumstances submitted to the jury were: (1) defendant's conduct was affected by his bad treatment while in prison in the State of Texas; (2) defendant was honorably discharged from the United States Marine Corps; (3) defendant earned a high school equivalency certificate; (4) defendant has been trustworthy and truthful in his relationship with Mr. Larry Davis; (5) defendant has been a decent person in his relationship with Miss Lisa Cox; (6) defendant has always acted like a gentleman in his relationship with Mrs. Larrie Marie Garner; (7) any other circumstance or circumstances arising from the evidence which the jury deems to have mitigating value. Each of the first six circumstances was supported by some evidence in the record; indeed the trial court peremptorily instructed the jury as to each that "all of the evidence tends to show [that particular mitigating circumstance,] and [t]here was no evidence to the contrary." Nevertheless, the jury found none of these mitigating circumstances to exist.

We cannot conclude beyond a reasonable doubt that the erroneous unanimity requirement did not prevent one or more jurors from finding one or more of the submitted mitigating circumstances. Nor can we conclude beyond a reasonable doubt that, had one or more of the submitted mitigating circumstances been found and considered by one or more jurors in arriving at defendant's sentence, the results would have been the same. *See State v. Johnson*, 331 N.C. at 670, 417 S.E.2d at 489; *State v. Brown*, 327 N.C. 1, 30, 394 S.E.2d 434, 451 (1990). Consequently, we set aside the sentences of death and remand for a new sentencing hearing.

IV.

[4] Defendant next contends he is entitled to be resentenced for all felony convictions governed by the Fair Sentencing Act, N.C.G.S. § 15A-1340.1 through -1340.7 (1988), because the court sentenced him to terms in excess of the presumptive term for each charge without finding the statutory mitigating factor that defendant had been honorably discharged from military service. N.C.G.S. § 15A-1340.4(a)(2)o (1988).

Before it imposes a sentence exceeding the presumptive term, the sentencing court must consider all statutory mitigating factors that are supported by the evidence. *State v. Pigott*, 331 N.C. 199, 214, 415 S.E.2d 555, 563 (1992). The sentencing court is obligated to find a statutory mitigating factor when the evidence supporting that factor is uncontradicted and manifestly credible. *Id.*, 415 S.E.2d at 564.

> [W]hen a defendant argues . . . that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, . . . [h]e is asking the court to conclude that "the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn," and that the credibility of the evidence is "manifest as a matter of law."

State v. Jones, 309 N.C. 214, 219-20, 306 S.E.2d 451, 455 (1983) (quoting *North Carolina National Bank v. Burnette*, 297 N.C. 524, 536-37, 256 S.E.2d 388, 395 (1979)). *See also State v. Pigott*, 331 N.C. at 214, 415 S.E.2d at 564. The sentencing court is accorded wide latitude in determining the existence of mitigating factors, for it "observes the demeanor of the witnesses and hears the testimony." *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983). "To show that the trial court erred in failing to find

a mitigating factor, the evidence must show conclusively that this mitigating factor exists, i.e., no other reasonable inferences can be drawn from the evidence." *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988).

During the sentencing phase of his capital trial defendant, who was not under oath, stated that he had been honorably discharged from the Marine Corps; and he introduced into evidence an unauthenticated exhibit which presumably appeared to be a certificate of honorable discharge from the Marine Corps.[2]

Evidence casting doubt upon the credibility of the defendant's assertion and the authenticity of defendant's exhibit was before the trial court in testimony presented in a pretrial hearing regarding whether defendant should continue to be shackled. The State's witness testified as follows:

> Q. Did Mr. Heatwole tell you what he did when he was in California stationed in the [M]arines?
>
> A. Yes, sir.
>
> Q. What did he tell you?
>
> A. Jeff was I guess you call it kicked out of the Marines or dishonorably discharged, whatever you call it. I never was in the Service.
>
> DEFENDANT: Honorably discharged.
>
> A. Jeff and I were talking. What he told me was he hit the Commander, whatever you call him. He was on R duty and hit the head guy of the base, or whatever you call him.

Given the contradictory nature of the evidence before the sentencing court and given the latitude accorded the trial court in assessing such evidence,[3] we hold that the court did not err in

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2. The original exhibit was not brought forward in the record on appeal. A photocopy of the exhibit is included in the appendix to the State's brief.

3. During the sentencing phase of defendant's capital trial, the trial court instructed the jury that evidence of defendant's honorable discharge from the Marine Corps was uncontradicted by the prosecution. This instruction was correct because the jury did not hear the pretrial testimony that contradicted the veracity of the certificate. The sentencing court, however, having heard this testimony, was free to consider it as evidence conflicting with defendant's evidence on the honorable discharge issue.

failing to find the statutory mitigating factor that defendant was honorably discharged from military service.

88CRS1335, 88CRS1337—Death Sentences vacated and the cases remanded for a new sentencing proceeding.

88CRS1336 (first-degree kidnapping)—no error.

88CRS1338 (assault with a deadly weapon with intent to kill inflicting serious injury)—no error.

88CRS1339 (assault with a deadly weapon with intent to kill)—no error.

88CRS1340 (discharging firearm into occupied property)—no error.

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

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

BUYCE v. CITY OF SALUDA

No. 350P92

Case below: 107 N.C.App. 302

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

C. F. R. FOODS, INC. v. RANDOLPH DEVELOPMENT CO.

No. 395P92

Case below: 107 N.C.App. 584

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

COLLINS & AIKMAN CORP. v.
HARTFORD ACCIDENT & INDEMNITY CO.

No. 252PA92

Case below: 106 N.C.App. 357

Petition by defendant (Hartford) for discretionary review pursuant to G.S. 7A-31 allowed 17 December 1992.

CONYERS v. LINCOLN COMMUNITY HEALTH CENTER

No. 212P92

Case below: 106 N.C.App. 231

Petition by defendants (Steller and Duke) for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

CRUMP v. BOARD OF EDUCATION

No. 363P92

Case below: 107 N.C.App. 375
332 N.C. 665

Petition by plaintiff for reconsideration of the petition for discretionary review dismissed 17 December 1992.

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

EAVES v. UNIVERSAL UNDERWRITERS GROUP

No. 88P92

Case below: 107 N.C.App. 595

Petition by defendants (Amica and Sims) for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

EDWARDS v. UNIVERSITY OF NORTH CAROLINA

No. 377P92

Case below: 107 N.C.App. 606

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992. Petition by defendant for writ of supersedeas denied and temporary stay dissolved 17 December 1992.

GALLBRONNER v. MASON

No. 369P92

Case below: 101 N.C.App. 362

Petition by defendant for writ of mandamus dismissed 17 December 1992.

HOUSEHOLD FINANCE CORP. v. ELLIS

No. 351P92

Case below: 107 N.C.App. 262

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question denied 17 December 1992. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 17 December 1992.

IN RE BELK

No. 376P92

Case below: 107 N.C.App. 448

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 December 1992. Petition by intervenor-petitioner for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

IN RE BELL

No. 391A92

Case below: 107 N.C.App. 566

Motion by Joyce Tucker to withdraw appeal allowed 17 December 1992.

KRON MEDICAL CORP. v. COLLIER COBB & ASSOCIATES

No. 360P92

Case below: 107 N.C.App. 331

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992. Motion by NACSA in support of petition for discretionary review denied 17 December 1992. Motion by CAPIA in support of petition for discretionary review denied 17 December 1992. Motion by plaintiffs for extension of time to file response to petition for discretionary review denied 17 December 1992.

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

PERRY-GRIFFIN FOUNDATION v. PROCTOR

No. 374PA92

Case below: 107 N.C.App. 528

Petition by defendant (Jimmie C. Proctor) for discretionary review pursuant to G.S. 7A-31 allowed 17 December 1992.

SMITH v. SMITH

No. 372PA92

Case below: 107 N.C.App. 491

Petition by defendants (Mr. and Mrs. Durwood Eugene Smith) for discretionary review pursuant to G.S. 7A-31 allowed 17 December 1992.

STATE v. BONNER

No. 423P92

Case below: 108 N.C.App. 353

Petition by defendant for temporary stay allowed 17 December 1992.

STATE v. HEMMINGWAY

No. 415P92

Case below: 108 N.C.App. 104

Petition by defendant for temporary stay allowed 8 December 1992.

STATE v. HILL

No. 378P92

Case below: 107 N.C.App. 490

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 December 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

STATE v. SHAW

No. 278P92

Case below: 106 N.C.App. 433

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

STATE v. SIMMONS

No. 277P92

Case below: 106 N.C.App. 494

Motion by Attorney General to dismiss appeals by defendants (Eric Leon Simmons and Robert Lee Simmons) for lack of substantial constitutional question allowed 17 December 1992. Petitions by defendants for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

STATE EX REL. THORNBURG v. LOT AND BUILDINGS

No. 394P92

Case below: 107 N.C.App. 559

Petition by Edward Fred Bowman for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

U.S. PACKAGING, INC. v. BRADLEY

No. 336P92

Case below: 107 N.C.App. 303

Petition by defendant (Cecil Edward Bradley, Jr.) for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 17 December 1992.

STATE OF NORTH CAROLINA v. DARON LEON FARMER

No. 398A91

(Filed 8 January 1993)

1. **Searches and Seizures § 12 (NCI3d)— no detention or seizure of defendant before arrest—probable cause for arrest—physical evidence—seizure incident to arrest and under warrant**

Defendant was not "detained" or "seized" within the meaning of the Fourth Amendment to the U.S. Constitution or Art. I, § 20 of the N.C. Constitution where defendant's encounter with the officers took place on a public street; the officers wore no uniforms and displayed no weapons; they did not summon the defendant into their presence but approached him and identified themselves as law officers; the officers requested, but did not demand, information concerning the defendant's identity and place of residence and asked why he was covered with what appeared to be blood; and the officers asked defendant why he had given them a false name after it became apparent that he had done so. Furthermore, officers had probable cause to arrest defendant for murder when they received information from an individual that defendant had left the individual's house headed in the direction of the victim's residence at 8:30 p.m. on the date the victim was killed, and that when defendant returned at 11:00 p.m., he had blood on his face and clothes and in his ears. Therefore, physical evidence seized at the time of defendant's arrest and during the later execution of a search warrant supported by probable cause was properly admitted in defendant's trial for first degree murder.

Am Jur 2d, Searches and Seizures §§ 10, 37.

Constitutionality of searching premises without warrant as incident to valid arrest—Supreme Court cases. 108 L. Ed. 2d 987.

2. **Evidence and Witnesses § 2516 (NCI4th)— murder—plan to rape victim—defendant's seriousness—cross-examination prohibited—harmless error**

Where a witness testified that defendant had asked him to be a lookout while defendant raped an elderly woman in Stokesdale, any error in the trial court's refusal to permit

defense counsel to ask the witness certain questions concerning whether defendant was serious about raping the woman did not affect the outcome of the trial and was harmless error given the strength of the State's evidence against defendant and the fact that defendant was allowed to elicit other testimony regarding the nature of the witness's conversations with defendant about raping a woman in Stokesdale.

Am Jur 2d, Witnesses § 812.

3. Evidence and Witnesses § 3191 (NCI4th)— admission of non-corroborative written statement—harmlessness

Assuming arguendo that a witness's written statement to an officer contradicted her trial testimony as to who defendant told her suggested breaking into a murder victim's home and was thus not corroborative, the admission of her statement into evidence was harmless where the witness's testimony supported an inference of concerted action by defendant and another; such evidence, if believed by the jury, would have required conviction of the defendant on a theory of concerted action regardless of who first suggested breaking into the home; and defendant failed to show a reasonable possibility that a different result would have been reached at trial had the witness's written statement been excluded.

Am Jur 2d, Witnesses §§ 929, 938.

4. Homicide § 705 (NCI4th)— premeditation and deliberation—failure to give requested special instruction—harmless error

Even if the trial court erred in failing to give defendant's requested instruction that the mere existence of grossly excessive force or brutal circumstances would not, standing alone, be sufficient to support a finding of premeditation as those factors are as likely to exist in an unpremeditated killing as in a premeditated and deliberate murder, defendant was not prejudiced by this omission where the jury returned a verdict finding defendant guilty of first degree murder both under the felony murder theory and under the theory of premeditation and deliberation, and it would thus not have been reversible error for the trial court to have failed to give any instructions concerning premeditation and deliberation.

Am Jur 2d, Trial §§ 1080, 1093, 1094.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

Appeal of right, pursuant to N.C.G.S. § 7A-27(a), from a judgment entered by Ross, J., in the Superior Court, Guilford County, on 22 October 1990. Heard in the Supreme Court on 3 November 1992.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

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

MITCHELL, Justice.

The defendant, Daron Leon Farmer, was tried in a capital trial, and the jury found him guilty of first-degree murder. At a separate sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment. The trial court entered judgment accordingly. The defendant appealed to this Court as a matter of right.

The State's evidence introduced at trial tended to show, *inter alia*, the following. On 13 November 1989, Norva Martin made arrangements with Margaret Robinson, the victim, to walk together at the Circle Mall. On the following morning, Martin called Robinson by telephone, but she got no answer. Martin then drove to Robinson's home in Stokesdale, a community in Guilford County. Martin knocked on the door, but no one answered. Martin then went to the Webco station located across the street from Robinson's home and asked Edd Shelton to accompany her back to the home. Upon arriving at Robinson's home, Shelton looked into the windows and checked the exterior of the house thoroughly. However, there was still no sign of Robinson, so Martin and Shelton returned to the Webco station and asked Phil Webster to call the Guilford County Sheriff's Department.

At 7:42 a.m. on 14 November 1989, Deputy Sheriff Moselle Kelly of the Guilford County Sheriff's Department was dispatched to the Webco station. After talking there with Webster, Deputy Kelly drove to Robinson's home. Deputy Kelly became suspicious when she saw a window up with the screen pushed in, so she

looked into the kitchen window and saw the toes of a person lying on the floor. Deputy Kelly also heard water running in a sink.

As a result of her observations, Deputy Kelly advised her dispatcher by radio that there was a person in the house and that she would have to make a forced entry. Deputy Kelly then returned to the Webco station where she encountered Marty Southard, a volunteer fireman, and asked him to accompany her to Robinson's home. While at Robinson's home, Southard looked into the kitchen window and saw the victim's nude body on the floor. Southard then enlisted the assistance of Winfree Dunlap, a passing motorist. With Dunlap's help, Southard broke out a panel in the back door and entered the house. After noticing a large amount of blood on the kitchen floor, Dunlap checked the victim for vital signs, but found none. Dr. Roger Thompson, a forensic pathologist in Chapel Hill, later conducted an autopsy and determined that Margaret Robinson's death was caused by blunt force injuries.

Michael Wayne Smith testified that he had known the defendant since they had attended high school together in Guilford County. One morning at approximately 11:00 a.m., Smith encountered the defendant who was walking in front of Smith's grandmother's house on Ellisboro Road. Smith and the defendant then spent some time at the defendant's home and at a place called Jack's Store. While the two men were together that morning, the defendant asked Smith to go with him to Stokesdale in order to assist him while he raped a woman. The defendant told Smith that the woman lived in a white house and that she was blonde and about fifty or sixty years of age. The defendant told Smith that he had seen this woman before through a window while she was taking a bath. The defendant then told Smith that he was going to cut the power off, kick in the door, and commit a rape. The defendant also stated that he wanted Smith to be the lookout and that Jamie Shoemaker would take them to the woman's house. The defendant further indicated that the rape would occur at approximately 2:30 or 3:00 a.m. and that he and Shoemaker would pick Smith up before 6:00 p.m.

Following this conversation, Smith went home and watched television. At approximately 6:00 p.m., Smith went down the road to meet the defendant and Shoemaker. However, after waiting for about thirty minutes, Smith concluded that the two men were not coming for him.

On direct examination, Smith testified that his conversation with the defendant took place on a morning in November 1989. On cross-examination, however, he testified that he did not know when the conversation occurred.

Timmie Tilley testified that he had first met the defendant while they were attending elementary school and that they had grown up in the same neighborhood. When they were children, the defendant frequently spent the night at Tilley's home. Three or four years prior to the Robinson killing, the defendant had lived next door to the victim.

On a day in November 1989 at approximately 6:30 p.m., the defendant visited Tilley's house. At approximately 7:00 p.m., Tilley, the defendant, and three acquaintances went to Bradley Rice's house, where they drank beer and smoked marijuana. At approximately 9:00 p.m., the defendant left after saying that he was going to get something from the store.

The defendant returned to Tilley's home at approximately 11:00 p.m. Tilley was sitting in a parked car in his back yard when he looked up and saw the defendant standing next to his car. Tilley asked the defendant to get into the car. At that time, he noticed that the defendant was acting sick, holding his head down and holding his stomach. Approximately five minutes later, Ronnie Buchanan drove up in his car, and Tilley went over to speak with him. Initially, the defendant also walked over to Buchanan's car, but he turned around and walked back to Tilley's car and sat in the passenger's seat.

After talking with Ronnie Buchanan, Tilley and the defendant went inside Tilley's home. Earlier that day, Tilley had told the defendant that he could spend the night there. Tilley noticed that the defendant had blood on his face, neck, forehead and ears. Tilley asked the defendant what had happened, and the defendant said that a gunshot wound had caused him to bleed. Tilley and the defendant then went upstairs to Tilley's bedroom and went to sleep.

On the following morning, Tilley's mother called and told him that Margaret Robinson had been killed. When Tilley told the defendant that Robinson had been killed, there was no expression on the defendant's face, and he merely said, "damn." Tilley then told the defendant that he had to leave. The defendant left Tilley's house at approximately 9:00 a.m.

William Lester Mabe testified that he learned about Margaret Robinson's death one day in November 1989. Mabe is a tobacco farmer and lives approximately three miles north of Stokesdale. At approximately 10:00 a.m. on the morning Mabe learned that the victim had been killed, the defendant walked through Mabe's yard, and the two men had a brief conversation. The defendant told Mabe that he had spent the night at a friend's house in Stokesdale and that he was on his way home. During the conversation, Mabe noticed "fresh" scratches on the defendant's face and neck. After this brief conversation with Mabe, the defendant left.

The State's evidence further tended to show that at some point after Margaret Robinson was killed, the defendant had a series of telephone conversations with his mother-in-law, Betty Shields. The defendant at one point told Shields that he did not hurt Margaret Robinson in any way, but that Timmie Tilley had beaten her. The defendant said that he had stayed outside the house while Tilley entered. The defendant told Shields that he had left when "things got out of hand."

At another point, the defendant told Shields that he had met Tilley in front of the victim's house. Tilley already had blood on his person at that time, and the two men left and went to Tilley's house.

In other conversations with Shields, the defendant said that he and Tilley had both entered the victim's home through a window. The defendant said that Tilley had picked up an antique iron that had been on the floor in the home and hit the victim. The defendant said that he was "going through a closet" in the home while Tilley was hitting the victim. The defendant told Shields that the only way he could have gotten blood on his person was by turning the victim over to see whether she was alive.

Lieutenant Roy T. Forrest of the Guilford County Sheriff's Department participated in the investigation of the Margaret Robinson homicide. On 15 November 1989 at approximately 10:00 a.m., Detective Sergeant Steve Shaver told Forrest that two women who live a few houses east of Margaret Robinson's home had said that a young boy named Daron Farmer had peeked into Robinson's windows and had made spiteful comments to her in the past. Phil Webster, the owner of a Webco station located directly across the street from the victim's house, told Forrest that the victim had said that the defendant Farmer had peeked into her windows

and had made derogatory comments to her approximately two or three years before, when Farmer lived next door to the victim. Webster also gave Forrest a physical description of the defendant and told him where the defendant lived.

As a result of the information they had received, Forrest and Shaver decided to ask the defendant some questions. They began driving north on Ellisboro Road toward the defendant's home. At approximately 10:50 a.m., after driving approximately four miles, the officers observed a man who fit the general description of the defendant walking down the road. After passing the man, the officers backed onto the shoulder of the road and stopped their car near him. The officers then got out of the car and introduced themselves to the man. When asked, the man stated that his name was James French. Shortly thereafter, other officers arrived, and the man who had identified himself as James French was identified as actually being the defendant, Daron Leon Farmer. As a result of this and other information received at the scene of the officers' initial encounter with the defendant on Ellisboro Road, Lieutenant Forrest placed the defendant under arrest for the murder of Margaret Robinson.

Upon arresting the defendant, Lieutenant Forrest had him remove his shirt which was placed into an evidence bag. The defendant was then taken to the Guilford County Jail where photographs were taken of his face and upper body. Some of those photographs depicted the scratches on the defendant's face and material around his cuticles and fingernails. The remainder of the defendant's clothes were taken at that time and placed in an evidence bag. A forensic serologist tested the stains on the defendant's clothing and identified them as human blood of a type consistent with that of the victim. Tests on these samples were otherwise inconclusive.

James Gregory of the North Carolina State Bureau of Investigation testified as an expert in fingerprint identification. He and other officers discovered fourteen latent fingerprints and palmprints in the victim's home, including three prints on the bedroom window, seven prints near two doorways leading into the bedroom, a print on the refrigerator in the kitchen, a print on a Doritos cornchip bag found in the bedroom, and a print on the door molding in the doorway between the living room and bedroom. Only four of the latent prints at the scene were of value for identification purposes; those were the fingerprint discovered on the cornchip bag,

the fingerprint from the door molding in the doorway between the living room and the bedroom, and two palmprints. One of the palmprints was identified as definitely not having been made by the defendant's palm. In Gregory's expert opinion, the two fingerprints and the other palmprint were those of the defendant.

The State introduced other evidence at trial which is discussed at other points in this opinion where pertinent to the issues raised by the defendant. The defendant introduced no evidence.

[1] By his first assignment of error, the defendant contends that the trial court erred in denying his motion to suppress the State's physical evidence which he contends was obtained as a result of an unconstitutional seizure. The Fourth Amendment to the United States Constitution provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." At issue in this case is whether the defendant was "detained" or "seized" within the meaning of the Fourth Amendment, either when law enforcement officers initially encountered him on Ellisboro Road or when they questioned him there in their car. We conclude that he was not.

The defendant made a motion in the trial court to suppress the State's physical evidence, which included his fingerprints, clothes, photographs, and blood samples. He argues that the trial court was required to exclude such evidence because it was obtained after he was placed under arrest on the basis of information obtained during an unconstitutional seizure of his person. The defendant bases his argument on the authority of cases such as *Davis v. Mississippi*, 394 U.S. 721, 22 L. Ed. 2d 676 (1969); *Mapp v. Ohio*, 367 U.S. 643, 6 L. Ed. 2d 1081 (1961); *State v. Carter*, 322 N.C. 709, 712-14, 370 S.E.2d 553, 556-57 (1988); and *State v. Accor*, 277 N.C. 65, 81-84, 175 S.E.2d 583, 593-95 (1970).

The trial court conducted a *voir dire* hearing on the defendant's motion. Based upon substantial competent evidence, the trial court made extensive findings of fact. The trial court found, *inter alia*, that Lieutenant Roy T. Forrest of the Guilford County Sheriff's Department and Detective Sergeant Steve Shaver were involved in the investigation of the killing of Margaret Robinson. They talked to several individuals in the neighborhood who told them that Robinson had experienced problems with a young man named Daron Farmer who had been peeking into her windows and generally

cursing and harassing her during periods ranging from five years to two years prior to the date on which she was killed. The neighbors suggested that the officers' investigation begin with the defendant, Daron Farmer. One of the neighbors gave the officers a physical description of Farmer and directions to the mobile home in Rockingham County where he lived.

Lieutenant Forrest and Detective Sergeant Shaver proceeded along Ellisboro Road toward the defendant's home in Rockingham County. After entering Rockingham County, the officers observed an individual walking along the road approximately four and one-half miles from the crime scene and proceeding in a direction away from the crime scene. The individual they observed matched the physical description they had been given of Daron Farmer.

The trial court further found that:

> [U]pon observing the individual, and after having passed him on the Ellisboro Road, Lieutenant Forrest stopped the vehicle approximately 75 to 100 feet past the individual that had been observed walking; thereafter, backed up on the road and parked the vehicle approximately 20 feet ahead of and in front of the individual that had been observed walking on Ellisboro Road;
>
> That Lieutenant Forrest and Detective Sergeant Shaver thereafter exited the vehicle that they had been occupants of, and approached the individual walking on the road;
>
> That at the time they approached the individual, they displayed no weapons, were not in uniform;
>
> . . . .
>
> That after having exited the vehicle and upon approaching the individual that had been walking down Ellisboro Road, that Lieutenant Forrest identified himself as a detective with the sheriff's department by showing his badge and also introduced Detective Sergeant Shaver to the individual that had been walking;
>
> That Lieutenant Forrest and Detective Sergeant Shaver approached the individual to a point of approximately three to four feet;
>
> That Lieutenant Forrest asked the individual his name, and he gave the name of James French. He was then asked

where his home was, and he indicated about three and-a-half miles down the road away from Stokesdale [the crime scene] into Rockingham County;

That during these initial questions, both Lieutenant Forrest and Detective Shaver had the opportunity to observe the individual from a distance of approximately three to four feet; that Lieutenant Forrest observed what appeared to be a blood stain near the knee of the bluejeans; that he observed dark stains on his shirt; that in the left breast area of his shirt, he observed a brown material or substance which, in his opinion, was dried blood or tissue; that he observed four or five fresh scratches, two under his left eye, one under his right eye, one near the tip of his nose, and one on his neck; that these scratches were broad, pink and fresh, not dried or healed over; that he noticed dark brown stains around all of the cuticles of his fingers and under his nails and underneath his forearms; that he concluded those stains were dried blood, and that these observations were made while he was asking the individual where he was headed;

That Detective Sergeant Shaver observed a reddish substance underneath his arms from the elbow to the wrist; that he believed it to be dried blood. He based his belief, in part, on a smell which he sensed at that time. He also observed stains on the clothing of the individual; that he observed scratches on his face which he observed to be fresh with no scabs;

That thereafter, the individual who had identified himself as James French was asked where he spent the night, and he indicated at Timmie Tilley's which he indicated was near a Bi-Rite in Stokesdale; that Lieutenant Forrest knew that the Bi-Rite was less than a quarter of a mile from Ms. Robinson's house, based upon his earlier observations and knowledge.

Lieutenant Forrest asked the individual who had identified himself as James French how he had gotten blood on himself. The man responded that he and some others had killed and dressed a deer the night before.

The trial court further found that:

Lieutenant Forrest asked the individual if he would ride back to Stokesdale with him to confirm with Mr. Tilley concerning

the killing of the deer; that the individual who had identified himself as James French told them that he needed to go to his mother's, that she was expecting him. Lieutenant Forrest thereafter indicated that he would take the individual to his home first and it would not take long to go back to Stokesdale. The individual responded he needed to let his mother know where he was. Lieutenant Forrest again offered to take him home; that the individual made no verbal response thereafter;

That all of this encounter took place on the roadside of Ellisboro Road, in the daylight, on a public road, not in a vehicle; that no weapons were displayed during this encounter; that at no time during this encounter did Lieutenant Forrest or Detective Sergeant Shaver touch the individual who identified himself as James French in any way; that at no time did the individual ask if he was under arrest, nor did he ask if he could leave.

The trial court further found that the officers then stepped approximately twenty feet away from the defendant without indicating to him that he should stay where he was or in any other way indicating that he was not free to go. The officers talked briefly with each other and decided to have someone from the Rockingham County Sheriff's Department meet them there. They also decided to contact the Guilford County Sheriff's Department to determine whether they could obtain any further information about Daron Farmer.

The trial court found that the officers then

went back to the individual who had identified himself as James French and told him that they intended to call the Rockingham County Sheriff's Department. They asked him if he would mind waiting there until members of that department arrived, and the defendant indicated that he did not mind;

That Lieutenant Forrest then asked him if he wanted to sit in the car and wait. He said that he would;

That they then—they being the defendant and Lieutenant Forrest—approached the car; that Lieutenant Forrest opened the back right door; that the individual that had identified himself as James French then entered the vehicle on his own without being touched physically, and that the door to the

vehicle, the right rear door, which was entered by the individual, was left open;

That once in the vehicle, Lieutenant Forrest explained to the individual that he wanted to get some biographical information; asked for his full name, date of birth and address; that he was given the name of James Lee French, a date of birth of January 3, 1968, and an address of Route 1, Box 162-M Ellisboro Road, Stokesdale;

. . . .

That thereafter, within a few moments, information was received by radio from the detective division that . . . [Daron Farmer's] date of birth was January 3, 1968, the same as that given by the individual that identified himself as James French;

That no other conversation was had with the individual during this period; that as of this time, the individual that had been identified as James French was never told that he was under arrest or in custody; he was never told that he was not free to go; no weapons were displayed to him; no force was used in an attempt to restrain him; that he did not ask to leave; he did not ask whether he was under arrest;

That three to five minutes later, two officers from the Rockingham County Sheriff's Department arrived; that Lieutenant Forrest asked them if they knew the person in the car; that one of those officers indicated that he knew the individual and that it was Daron Leon Farmer. When asked how the officer from Rockingham County knew that it was Daron Leon Farmer, he responded by saying that Farmer was on probation for stealing a truck, and that he also knew his family;

That thereafter, after the individual had been identified as Daron Leon Farmer, that Lieutenant Forrest asked the defendant why he had lied about his name, and he said that he had lied because he was on probation about stealing a car in Stokes County;

That thereafter, Lieutenant Forrest received a call from Sergeant Powell of the Guilford County Sheriff's Department who had by then interviewed a Timmie Tilley; that Sergeant Powell related to Lieutenant Forrest that Mr. Tilley had told

him that Daron Farmer had left his, that is, Tilley's, house at approximately 8:30 p.m. on November 14, 1989, headed toward the area of Ms. Robinson's home; that he returned at approximately 11:00 p.m.; that when he returned, he had blood on his face and clothes, and even had blood in his ears;

That thereafter, Captain Shepherd arrived. Along with him were SBI Agents Ed Hunt and Frank Brown, and also Phillip Webster; that at that point, Lieutenant Forrest asked Daron Farmer to step out into the rear of the car; that he did so; that thereafter, Captain Shepherd exited his car, which also contained Phillip Webster, and told Lieutenant Forrest that Mr. Webster had said that the individual was Daron Leon Farmer;

That at that point, Daron Leon Farmer, the defendant, was placed under arrest for the murder of Margaret Robinson.

The trial court further found that after the defendant was placed under arrest for the murder of Margaret Robinson, his shirt was taken because Lieutenant Forrest had earlier noted what appeared to be gray hairs on the shirt. The defendant was then taken to the Guilford County Jail where he was advised of his constitutional rights and indicated that he wanted an attorney present prior to any questioning. As a result, no questions were asked of him, but his fingerprints were taken and photographs were taken of him.

Thereafter, Lieutenant Forrest prepared an application for issuance of a search warrant and a supporting affidavit which included the information obtained during the officers' encounter with the defendant on Ellisboro Road. Based upon the application and affidavit, a magistrate issued a search warrant. The warrant was served upon the defendant, and certain items of evidence were taken as a result, including finger scrapings, blood samples, and other items specified in the search warrant.

Based upon the foregoing and other findings, the trial court concluded:

That at the time the defendant was approached on Ellisboro Road by Lieutenant Forrest and Detective Sergeant Shaver, that the approach was not a seizure of the defendant; that the approach was in a non-threatening manner; that Lieutenant Forrest and Detective Sergeant Shaver had identified

themselves as law enforcement officers; that the conduct was inoffensive and was conduct between members of the public and the police that did not amount to a seizure of the person, and the Court relies upon Florida versus Royer, 460-U.S.—491, and United States versus Mendenhall, 446-U.S.-544;

That after having inquired of the individual that was approached on Ellisboro Road, after having inquired of his name and where he was heading, that the observations made by Lieutenant Forrest of the physical condition of the individual along with the information which he had previously obtained from Mr. Webster, Sergeant Shaver and other officers at the alleged crime scene, that Lieutenant Forrest had reasonable articulable suspicion that the individual that had been approached was Daron Leon Farmer, and that he had been involved in a criminal offense;

That even if Lieutenant Forrest did not have reasonable articulable suspicion at that point, there was no seizure; that a seizure occurred at its earliest point when the defendant was in the vehicle of Lieutenant Forrest and when he was asked why he had lied about his name;

That as of that point, in addition to the observations made of the physical condition of the individual, significant other information had been acquired which gave reasonable articulable suspicion to Lieutenant Forrest to constitutionally permit the seizure;

That any seizure that occurred prior to the arrest of the defendant was a mere investigative stop which would require only reasonable articulable suspicion, which reasonable articulable suspicion existed, as the Court has concluded, after the observations of the physical appearance of the individual stopped on Ellisboro Road;

That after receiving the information from Sergeant Powell, Lieutenant Forrest had probable cause for the arrest of the defendant.

Based on its findings and conclusions, the trial court denied the defendant's motion to suppress the items of evidence seized at the time of the defendant's arrest and during the later execution of the search warrant.

The defendant contends on appeal that he was "detained" or "seized" in violation of the Fourth Amendment when Lieutenant Forrest and Detective Sergeant Shaver approached him and made inquiries of him on Ellisboro Road, and that the trial court erred in its conclusions to the contrary and in its action in denying his motion to suppress. Therefore, the defendant contends under principles established in cases such as *Florida v. Royer*, 460 U.S. 491, 75 L. Ed. 2d 229 (1983), and *United States v. Mendenhall*, 446 U.S. 544, 64 L. Ed. 2d 497 (1980), that, even if his seizure or detention was only brief or temporary, it violated the Fourth Amendment because the officers did not have a reasonable, articulable suspicion that he had committed a crime. As we conclude upon the facts as found by the trial court that the defendant was never "seized" or "detained" in the constitutional sense at any time prior to being told he was under arrest, however, we find it unnecessary to address this question.

The trial court's findings of fact were supported by substantial evidence introduced during the hearing on the defendant's motion to suppress and, therefore, are binding upon this Court. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). The trial court's conclusions of law based upon those facts, however, are fully reviewable on appeal. *Id.* Therefore, we turn to applicable principles of law in reviewing those conclusions.

It is well established that

> [l]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. If there is no detention—no seizure within the mean-

ing of the Fourth Amendment—then no constitutional rights have been infringed.

Florida v. Royer, 460 U.S. at 497-98, 75 L. Ed. 2d at 236 (citations omitted). We conclude that the facts found by the trial court required its conclusion that the defendant Farmer was not "detained" or "seized" for Fourth Amendment purposes prior to being asked why he had lied about his identity. We further conclude that the facts found by the trial court compel the conclusion that the defendant was not "detained" or "seized" within the meaning of the Fourth Amendment until he was actually placed under arrest based on probable cause.

A person is "seized" for Fourth Amendment purposes

only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." United States v Martinez-Fuerte, 428 US 543, 554, 49 L Ed 2d 1116, 96 S Ct 3074. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

. . . .

[A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See Terry v Ohio, *supra*, at 19, n 16, 20 L Ed 2d 889, 88, S Ct 1868, 44 Ohio Ops 2d 383; Dunaway v New York, 442 US 200, 207, and n 6, 60 L Ed 2d 824, 99 S Ct 2248; 3 W. LaFave, Search and Seizure 53-55

(1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of the person.

United States v. Mendenhall, 446 U.S. at 553-55, 64 L. Ed. 2d at 509-10 (1980) (opinion of the Court by Stewart, J., joined by Rehnquist, J. (now C.J.), and joined in part by Burger, C.J., and Blackmun and Powell, JJ.).

On the facts found here by the trial court from substantial competent evidence, no "detention" or "seizure" of the defendant occurred in the present case prior to his being told that he was under arrest. *See id.* at 555, 64 L. Ed. 2d at 510. The defendant's encounter with the officers took place on a public street. The officers wore no uniforms and displayed no weapons. They did not summon the defendant into their presence, but instead approached him and identified themselves as law enforcement officers. They requested, but did not demand, information concerning the defendant's identity and place of residence and asked why he was covered with what appeared to be blood. They also asked him why he had given them a false name after it became apparent that he had done so. Such conduct, without more, was not an intrusion upon any constitutionally protected interest. *Id.* The defendant was not "seized," briefly or otherwise, in the constitutional sense simply by reason of the fact that the officers approached him and asked such questions. *Id.*

On the facts found by the trial court, we conclude that, prior to being told that he was under arrest, the defendant had no objective reason to believe that he was not free to end his encounter with the law enforcement officers and to proceed on his way. *Id.* Therefore, we conclude that, until he was formally placed under arrest, the defendant was not "detained" or "seized" within the meaning of the Fourth Amendment.

The defendant further contends under this assignment of error that he was seized in violation of Article I, section 20 of the Constitution of North Carolina and that physical evidence obtained as a result of that seizure must therefore be suppressed. "Our state constitution, like the Federal Constitution, requires the exclusion of evidence obtained by unreasonable search and seizure." *State v. Carter*, 322 N.C. 709, 712, 370 S.E.2d 553, 555 (1988). For reasons previously discussed herein concerning the applicability of the Fourth Amendment, we conclude that the defendant was

not "seized" within the meaning of the Constitution of North Carolina. *See generally State v. Bromfield*, 332 N.C. 24, 418 S.E.2d 491 (1992) (discussing controlling principles concerning seizure or involuntary detention within the meaning of our state constitution).

All of the physical evidence introduced at trial was seized incident to the defendant's arrest or seized thereafter upon the authority of the search warrant issued after his arrest. To be lawful, the defendant's warrantless arrest must be supported by probable cause. *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984). "A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon." *Id.* (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 686 (1974)). On the facts found by the trial court as previously set forth in this opinion, the officers clearly had probable cause for a warrantless arrest of the defendant at the time he was formally placed under arrest. The same information, submitted in the affidavit presented to the issuing magistrate, provided probable cause for the issuance of the search warrant. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984). Therefore, the seizure of physical evidence pursuant to the arrest of the defendant and pursuant to the search warrant later issued was lawful.

For the foregoing reasons, the trial court did not err in denying the defendant's motion to suppress the physical evidence in question. This assignment of error is without merit.

[2] In his next assignment of error, the defendant contends that the trial court erred by preventing him from cross-examining Michael Smith about the existence of a plan by the defendant to rape a woman in Stokesdale. On direct examination, Smith testified that the defendant had asked him to be a lookout while the defendant raped an elderly woman in Stokesdale. On cross-examination, the defendant attempted to minimize this testimony by showing that neither the defendant nor Smith was ever serious about the matter. However, when the defendant attempted to produce this evidence on cross, the trial court sustained the State's objection to some of the defendant's questions.

Assuming *arguendo* that the trial court erred in sustaining the objections to the defendant's questions, the error was harmless. A defendant is prejudiced by errors arising other than under the Constitution of the United States when there is a reasonable possibili-

ty that, had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988).

In the present case, the trial court sustained the State's objections to some of the defendant's questions regarding the seriousness of Smith and the defendant's plan to rape a woman in Stokesdale. However, the trial court also overruled some of the State's objections and allowed Smith to answer as evidenced by the following cross-examination:

Q. Michael [Smith], you did not have any plans to go out and rape anybody did you?

MR. GOODMAN: Objection.

COURT: Overruled.

A. No, sir.

Q. You did not have a plan to go and break into anybody's house?

A. No, sir.

Q. Was it your intention to break into anybody [sic] house?

A. No, sir.

COURT: Approach the Bench, counsel. (After consultation) Rephrase the question.

Q. Now Mr. Smith, you did not plan or intend in going along and being a look out for any crime that Daron Farmer may have told you about?

A. No, sir. Yes.

MR. GOODMAN: Objection.

COURT: Overruled.

Q. Sir?

A. Yes, sir.

Q. You were planning to go with Daron Farmer that night?

MR. GOODMAN: Objection, he answered that.

COURT: Overruled

A. Yes, sir.

Q. And you went down and waited for Daron to come and get you?

A. Yes, sir.

. . . .

Q. Now you did not think that you were going to rape anybody or break into a house if you went with Daron Farmer did you?

MR. GOODMAN: Objection.

A. Yes, sir.

COURT: Overruled.

Q. Did you think that you were going to rape somebody or be a look out?

A. No, sir.

The trial court did sustain the State's objections when the defendant asked Smith further questions, such as whether the defendant "was serious about" anything that was said during their conversations about going to rape anyone. However, the testimony Smith was allowed to give adequately permitted the defendant to introduce evidence as to whether Smith and the defendant were serious about any conversations they had concerning raping a woman in Stokesdale. Given the strength of the State's evidence against the defendant and the fact that the defendant was allowed to elicit testimony regarding the nature of his conversations with Smith about raping a woman in Stokesdale, we conclude that the trial court's decision to exclude similar testimony did not affect the outcome at trial. Therefore, the defendant has failed to carry his burden of showing a reasonable possibility that, but for the purported error in question, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Accordingly, this assignment of error is without merit.

[3] In his next assignment of error, the defendant contends that the trial court erred by admitting evidence of Betty Shields' written statement to Officer Ronald Washburn as corroborative evidence. Specifically, the defendant argues that the written statement Shields gave to Washburn did not corroborate her trial testimony but was inconsistent with such testimony.

In order to be admissible as corroborative evidence, a witness's prior consistent statements merely must tend to add weight or credibility to the witness's testimony. *State v. Harrison*, 328 N.C. 678, 682-83, 403 S.E.2d 301, 304 (1991). Further, it is well established that such corroborative evidence may contain new or additional facts when it tends to strengthen and add credibility to the testimony which it corroborates. *State v. Burton*, 322 N.C. 447, 450, 368 S.E.2d 630, 632 (1988). However, the witness's prior contradictory statements may not be admitted under the guise of corroborating his testimony. *State v. Ramey*, 318 N.C. 457, 469, 349 S.E.2d 566, 574 (1986).

At some point after his arrest, the defendant called his mother-in-law, Betty Shields. Shields testified at trial that the defendant had told her that he and Timmie Tilley were walking past Robinson's house and that Tilley wanted to break into the home. Shields also testified that the defendant had told her that he was "going through the closet" while Tilley was beating Robinson.

On 21 October 1990, Betty Shields gave a written statement to Officer Ronald Washburn regarding these same conversations that she had with the defendant. Evidence of that statement was accepted as evidence tending to corroborate Shields' trial testimony. In her written statement, Shields stated that the defendant had told her that he and Tilley were walking past Robinson's home when the defendant suggested that they break into Robinson's house. Shields also stated that the defendant had told her that while Tilley and Robinson were arguing, the defendant opened the door which led into the hallway and "started ransacking the place."

The defendant argues that Shields' written statement to Washburn contradicted her trial testimony and was, therefore, inadmissible as corroborative evidence. Assuming *arguendo* that Shields' written statement contradicted her trial testimony and was not corroborative, we conclude that its admission into evidence was harmless. N.C.G.S. § 15A-1443(a) (1988).

Shields testified that the defendant had told her that he and Tilley had broken into and entered Robinson's house by pushing in a window. Shields further testified that the defendant had told her that he was "going through" the closet while his accomplice Tilley was beating Robinson to death. This testimony supported an inference of concerted action between the defendant and Tilley. Such evidence, if believed by the jury, would have required convic-

tion of the defendant on a theory of concerted action, regardless of who first suggested breaking into the home. In light of the evidence already before the jury in the form of Shields' testimony, as well as other evidence adduced at trial, we conclude that the defendant has not met his burden of showing a reasonable possibility that a different result would have been reached at the trial had Shields' pretrial written statement been excluded. *Id.* This assignment of error is also without merit.

[4] In his next assignment of error, the defendant contends that the trial court erred by refusing to give his requested special jury instruction regarding factors relevant to premeditation and deliberation. In addition to the pattern instruction on premeditation and deliberation, the defendant requested the following instruction:

> Further, the fact that there are multiple wounds and the brutal circumstances of the killing are facts from which the jury could infer premeditation and deliberation. However, these facts, standing alone, are not sufficient for the jury to find premeditation and deliberation. You must look at all the facts and circumstances surrounding the killing and consider them jointly in making a decision. You must also consider what the defendant did prior to the killing and whether that conduct shows that he engaged in activity directed toward the killing. The mere fact that a killing was attended by much violence or that severe wounds were inflicted is not, in and of itself, determinative, as such a killing is as likely to have been on impulse.

The trial court denied the defendant's request and gave the following pattern instruction on premeditation and deliberation:

> Now, 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; the conduct of the defendant before, during and after the killing; threats and declarations of the defendant; use of grossly excessive force; infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; and the manner in which or the means by which the killing was done.

N.C.P.I. Crim. 206.10 (1989).

It is well established that if a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance. *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 606 (1988); *State v. Hooker*, 243 N.C. 429, 431, 90 S.E.2d 690, 691 (1956). The trial court gave the jury the pattern instruction stating in part that premeditation and deliberation are not usually susceptible of direct proof and may be proved by circumstances such as the use of grossly excessive force and the brutal circumstances of the killing. The defendant argues that the pattern instruction did not include his requested instruction, even in substance, because it did not instruct the jury that the mere existence of grossly excessive force or brutal circumstances would not, standing alone, be sufficient to support a finding of premeditation, as those factors are as likely to exist in an unpremeditated killing as in a premeditated and deliberate murder. To support this argument, the defendant relies upon cases such as *Alston v. United States*, 382 F.2d 129, 139 (D.C. Cir. 1967), which stated that

> [v]iolence and multiple wounds . . . cannot standing alone support an inference of . . . premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy.

We find it unnecessary to address or resolve the issue raised by the defendant in this assignment. In the present case, the jury returned a verdict expressly finding the defendant guilty of first-degree murder *both* under the felony murder theory *and* under the theory that the murder was committed with premeditation and deliberation. That being the case, it would not have been reversible error for the trial court to have failed to give any instructions concerning premeditation and deliberation. *See State v. Wall*, 304 N.C. 609, 620-21, 286 S.E.2d 68, 75 (1982). Therefore, even if the trial court erred in failing to give the defendant's requested special instruction, no prejudice resulted from the trial court's omission in this regard.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND CAROLINA TRACE CORPORATION, APPLICANT-APPELLEE v. PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR-APPELLANT

No. 385A91

(Filed 8 January 1993)

1. Utilities Commission § 35 (NCI3d)— water and sewer services—utility plant not currently used and useful—extraordinary expense retirement

The Utilities Commission erred by finding and concluding that an investment cost in physical plant that is not used and useful should be charged to expense and recovered through amortization as an extraordinary property retirement where CTC, a public utility providing water and sewer services in the Carolina Trace subdivision in Lee County, had constructed a sewer connection between its original wastewater treatment plant and the City of Sanford's plant to supplement CTC's plant; CTC constructed a new treatment plant and did not subsequently divert any sewage through the connection to Sanford; and CTC included the full cost of the connection in its rate base, contending that this was still plant that was used and useful. There is no evidence in the record that the connection has become obsolete, lost its usefulness, or otherwise reached a condition indicating that it has been or should be classified as retired plant. The designation of unused but usable physical plant as "property retirement" and treating it as "reasonable operating expenses" by allowing its amortization is simply to create a fiction within N.C.G.S. § 62-133(b) and denies the fundamental logic of the ratemaking formula. Clearly the construction of this sewer connection, unlike ongoing, "operating" expenses, was a one time capital investment that can be capitalized in the rate base when it becomes used in service to the public. Only such "operating expenses" which are incurred through the providing of service to the consuming public with property used and useful can be considered in the setting of rates for a utility.

Am Jur 2d, Public Utilities §§ 133, 138-139.

2. Utilities Commission § 32 (NCI3d)— water and sewer service— plant no longer used—extraordinary property retirement— unamortized balance included in rate base

The Utilities Commission, having erred by ordering that a currently unused connection to another sewage system be treated as extraordinary property retirement and amortized, further erred by directing that the unamortized balance be included in the rate base. The Commission has simultaneously treated the unused property as rate base and as reasonable operating expenses in direct violation of the ratemaking process.

Am Jur 2d, Public Utilities §§ 133, 138-139.

3. Utilities Commission § 35 (NCI3d)— water and sewer service— rate base—excess capacity

The Utilities Commission erred in its determination of the appropriate "capacity allowance" (reserve plant capacity for future growth) in the rate base of a portion of a new sewage treatment plant not presently in service but held for future use. The Commission was correct in rejecting the position of the Public Staff that a utility's plant investment in service capacity should be exactly equal to current customer demand, i.e., no capacity allowance. However, it was error for the Commission to accept the Division of Environmental Management's design criteria as the actual plant capacity currently needed and the beginning point for determining appropriate additional capacity allowance, rather than making its own determination upon the evidence before it. Furthermore, the Commission erred by changing its methodology and matching revenues from present customers with the cost of plant built to serve both present customers and additional future customers.

Am Jur 2d, Public Utilities §§ 133, 138-139.

On direct appeal as of right pursuant to N.C.G.S. §§ 62-90(d) and 7A-29(b) from a final order of the North Carolina Utilities Commission entered 31 May 1991 in Docket No. W-436, Sub 4. Heard in the Supreme Court on 10 March 1992.

Hunton & Williams, by Edward S. Finley, Jr., for applicant-appellee.

Public Staff Legal Division, by David T. Drooz, Staff Attorney, for intervenor-appellant.

LAKE, Justice.

This is a public utility general rate case on direct appeal by the Public Staff of the North Carolina Utilities Commission from a final decision of the Commission awarding an increase in rates to be charged by Carolina Trace Corporation (CTC) to the consuming public which it serves. The assignments of error raised present important, fundamental principles of ratemaking law and policy under the limited authority delegated to our Utilities Commission by the General Assembly pursuant to the Public Utilities Act, Chapter 62 of the General Statutes.

The basic question presented is whether a public utility company may lawfully recover, through rates charged its customers, either its investment cost in or a profit on its property which is not presently used or useful in its service to its customers, under the standards and requirements specified in the substantive, controlling ratemaking section of the Act, N.C.G.S. § 62-133(b). Specifically, the issues raised include: (1) whether the investment cost of utility plant that is not "used and useful" in the public service may be treated in effect as "reasonable operating expenses" and recovered in part through amortization; (2) whether the unamortized portion of such plant may be recovered, along with a return or profit thereon, by including such portion in the company's rate base; and (3) the appropriate capacity allowance in the rate base of plant which is not presently in service to the public but is held for future use.

The record reflects that on 28 June 1990 CTC, a public utility that provides water and sewer services in the Carolina Trace subdivision in Lee County, North Carolina, filed application with the Utilities Commission for increase in its rates for both its water and sewer operations. The Commission declared this a general rate case and scheduled the matter for evidentiary hearing which commenced on 14 November 1990 before a hearing examiner, whose recommended order approving rates was issued on 21 March 1991. The Public Staff appealed the recommended order to the full Commission which then issued the final order approving increased rates on 31 May 1991. The Public Staff filed exceptions and notice of appeal of this final order on 28 June 1991.

The first two issues raised relate to a contract between CTC and the City of Sanford and CTC's construction pursuant thereto of a sewer connection between its original wastewater treatment

plant and the City of Sanford's plant to supplement CTC's plant and system by use of Sanford's treatment capacity. This interconnection with Sanford was installed in 1983 at a net investment cost to CTC of $89,722. On 7 December 1989 CTC put a new wastewater treatment facility with a capacity of 325,000 gallons per day into operation. The old plant had a capacity of 150,000 gallons per day. After April of 1990 CTC treated all of its sewage at its new treatment plant and did not divert any sewage through the connection to Sanford. However, in its June 1990 application, CTC included the full cost of the connection in its rate base, contending this was still plant that was "used and useful" under the statute. The Public Staff contended this connection was at most plant held for future use and should be excluded from rate base. The Commission rejected both of these opposing contentions, with the hearing examiner holding the connection should be treated "as abandoned plant" and the Commission holding it should be treated as "extraordinary property retirement." Both held the cost should be amortized over a six-year period, with the unamortized balance included in rate base.

The third issue relates to how much of the cost of the *new* sewage treatment plant should be included in the rate base under the "used and useful" statutory standard. Although the CTC evidence showed that 281,160 gallons per day of capacity would meet the Division of Environmental Management design standards for existing customers, or 86.5% of the 325,000 gallons per day total capacity, CTC contended the entire cost of the new plant ($439,024) should be allowed in the rate base. The Public Staff contended that only 48% of the plant cost should go in the rate base because its evidence showed only 48% of the total capacity (155,000 gallons per day) was actually needed and used to serve existing customers. The hearing examiner added 15,344 gallons per day to the CTC evidence standard of 281,160 gallons by calculating a "reasonable capacity allowance of thirty-five percent" to conclude that 91.23% or $400,522 should go into rate base. The Commission in its final order found that a 281,160 gallon capacity was required to serve existing customers under design standards, and further found that a "capacity allowance" for future growth should be added. In determining the capacity allowance for future growth, the Commission concluded CTC had a 7% annual growth rate and that a two year planning horizon was reasonable. The Commission then calculated 39,362 gallons of margin should be added to the 281,160 deemed

necessary and useful capacity for existing customers, resulting in an allowance of 98.62%, or $432,967 of the $439,024 total cost, into the rate base.

I.

[1] In reviewing the propriety of the Commission's findings and conclusions, specifically its determination that an investment cost in physical plant that is not "used and useful" (and thus not includable in rate base) should be charged to expense and recovered through amortization as an "extraordinary property retirement," we consider whether the Commission's order is affected by errors of law and "whether there is substantial evidence, in view of the entire record, to support the position adopted." *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 484, 492, 385 S.E.2d 463, 467 (1989). With regard to the law "the Commission must . . . comply with the requirements of [N.C.G.S. Chapter 62], more specifically, G.S. 62-133." *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E.2d 705, 717 (1972). Upon such review, we find the classification of the physical plant here in question as "extraordinary property retirement" and subject to recovery through amortization, to be extraordinary indeed, as there is neither legal basis nor any fact or evidence to support it.

Turning first to the evidentiary record, CTC contended and offered testimony through its main witness that the connection was currently used and useful and that he expected it to be used in the near future. While the record as a whole shows abundant, substantial evidence that the sewer connection may be used and useful in the future, there is no evidence in the record that the connection has become obsolete, has lost its usefulness, or has otherwise reached a condition indicating it has been or should be classified as "retired plant." Both the record evidence and the detailed findings in the Commission's order itself expressly show the possible use or usefulness of this sewer connection in the future. The Commission's order in this regard held:

> The Commission concludes that the cost of the connection to Sanford should not be included in plant in service. The new treatment plant was built with some additional capacity that is not required for today's customers, and it has an equalization chamber that should be capable of smoothing peak flows. The connection to Sanford has not been used since April of 1990. There is no contractual basis and no clear certainty that

> Sanford will accept wastewater from Carolina Trace for treatment in the future. It is not reasonable that the customers of Carolina Trace should pay higher rates for this interconnection just so their utility can have a backup system that other utilities are able to exist without. It is possible that the connection to Sanford will be useful to Carolina Trace in some future year as the subdivision grows and as the City of Sanford becomes more able to take outside wastewater, but for the present the interconnection between Sanford and Carolina Trace is not used and useful to the ratepayers.
>
> There is no question, however, that the connection has been used and useful for utility service in the past. The connection was needed to supplement the capacity of the Company's then existing 150,000 gallons per day plant. The sewage for Carolina Trace could not have been treated in any other way. Although the Commission has found and concluded that the connection is no longer used and useful, the Commission is of the opinion that the connection should be treated as extraordinary property retirement and amortized over a six-year period, with the unamortized balance included in rate base. In this way the Company will be allowed to recover its investment in plant that at one time was used and useful to provide service. [Emphasis added.]

The Commission's conclusion that "the connection should be treated as extraordinary property retirement" is not supported by competent, material and substantial evidence in view of the entire record and, in fact, is inconsistent with its finding that "(i)t is possible that the connection to Sanford will be useful to Carolina Trace in some future year . . . ."

With respect to the legal basis, the designation of unused but usable physical plant as "property retirement" and treating it as "reasonable operating expenses" by allowing its amortization is simply to create a fiction within N.C.G.S. § 62-133(b). Any such treatment denies the fundamental logic of the ratemaking formula of N.C.G.S. § 62-133(b), including the obvious nexus between "reasonable operating expenses" and plant "used and useful" in providing service. Clearly the construction of this sewer connection, unlike on-going, "operating" expenses, was a one time capital investment that can be capitalized in the rate base when it becomes

used in service to the public. CTC, like any utility company, could have elected to employ this correct approach at any time since the 1983 completion of this plant investment by the relatively simple process of filing an application with the Commission.

The clear wording of N.C.G.S. § 62-133(b) requires the Commission to determine the utility's rate base (RB) (the reasonable cost of its property used and useful in service to the public, *less* accumulated depreciation plus reasonable cost of construction work in progress), its reasonable operating expenses (OE), and a fair rate of return on the company's capital investment (RR). These three components are then combined in a formula expressed as follows: (RB × RR) + OE = Revenue Requirements. "Operating expenses generally include costs for fuel, wages and salaries, and maintenance, as well as annual depreciation charges and taxes. . . . The rate of return is a percentage multiplier applied to the rate base to produce the amount of money the Commission concludes should be earned by the utility, over and above its reasonable operating expenses." *State ex rel. Utilities Commission v. Thornburg*, 325 N.C. 463, 467 n.2, 385 S.E.2d 451, 466 n.2 (1989). *See generally* C.F. Phillips, Jr., *The Regulation of Public Utilities* 332 and 229 (1984).

It is fundamental under our ratemaking statute and formula that the "reasonable operating expenses," specified in N.C.G.S. § 62-133(b)(3) and (5), relate and must be directly connected to "the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period," as specified in subsection (b)(1). N.C.G.S. § 62-133(b)(1) (1989). Only such "operating expenses" which are incurred through the providing of service to the consuming public with property "used and useful" can be considered in the setting of rates for a utility. *State ex rel. Utilities Comm. v. Nantahala Power & Light Co.*, 313 N.C. 614, 332 S.E.2d 397 (1985), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1987).

The relationship between "reasonable operating expenses" (N.C.G.S. § 62-133(b)(3)) and the rate base consisting of property which must be "used and useful" (N.C.G.S. § 62-133(b)(1)) is unequivocally established by the encompassing language of the last stage of the ratemaking process—subdivision (5) of the statute, which states:

> Fix such rates to be charged by the public utility as will earn in addition to reasonable operating expenses ascertained pursuant to subdivision (3) of this subsection the rate of return fixed pursuant to subdivisions (4) and (4a) on the cost of the public utility's property ascertained pursuant to subdivision (1).

N.C.G.S. § 62-133(b)(5) (1989).

Further, it is apparent that under the Commission's approach, in the event the sewer connection here involved does become used and useful in the future, CTC's current ratepayers will have already paid for "retirement" of this plant within seven years, a result certainly not intended or allowed under our law. The Commission's order must be reversed in this regard.

II.

[2] After finding the Sanford sewer connection to be "no longer used and useful" and concluding thereupon that it should be treated as extraordinary property retirement and amortized over a six-year period, the Commission then compounds this error of law by directing the "unamortized balance" to be "included in rate base." The Commission then states in its order: "In this way the Company will be allowed to recover its investment in plant that at one time was used and useful to provide service."

In actuality, "in this way" the Company will be allowed to recover substantially more than its investment in plant. Certainly, CTC will be allowed to recover (albeit improperly) through amortization its investment in this plant which is not used or useful, and, additionally, under the ratemaking formula, with this provision CTC will be able to earn the "rate of return" or profit allowed by the Commission on any portion of this unused plant that is included in the rate base. The Commission has simultaneously treated this unused property as rate base and reasonable operating expenses. This is a direct violation of the ratemaking process. There is no statutory authority anywhere within Chapter 62 that permits the Commission to include in rate base any completed plant (as opposed to construction work in progress) that is not "used and useful" within the meaning of this term as determined by our case law. This Court has stated with regard to N.C.G.S. § 62-133(b)(5):

> While this statute makes clear that the rates to be charged by the public utility allow a return on the cost of the utility's property which is used and useful within the meaning of N.C.G.S.

§ 62-133(b)(1), the statute permits recovery but no return on the reasonable operating expenses ascertained pursuant to subdivision (3).

State ex rel. Utilities Commission v. Thornburg, 325 N.C. at 475, 385 S.E.2d at 458 (emphasis added).

The Commission's order with respect to this provision must be reversed.

III.

[3] The third issue raised involves the determination of the appropriate "capacity allowance" (or reserve plant capacity for future growth) in the rate base of that portion of CTC's new treatment plant that is not presently in service but is held for future use. This issue (frequently referred to as a question of "excess capacity" in rate base) generally involves the striking of an appropriate balance between the rate burdens to be borne by current and future customers for that portion of the plant not presently used but allowed in the rate base as appropriate reserve for future growth. As always, our review of this issue on appeal is limited to whether the Commission correctly followed requisite guidelines specified in N.C.G.S. § 62-133(b) and based its determination on competent, material and substantial evidence in light of the entire record.

As noted above, there is a wide disparity in the positions of CTC and the Public Staff. CTC contends the entire cost of the new plant should be in the rate base even though only 86.5% of total capacity was needed to serve current customers under the Division of Environmental Management (DEM) design standards. The Public Staff contends only 48% should go into rate base since its evidence showed only 48% of total capacity was actually being used by current customers, its position being that under proper construction of the statute the capacity allowance should always be equal to the current customer demand. The Commission rejected, out of hand, this position of the Public Staff and adopted, as its starting point for current usage the design criteria of DEM, concluding that "[t]he design criteria of this State agency should be accorded great weight by the Commission in determining the amount of plant to be included in rate base." The Commission then adopted a methodology different from that used by the hearing examiner, and previously used by the Commission, to conclude

that CTC should be allowed virtually all of the new plant cost (98.62%) in the rate base.

At the outset, we agree the Commission was correct in rejecting as too rigid the position of the Public Staff that a utility's plant investment in service capacity should be exactly equal to current customer demand, i.e., no capacity allowance. The position of the Public Staff is not in accord with our previous decisions on this issue. Accordingly, we consider now the standards and methodology apparently employed by the Commission. The Commission, in support of its findings and conclusions, sets forth in its order portions of this Court's decision in *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E.2d 705, the leading case on ratemaking theory, particularly with respect to this issue. In speaking on this issue, Justice Lake, Sr. set forth the following relevant, fundamental principles:

> The question for determination in connection with an alleged overbuilding of the utility plant is whether the properties in question can be deemed "used and useful" in rendering the service, as of the end of the test period. If not, they may not properly be included in the rate base. G.S. 62-133; *Utilities Commission v. Morgan, Attorney General, supra*, at p. 268; *Utilities Commission v. Gas Co.*, 254 N.C. 536, 548, 119 S.E.2d 469. As the Supreme Court of Oregon said, in *Pacific Telephone & Telegraph Co. v. Wallace*, 158 Ore. 210, 231, 75 P.2d 942, 951:
>
> > "We are well satisfied that the company cannot include within its valuations property which it neither used nor was useful to the public service. Property which was not reasonably necessary to the adequate furnishing of telephone service must be excluded from the rate base."
>
> Similarly, in *St. Joseph Stockyards Co. v. United States*, 11 F. Supp. 322, 329 (W.D. Mo.), *aff'd*, 298 U.S. 38, 56 S. Ct. 720, 80 L. Ed. 1033, the Court said:
>
> > "The matter of including or excluding land or property held for business expansion in the rate base is the matter of who—the ratepayers or the company—shall carry property which is not being used to produce the service paid for by the rate. Obviously, it may be proper and good business judgment may sometimes dictate provision for future expansion of the business. It is equally clear

> that, so far as the present ratepayers are concerned, there must be a limit to the extent to which they can be compelled to pay for providing possible future facilities for future business. While a broad power and discretion must be left undisturbed in company management, yet, even as to expenditures directly entering into the present service for which the now customer pays, this discretion is not beyond control. [Citations omitted.] It would seem that such control should be much more extensive where the expenditure has no part whatsoever in furnishing the service paid for. In fact, the general doctrine is that the rate base is made up of values used in furnishing the service."

Justice Holmes, speaking for the Court in *San Diego Land & Town Co. v. Jasper*, 189 U.S. 439, 446, 23 S. Ct. 571, 47 L. Ed. 892, said:

> "If a plant is built * * * for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two-thirds of the contemplated number should pay a full return."

At the time he so spoke, the Supreme Court of the United States followed the view that the Federal Constitution required regulatory commissions to comply with the rule of *Smyth v. Ames*, 169 U.S. 466, 18 S. Ct. 418, 42 L. Ed. 819, from which G.S. 62-133 is derived.

Justice Cardozo, speaking for the Court in *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398, 407, 54 S. Ct. 763, 78 L. Ed. 1327, said:

> "[Certain gas leases purchased by the utility] ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits must be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future."

To the same effect are: *Cedar Rapids Gaslight Co. v. City of Cedar Rapids*, 144 Iowa 426, 120 N.W. 966, 969, and *Public Service Commission v. Montana-Dakota Utilities Co. (N.D.)*, 100 N.W.2d 140, 150.

> On the other hand, a public utility is under a present duty to anticipate, within reason, demands to be made upon it for service in the near future. *Idaho Underground Water Users Association v. Idaho Power Co.*, 89 Idaho 147, 404 P.2d 859; *Wisconsin Telephone Co. v. Public Service Commission*, 232 Wis. 274, 343, 287 N.W. 122. Substantial latitude must be allowed the directors of the utility in making the determination as to what plant is presently required to meet the service demand of the immediate future, since construction to meet such demand is time consuming and piecemeal construction programs are wasteful and not in the best interests of either the ratepayers or the stockholders. *Springfield v. Springfield Gas & Electric Co.*, 291 Ill. 209, 234, 125 N.E. 891, 901; *Latourneau v. Citizens' Utilities Co.*, 125 Vt. 38, 209 A.2d 307; *Pacific Telephone & Telegraph Co. v. Department of Public Service*, 19 Wash. 2d 200, 142 P.2d 498; *Wisconsin Telephone Co. v. Public Service Commission, supra*; 73 C.J.S., *Public Utilities*, 18a. However, Commission action deleting excess plant from the rate base is not precluded by a showing that present acquisition or construction is in the best interests of the stockholders. The present ratepayers may not be required to pay excessive rates for service to provide a return on property which will not be needed in providing utility service within the reasonable future.
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> . . . .
>
> The question of whether specific property is presently "used and useful" in rendering service is one of fact to be determined by the Commission upon competent and substantial evidence. *Southern New England Telephone Co. v. Public Utilities Commission*, 29 Conn. Super. 253, 282 A.2d 915, 919; *Latourneau v. Citizens Utilities Co., supra.* On this question, the burden of proof is upon the utility to show that the property should be included in its rate base, for it has the burden of showing that its proposed increase in rates is just and reasonable. G.S. 62-75; G.S. 62-134(c).

Utilities Comm. v. Telephone Co., 281 N.C. at 351-54, 189 S.E.2d at 726-28 (emphasis added).

While we have agreed with the Commission's rejection of the Public Staff's position of no capacity allowance or reserve for future

growth as being too restrictive and inconsistent with the above principles of ratemaking, we do not agree with the Commission's apparent carte blanche sanction of the design criteria of DEM as a substitute for its own determination of the actual current use capacity of the plant—the starting point for determining how much additional capacity allowance or reserve for future growth is appropriate as "used and useful" property in the rate base. Certainly the DEM's design criteria must not simply replace the Commission's own determination of "the amount of plant to be included in rate base."

While the opinions and criteria of the DEM, in terms of our environment, are indeed of great importance and should be considered by the Commission and even "accorded great weight" by any utility company management in the planning and operation of its business, the determination of what is required of a utility company or any company under law in terms of the environment is one thing, and the determination of what is required of a utility company under law in terms of rate base and ratemaking is quite another. The latter is the exclusive responsibility of the Utilities Commission.

> [T]he Legislature has conferred upon the Utilities Commission the power to police the operations of the utility company so as to require it to render service of good quality at charges which are reasonable. G.S. 62-31; G.S. 62-32; G.S. 62-130; and G.S. 62-131. These statutes confer upon the Commission, not upon this Court or the Court of Appeals, the authority to determine the adequacy of the utility's service and the rates to be charged therefor.

Utilities Comm. v. Telephone Co., 281 N.C. at 335-36, 189 S.E.2d at 717 (citations omitted).

Accordingly, we conclude it was error for the Commission to arbitrarily or subserviently accept, in place of its own determination upon the evidence before it, the DEM's design criteria of 281,160 gallons per day as the actual plant capacity currently needed for service to existing customers—and the beginning point for determining the appropriate additional "capacity allowance."

Further, we note the Commission, as it emphasizes in its order, has changed its methodology in this case from that previously employed (*State ex rel. Utilities Comm. v. Carolina Water Service*,

328 N.C. 299, 401 S.E.2d 353 (1991)) and employed in this case by the hearing examiner. The Commission states in its order:

> The Hearing Examiner in reaching his decision in this regard found and concluded that a plant capacity allowance of 35 percent of that portion of the design capacity of the Company's new wastewater treatment plant *not fully utilized in serving existing customers* at the end of the test year . . . [was] properly includable in determining the Company's cost of service . . . .
>
> However, the Commission believes that the proper allowance, based on the evidence in this case, for such required plant capacity is an amount equal to 14 percent of that portion of the subject plant facilities *that are being fully utilized in providing service to existing customers* as opposed to the allowance employed in the Recommended Order. This determination is based upon the Commission having concluded that in order to achieve economic efficiency certain plant facilities cannot be constructed on a piecemeal basis; . . . that a planning horizon of two years is appropriate for use in this proceeding for this purpose; . . . and that the inclusion of an allowance for such required plant capacity in determining the Company's cost of service or overall revenue requirement achieves the most propitious matching of revenues and costs . . . . [Emphasis added.]

This change in methodology appears to reflect an approach to matching of revenues and costs of plant in rate base different from that employed by the Commission in *State ex rel. Utilities Comm. v. Carolina Water Service*. In that case the Commission declined to allow a substantial portion of plant requested into rate base partially because the company failed to show how much revenue would be produced by the additional plant that became used and useful after the test period, resulting in a mismatch of historical revenues and costs of future plant. This Court in that case upheld the Commission's approach to matching stating:

> Matching requires that *future revenues* and expenses be matched with the part of the cost of a plant put in the rate base which is to *serve future customers*. Its purpose is to prevent *present customers* from paying for that portion of a plant that will serve only *future customers*.

State ex rel. Utilities Comm. v. Carolina Water Service, 328 N.C. at 304, 401 S.E.2d at 355 (emphasis added). The order in the instant case appears to match revenues from present customers with the cost of plant built to serve both present customers and additional future customers. Thus, the order in the case *sub judice* does not comport in this regard to approved practice and must be reversed and this case remanded for adjustment of revenues on a *pro forma* basis for whatever "capacity allowance" is then determined appropriate under the "used and useful" standard.

Accordingly, upon the foregoing as to each of the issues presented, the order of the Commission is reversed and this case is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

DANIEL ALEXANDER McGILL AND WIFE, JANIE McGILL v. DR. THOMAS N. FRENCH AND THE LAURINBURG SURGICAL CLINIC, P.A.

No. 108PA92

(Filed 8 January 1993)

1. **Negligence § 34 (NCI3d) — medical malpractice — failure to inform patient of cancer — submission of contributory negligence to jury**

The Court of Appeals erred in a medical malpractice action by holding that the trial court erred in submitting the issue of contributory negligence to the jury on the ground that the verdict of negligence could only have been based upon failure to inform plaintiff of his prostatic cancer, so that contributory negligence by plaintiff in not keeping appointments was impossible. The Court of Appeals failed to recognize that plaintiff alleged negligence in seven different respects and seriously contended and offered evidence in support of at least four of his contentions. The Court of Appeals erred in assuming that the particular act of negligence upon which the jury based its verdict was defendant's alleged failure to inform plaintiff of his cancer.

Am Jur 2d, Negligence §§ 1099-1103; Physicians, Surgeons and Other Healers § 263.

Medical malpractice: patient's failure to return, as directed, for examination or treatment as contributory negligence. 100 ALR3d 723.

Malpractice: failure of physician to notify patient of unfavorable diagnosis or test. 49 ALR3d 501.

Contributory negligence or assumption of risk as defense in action against physician or surgeon for malpractice. 50 ALR2d 1043.

2. **Negligence § 34.1 (NCI3d); Physicians, Surgeons, and Allied Professions § 17.1 (NCI3d)— medical malpractice—failure to inform patient of cancer—failure of patient to keep appointments—contributory negligence**

There was sufficient evidence to submit contributory negligence to the jury in a medical malpractice action where plaintiff alleged that defendant was negligent in not informing him of his prostate cancer; defendant contended that plaintiff was contributorily negligent in not keeping appointments; there was medical testimony that defendant met the appropriate standard of care by electing to observe plaintiff, as plaintiff was asymptomatic, and begin treatment when he experienced pain or other symptoms; there was evidence that plaintiff was experiencing symptoms but failed to contact defendant or to keep an appointment; there was expert testimony that the responsibility for the well-being of a patient is a shared responsibility between the patient and his physician; and there was testimony that the cancer does not spread as fast once treatment has begun. The proximate cause issue of contributory negligence does not necessarily or in all cases require medical expert testimony; the jury, based on its own knowledge and experience, could understand and determine that had plaintiff followed the advice of defendant and either returned for follow-up care or called, his treatment could have begun earlier and thus the rate of spread of his disease might have lessened.

Am Jur 2d, Negligence §§ 1099-1103; Physicians, Surgeons and Other Healers § 263.

Medical malpractice: patient's failure to return, as directed, for examination or treatment as contributory negligence. 100 ALR3d 723.

Malpractice: failure of physician to notify patient of unfavorable diagnosis or test. 49 ALR3d 501.

Contributory negligence or assumption of risk as defense in action against physician or surgeon for malpractice. 50 ALR2d 1043.

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of an unpublished decision of the Court of Appeals, 105 N.C. App. 246, 412 S.E.2d 700 (1992), finding error in the submission of the issue of contributory negligence to the jury by Clark, J., in Superior Court, Robeson County, on 29 August 1990 and remanding the case for a new trial on the issue of damages only. Heard in the Supreme Court 9 September 1992.

Britt & Britt, by William S. Britt, for plaintiff-appellees.

R. C. Carmichael, Jr., for defendant-appellants.

LAKE, Justice.

This is a medical malpractice case involving submission to the jury of the issue of plaintiff's contributory negligence, and whether the Court of Appeals, in holding the trial court should not have submitted the issue, erred in its analysis of the allegations and evidence of negligence and in its determination of the appropriate evidentiary standard for the requisite causal connection in establishing proximate cause. We conclude the Court of Appeals erred in both respects and, accordingly, reverse.

Plaintiffs filed a complaint against defendants[1] alleging that defendant, Dr. French, was negligent in, *inter alia*, diagnosing prostate cancer and not informing plaintiff-patient, Daniel Alexander McGill, or the referring physician, Dr. Woolfolk. Defendant filed an answer denying the allegations and alleging contributory negligence on the part of the plaintiff. The jury reached a verdict finding negligence on the part of defendant and also contributory negligence on the part of plaintiff, Mr. McGill. Plaintiff appealed, and the Court of Appeals held on two grounds that the trial court

1. When reference is made to the defendants, we will use "defendant" or "Dr. French," since plaintiffs' action against The Laurinburg Surgical Clinic is based solely upon plaintiffs' claim that the negligence of Dr. French is imputed to the defendant clinic. Likewise, we will refer to plaintiffs as "plaintiff" or "Mr. McGill."

erred in submitting the issue of contributory negligence to the jury and remanded the case for a new trial only on the issue of damages.

Prior to June 1982, plaintiff, Daniel McGill, was a patient of Dr. Donald Woolfolk, a physician specializing in internal medicine, who practices in Laurinburg, North Carolina. Dr. Woolfolk was treating Mr. McGill for lung problems. Mr. McGill, a farmer, had suffered from emphysema and two heart attacks prior to 1982. In June 1982, Dr. Woolfolk sent plaintiff to Dr. Thomas B. Barnett at the University of North Carolina School of Medicine at Chapel Hill for consultation regarding breathing problems. In a letter to Dr. Woolfolk, dated 25 June 1982, Dr. Barnett noted a prostatic enlargement with an elevation of Mr. McGill's serum acid phosphate level and recommended that he be seen by a urologist for further consultation.

Thereafter, Dr. Woolfolk referred Mr. McGill to defendant, Dr. French, a board certified urologist, who saw him on 2 July 1982. Dr. French noted an enlarged prostate and scheduled Mr. McGill for an intravenous pyelogram (I.V.P.) on 6 July 1982. This test showed mild prostatic enlargement. After receiving the results of the I.V.P., Dr. French testified that he tried unsuccessfully for several weeks to a month to get in touch with Mr. McGill in order to discuss the results with him.

Dr. French did not see Mr. McGill again until 26 August 1983, in the Scotland Memorial Hospital emergency room where Mr. McGill was seeking treatment for urinary retention. Mr. McGill remained in the hospital from 26 August 1983 until 1 September 1983. During the hospitalization, Dr. French performed a prostatectomy on Mr. McGill. In a pathology report dated 29 August 1983, the pathologist diagnosed prostatic cancer in the obtained specimen. Dr. French did not inform Mr. McGill of the diagnosis before Mr. McGill's release from the hospital on 1 September 1983 because, according to Dr. French, the diagnosis was not included in the medical chart at the time of Mr. McGill's discharge.

Mr. McGill returned for office visits with Dr. French on 16 September 1983 and 10 October 1983. During the 16 September office visit, Dr. French testified that for the first time he told Mr. McGill of the prostate cancer diagnosis. Dr. French testified he took ten to fifteen minutes to explain to Mr. McGill that he had a bad cancer of his prostate, that it was "on the more wildly

malignant end of the spectrum," that he was going to have trouble with it shortly, and that it was necessary to keep a close watch on him for the first sign of back pain or bone pain or any other type of difficulty he might have. Dr. French testified that he also explained to Mr. McGill that it was imperative that he return to the office to see the doctor promptly when asked. Dr. French did not undertake any treatment other than observation of Mr. McGill at or following the 16 September visit. Instead, Dr. French testified that he planned to offer either diethylstilbestrol (D.E.S.) or an orchiectomy if Mr. McGill had come back as he was told upon his first experience of pain or discomfort.

During the 16 September 1983 visit, an appointment for Mr. McGill was made for 17 October 1983. Mr. McGill saw Dr. French on 10 October 1983, earlier than his scheduled appointment, and he missed his 17 October appointment. On 10 October, Mr. McGill did not complain of any symptoms referable to his prostate cancer. Dr. French testified that he again sat down with Mr. McGill and had the same conversation he had with him during the September visit. He also told Mr. McGill that it did not matter in the course of the disease when he started treatment because it would not change his quality of life or his life expectancy since he was asymptomatic and in an advanced stage of carcinoma of the prostate. Dr. French thereafter scheduled Mr. McGill for an appointment on 11 January 1984, which Mr. McGill did not keep. Dr. French contends, and plaintiff controverts, that appointment cards or some kind of notice was sent to Mr. McGill after he missed his January appointment. Dr. French's nurse testified that in her thirty years experience at Laurinburg Surgical Clinic, it was her responsibility and practice in the relevant years of 1983 and 1984 to call a cancer patient several times a day if he missed an appointment and, in the event of no contact, she would send a postcard. She would then report to Dr. French the results of her efforts.

Mr. and Mrs. McGill both testified that Dr. French did not tell them at any time that he had made a diagnosis of prostatic cancer. Dr. French testified that he told Mr. McGill of the diagnosis on each office visit following the 29 August pathology report.

In June 1984, Mr. McGill experienced stomach pain and went to Dr. Woolfolk who hospitalized him on 20 June 1984. At that time, Dr. Woolfolk discovered that Mr. McGill had prostatic cancer which had been present since his hospitalization in August 1983.

Mr. and Mrs. McGill stated that this was the first time they were made aware of the 29 August 1983 diagnosis of prostatic cancer. In his deposition, Dr. Woolfolk stated that he was not aware of Mr. McGill's prostate cancer before the June 1984 hospitalization, at which time he rechecked the medical records of Scotland Memorial Hospital and found that Dr. French had noted in September 1983 that Mr. McGill had prostate cancer. Dr. Woolfolk further testified that when he told Mr. and Mrs. McGill, they were very surprised and shocked.

During the June 1984 hospitalization, Dr. Woolfolk called in Dr. French for consultation on 27 June 1984. At that time, Dr. French recommended starting Mr. McGill on estrogen therapy. Mrs. McGill stated that when she saw Dr. French as he was coming in for the consultation, she asked him why he did not tell them, and his answer was "well, it doesn't make any difference when you start treatment." Dr. French, in the capacity of consulting physician, then started Mr. McGill on D.E.S. and rocalcitrol and discharged him the next day. Mr. McGill was given a follow-up appointment with Dr. French the following month on 27 July 1984. Mr. McGill did not keep this appointment, and thereafter had no further contact with Dr. French.

Dr. Woolfolk referred Mr. McGill to Duke Hospital where a bilateral orchiectomy was performed by Dr. David F. Paulson in July 1984. It was noted in June 1984 that the cancer had spread to the bones. From 10 December 1984 to 24 January 1985, Mr. McGill was hospitalized in Moore County for the removal of two malignant tumors on his colon. He returned to Scotland Memorial Hospital with pneumonia on 30 January 1985 and stayed until 13 March 1985. Mr. McGill underwent a course of radiation treatment from 14 April 1986 through 18 June 1986 at Cape Fear Valley Hospital in Fayetteville by Dr. Hugh Bryan. He subsequently had several hospitalizations for pneumonia spanning the period from October 1986 to January 1990.

At the time of trial in August 1990, Mr. McGill was in very poor condition and testified by video deposition. The jury was also presented with a "Day in the Life" video of Mr. McGill. Mr. McGill died in January of 1991.

In reversing the trial court's entry of judgment on the verdict dismissing plaintiff's cause of action, on the ground that the trial court erred in submitting the issue of contributory negligence to

the jury, the Court of Appeals stated two reasons, and defendant appeals on those two grounds contending: (1) the Court of Appeals erred by determining, in disregard of the record, that the jury verdict could have been based *only* upon a finding of one of the several allegations of negligence; and (2) the Court of Appeals applied an inappropriate evidentiary standard, and there was sufficient, competent evidence from which the jury could conclude that plaintiff's negligence contributed to his injuries. We agree with defendant on both grounds, reverse the Court of Appeals, and order reinstatement of the judgment of the trial court.

[1] With respect to the first ground, the Court of Appeals presumed that defendant's negligence was based upon his failure to inform Mr. McGill of his prostatic cancer. The Court of Appeals then reasoned that since the jury answered the question of defendant's negligence affirmatively, on this basis, this indicated that plaintiff had no knowledge of his illness, and such circumstance would make contributory negligence on his part impossible. In ruling that the jury verdict of defendant's negligence was based *solely* upon the allegations and evidence that defendant, Dr. French, negligently failed to inform Mr. McGill of his prostatic cancer, the Court of Appeals failed to recognize that the plaintiff alleged negligence in *seven* different respects and seriously contended and offered evidence in support of at least four of his contentions that Dr. French was negligent. Thus, it was error for the Court of Appeals to presume to know upon which of the several acts of negligence the jury relied and found as a fact to exist.

The plaintiff alleged the following different acts of negligence by the defendant: (1) Dr. French failed to institute radiation therapy or other appropriate therapy in 1982; (2) Dr. French failed to notify the referring physician, Dr. Woolfolk, in 1982 that the plaintiff was suspected of having prostate cancer and had not come back to Dr. French; (3) Dr. French failed to tell the plaintiff of the diagnosis of the cancer in 1983; (4) Dr. French failed to institute radiation therapy or other appropriate therapy in 1983; (5) Dr. French failed to inform the plaintiff's physicians, Dr. Ball and Dr. Woolfolk, in 1983 of the diagnosis of cancer and failed to discuss with them his ability to undergo treatment and the determination of appropriate treatment; (6) Dr. French failed to monitor the plaintiff with diagnostic tests; and (7) Dr. French failed to inform Dr. Woolfolk that the plaintiff had not come in for follow-up treatment after he was known to have the cancer in 1983. In his charge

to the jury, the trial judge reviewed each of these seven contentions and instructed the jury that,

> [I]f you are satisfied by the greater weight of the evidence in this case that the defendant, Dr. French, in his care and treatment of the plaintiff, did fail to comply with the standard of health care required by law *in any one or more of the ways that I have explained to you*, . . . it would then be your duty to answer the first issue yes in favor of the plaintiff.

(Emphasis added.) The jury returned with a verdict finding defendant negligent and the plaintiff contributorily negligent.

Although allegation of negligence number three (3), the failure to inform the plaintiff, could have been the act of negligence upon which the jury relied, there was evidence to support other allegations of negligence, and it is evident that one or more of the other separate contentions, and the evidence relevant thereto, could have supported the jury's verdict as to defendant's negligence. Thus, the jury still could have found the defendant negligent even if it believed his testimony that he told Mr. McGill about the cancer.

We therefore hold that the Court of Appeals erred in assuming that the particular act of negligence upon which the jury based its verdict was defendant's alleged failure to inform the plaintiff of his cancer. Our holding is consistent with several prior decisions of this Court which though factually distinguishable nonetheless support the principle that a reviewing court cannot appropriately determine, absent clear showing of record, upon what basis a jury renders its verdict. *See Bittle v. Jarrell*, 270 N.C. 266, 154 S.E.2d 43 (1967) (where the word "defendant" was erroneously used instead of the word "plaintiff" in the judge's charge to the jury regarding contributory negligence, this Court ordered a new trial since it could not say with certainty what the jury's intention was in reaching a verdict in favor of plaintiff); *Barber v. Heeden*, 265 N.C. 682, 144 S.E.2d 886 (1965) (holding that where conflicting instructions regarding burden of proof are given, the Court cannot assume a jury possesses such discriminating knowledge of the law as to be able to disregard the incorrect instruction and accept the correct one); *In re Will of Shute*, 251 N.C. 697, 111 S.E.2d 851 (1960) (holding that where conflicting instructions are given, one erroneous and the other correct, a new trial must be granted, for the jury is not presumed to know which one is correct and this Court cannot

say that it did not follow the erroneous instruction). The defendant's first assignment of error is well founded.

[2] We next address the issue concerning the standard for determining whether there was sufficient, competent evidence to support a finding by the jury that plaintiff's failure to keep his appointments was a proximate cause of his injury. Relying on its prior decision in *Powell v. Shull*, 58 N.C. App. 68, 293 S.E.2d 259, *disc. rev. denied*, 306 N.C. 743, 295 S.E.2d 479 (1982), the Court of Appeals held that defendant failed to prove that the plaintiff's injuries were proximately caused by his own negligence. Concluding that the facts in the case *sub judice* are analogous to those in *Powell*, the Court of Appeals ruled that defendant presented no medical testimony showing a causal connection between Mr. McGill's missed appointments and his "illness," therefore no proximate cause was established, resulting in an erroneous submission of contributory negligence to the jury. We disagree.

Our first concern here is what the Court of Appeals meant by its use of the word "illness." The Court of Appeals seemed to focus on prostatic cancer as the illness in question. Clearly, the Court of Appeals is correct in stating that the failure of the plaintiff to keep his appointments after the cancer had been diagnosed did not proximately cause the cancer. However, it is more logical to focus on the *spread* or *rate of spread* of the previously diagnosed cancer as the "illness" or resulting injury, which is, from the actionable negligence standpoint in this case, what really debilitated plaintiff and shortened his life expectancy. Therefore, since the spread of cancer, not the contraction of it, is the illness or compensable injury which could be proximately caused by failure to keep appointments, we return to the substance of this issue.

In order for a contributory negligence issue to be presented to the jury, the defendant must show that plaintiff's injuries were proximately caused by his own negligence. N.C.G.S. § 1-139 (1983); *Powell*, 58 N.C. App. at 76, 293 S.E.2d at 264. The general rule in medical malpractice cases is that the plaintiff must establish proof of a causal connection between the negligence of the physician and the injury complained of by the testimony of medical experts. N.C.G.S. § 90-21.12 (1975); *Jackson v. Sanitarium*, 234 N.C. 222, 67 S.E.2d 57 (1951), *reh'g denied*, 235 N.C. 758, 69 S.E.2d 29 (1952); *Moore v. Reynolds*, 63 N.C. App. 160, 303 S.E.2d 839 (1983). The plaintiff in the case *sub judice* contends that the corollary of this

general principle is that the *defendant* also must offer proof of a causal relationship between the alleged acts of contributory negligence and the injury complained of by means of medical expert testimony. Although an exception to the general rule lies where the jury, based on its common knowledge and experience, can readily determine without expert assistance whether defendant proximately caused plaintiff's injuries, *Chapman v. Pollock*, 69 N.C. App. 588, 317 S.E.2d 726 (1984), plaintiff argues that the rate of spread of prostate cancer is not such that ordinary laypersons possess that information or knowledge. Plaintiff further contends that the defendant failed to offer any medical evidence that had Mr. McGill kept his appointments and returned to Dr. French, treatment could have begun earlier and the rate of spread of cancer might have been lessened.

We do not agree with the plaintiff that on the issue of contributory negligence, the defendant is required in all cases to present medical evidence of proximate causation. "It has never been the rule in this State . . . that expert testimony is needed in all medical malpractice cases to establish either the standard of care or proximate cause. Indeed, when the jury, based on its common knowledge and experience, is able to understand and judge the action of a physician or surgeon, expert testimony is not needed." *Powell*, 58 N.C. App. at 71, 293 S.E.2d at 261 (quoting *Smithers v. Collins*, 52 N.C. App. 255, 260, 278 S.E.2d 286, 289, *disc. rev. denied*, 303 N.C. 546, 281 S.E.2d 394 (1981)). Furthermore, once the standard of care is established, whether by expert or non-expert testimony, a doctor's departure from that standard may be shown by non-expert witnesses. *Powell*, 58 N.C. App. at 72, 293 S.E.2d at 261. As we have stated in *Jackson v. Sanitarium*:

> The courts generally recognize that the science of medicine is an experimental science and they have been extremely careful to protect physicians and surgeons against verdicts resting on non-expert testimony in those cases where non-expert testimony could constitute nothing more than mere conjecture or surmise . . . . Yet this Court has not and could not go so far as to say that in no event may a physician or surgeon be held liable for the results of his negligence unless the causal connection between the negligence and the injury or death be established by the testimony of a brother member of defendant's profession.
>
> . . . .

> . . . [I]n many instances proximate cause can be established only through the medium of expert testimony. There are others, however, where non-expert jurors of ordinary intelligence may draw their own inferences from the facts and circumstances shown in evidence.

Jackson, 234 N.C. at 226-27, 67 S.E.2d at 61-62.

The proximate cause issue of contributory negligence does not necessarily or in all cases require medical expert testimony. Since the standard of care by which the usual plaintiff is to be judged in medical malpractice cases is simply that of a person of ordinary prudence acting under the same or similar circumstances, in the case *sub judice* we are even more convinced that the jury, based on its own knowledge and experience, i.e., common sense, could understand and determine that had plaintiff followed the advice of defendant and either returned for follow-up care or called, his treatment could have begun earlier and thus the rate of spread of his disease might have lessened. Therefore, we conclude that medical expert testimony, although useful, is not required to show the causal connection between plaintiff's alleged contributory negligence and his injuries.

Applying the rule set forth above, we now must determine whether defendant met his burden. Although *Powell* addressed the same issue as in this case, e.g.—did the trial court err in submitting an issue of contributory negligence to the jury where the evidence was that the plaintiff missed one or more appointments with the defending physician—we find that the facts in *Powell* are distinguishable.

In *Powell*, the plaintiff alleged that her physician, Dr. Shull, negligently treated her between 17 April 1977 and 2 August 1977 for a fractured arm. According to the medical testimony at trial, there was a progressive slippage and an increase in displacement of the fracture. By 1 July 1977 (during the time of the alleged negligence), the displacement was probably 100% according to the testimony of the radiologist. Between 17 April and 1 August, the dates when the alleged negligence took place, the plaintiff kept all scheduled appointments. It was not until after 2 August 1977 that she failed to return to Dr. Shull's office or contact another doctor. The jury returned a verdict finding the defendant negligent and the plaintiff contributorily negligent. *Powell*, 58 N.C. App. at 69-70, 293 S.E.2d at 261. The Court of Appeals held that the

plaintiff's failure to keep her appointments did not proximately cause or even contribute to the injuries she received *prior to* 1 August 1977, and that there was no evidence that the degree of deformity in her arm as established by the 1 August x-rays would have been lessened by anything she did prior to or after 2 August 1977. *Id.* at 77, 293 S.E.2d at 264.

Several differences between the plaintiff's case in *Powell* and Mr. McGill's case distinguish the results. One critical difference is that unlike the plaintiff in *Powell*, Mr. McGill failed to keep his appointments during a crucial time of his illness. The evidence indicates, and the jury could have found that based on the testimony of two medical experts, Dr. Scholl and Dr. Paulson, Dr. French met the appropriate standard of care in 1983 by electing to observe Mr. McGill. Although he had the cancer, and the jury could have found that he had been informed of such, Mr. McGill was asymptomatic in September and October 1983, and it was Dr. French's plan to monitor him and then begin treatment by D.E.S. or orchiectomy at such time as Mr. McGill experienced pain or other symptoms. As demonstrated by the testimony of his daughter, Mr. McGill failed to contact Dr. French upon experiencing weight loss and weakness from the time he was discharged from the hospital in September 1983 until Christmas 1983. Moreover, his daughter further testified that from Christmas until June 1984 he was not as strong as he once was and could not do things that he once did without having to rest. Since there was evidence which tended to show that Mr. McGill was experiencing symptoms, yet he failed to contact Dr. French or keep his January 1984 appointment, the plaintiff effectively denied defendant the opportunity to treat plaintiff. Thus, whereas the plaintiff's injury in *Powell* was at its worst during a time when the plaintiff attended her scheduled appointments and nothing could have lessened the severity of her injury after that time, the jury found that Mr. McGill contributed to the worsening of his condition by failing to keep scheduled appointments after allegedly being told at least twice of the importance of so doing; and, most damaging of all, failing to contact Dr. French or any physician upon his first experience of symptoms.

In addition to the testimony of Dr. French himself, two expert witnesses for defendant and one expert witness for plaintiff testified in essence that the patient has an active responsibility for his own well-being. Dr. Paulson testified that the responsibility for the well-being of a patient is a shared responsibility between the

patient and his physician. Dr. Woolfolk testified that a patient has a responsibility for his own care and is responsible for return visits to his doctor. Dr. Scholl testified that a patient has a large responsibility for his own care including return visits for follow-up, which in this case were mandatory. He further testified that even if plaintiff had not known of his cancer, there would have been reasons for his return. Moreover, as testified to by Dr. Paulson, the cancer does not spread as fast once treatment has begun either by orchiectomy or by estrogen manipulation. Based upon this testimony, which was medical evidence, the jury could infer that had plaintiff returned as he was instructed, whether or not he even knew of the cancer, the cancer might not have spread as fast had Dr. French been given the opportunity to begin the treatment as he planned. Thus, the testimony of these experts, as well as Dr. French's testimony and other evidence indicating the condition of plaintiff's health, is sufficient evidence for a jury to find a causal connection between missing appointments and the spread or increased rate of spread of cancer.

Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the Superior Court, Robeson County for reinstatement of the judgment entered upon the verdict of the jury.

REVERSED AND REMANDED.

IN RE: FORECLOSURE OF DEED OF TRUST OF MICHAEL WEINMAN ASSOCIATES GENERAL PARTNERSHIP

No. 430A91

(Filed 8 January 1993)

1. Mortgages and Deeds of Trust § 25 (NCI3d) — foreclosure — deed of trust power of sale — authority of Clerk of Superior Court

The Clerk of Superior Court had the authority to determine who had legal title to property about to be foreclosed where Michael Weinman Associates General Partnership agreed to buy from North Mecklenburg Associates 402.67 acres, consisting of four parcels; North Mecklenburg financed a portion of the property, so that Weinman paid twenty-five percent

of the purchase price at closing and twenty-five percent at the end of each year following closing, plus interest; parcels representing approximately 25% of the land would be released from the deed of trust as the payments were made; Weinman made a payment at closing and North Mecklenburg released the first tract; Weinman made a second payment, which North Mecklenburg acknowledged, but the second tract was not released because the survey of the tract was not complete; Weinman failed to make the third payment; North Mecklenburg instituted foreclosure proceedings; the Clerk of Superior Court denied North Mecklenburg's authority to proceed with foreclosure under the power of sale in the Deed of Trust, finding that the trustee had failed to show that he had a right to foreclose on Tracts 2, 3, and 4; and the superior court denied the petition for commencement of foreclosure proceedings. The Clerk of Superior Court has the authority to determine who has legal title to property about to be foreclosed; in this case, by deciding whether North Mecklenburg should have released Tract 2 as security under the deed of trust. Although North Mecklenburg contended that the right to a release is not a proper legal defense and that the proper procedure for resolution of the dispute over the release should have been a separate action, N.C.G.S. § 45-21.16(d) provides a more appropriate process to resolve who is the equitable or legal owner of Tract 2 or any property sought to be sold under foreclosure.

Am Jur 2d, Mortgages § 552.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made. 41 ALR3d 7.

2. Mortgages and Deeds of Trust § 25 (NCI3d)— foreclosure—failure to pay ad valorem taxes—release of tract from deed of trust

A purchaser of land was denied its right to a release of a portion of the land from a deed of trust where a small portion of the ad valorem taxes was not paid. The purchaser, Weinman, had to be notified in writing of the nonpayment before foreclosure proceedings could begin. If Weinman is precluded from a release on Tract 2 because he is in default under the deed of trust, then the seller, North Mecklenburg,

is estopped from asserting this default by its own failure to abide by the Deed of Trust in giving written notice of the default.

Am Jur 2d, Mortgages § 552.

Construction of provision in real-estate mortgage, land contract, or other security instrument for release of separate parcels of land as payments are made. 41 ALR3d 7.

Appeal by petitioner as of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 103 N.C. App. 756, 407 S.E.2d 288 (1991), which affirmed a judgment entered for respondent by Griffin, J., at the 20 August 1990 Civil Session of Superior Court, Mecklenburg County. Heard in the Supreme Court 14 April 1992.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by John W. Ervin, Jr. and Robert C. Ervin, for petitioner-appellant.

Weinstein & Sturges, P.A., by L. Holmes Eleazer, Jr., Thomas D. Myrick and T. LaFontine Odom, for respondent-appellee.

LAKE, Justice.

This case arose upon an application to commence foreclosure pursuant to a power of sale in a deed of trust. It presents directly to this Court, as the essential issue, the extent of authority and responsibility of the Clerks of Superior Court in their consideration and determination of the four elements which must be found to exist under our power of sale foreclosure statute, N.C.G.S. § 45-21.16(d), before foreclosure may commence. The specific portion of the subsection involved in this case is element (iii) the "right to foreclose under the instrument." While this subject has been addressed peripherally, with some inconsistency over the years by the Court of Appeals since the enactment of N.C.G.S. § 45-21.16 in 1975, this issue has not heretofore been considered and determined by this Court.

On 19 June 1987, Michael Weinman Associates General Partnership (Weinman) and North Mecklenburg Associates executed a Contract of Sale in which Weinman agreed to buy from North Mecklenburg 402.67 acres consisting of Mecklenburg County tax parcels, 015-161-13, 015-161-14 and 23-031-08 for $1,409,345 or $3,500 per acre. The exact purchase price was to be adjusted based upon a survey to determine the actual acreage. The parties agreed in

the contract that if Weinman elected to have North Mecklenburg finance a portion of the property, North Mecklenburg would permit Weinman to make a payment of twenty-five percent of the final purchase price at the time of closing, and three successive payments of twenty-five percent at the end of each year following closing, plus accumulated interest at the time of each such payment. The contract further provided:

> Should this option be exercised, Buyer agrees to prepare a land use map showing the property being divided into four parcels with equal road frontage.
>
> One parcel representing approximately 25% of the land on one end of the property would be released at closing, and additional contiguous parcels would be released at one year intervals as payments outlined above are made.

Weinman elected to have North Mecklenburg finance a portion of the property in accordance with these provisions of the contract.

At the time of closing on 7 April 1988, North Mecklenburg conveyed to Weinman 399.449 acres by a deed recorded 8 April 1988. The finally determined purchase price of the property bought by Weinman from North Mecklenburg was $1,400,556.50. Upon receipt of the deed, on 7 April 1988, Weinman made a payment of $350,139.13, representing twenty-five percent of the purchase price, and executed and delivered to North Mecklenburg a promissory note in the amount of $1,050,417.37 for the balance of the purchase money, together with a purchase money deed of trust for the property securing said promissory note. Upon acceptance of the initial twenty-five percent payment, North Mecklenburg executed and delivered to Weinman a release of the first tract, Tract 1, from the Deed of Trust. A map of the approximately 400 acres and the areas designated for each subsequent release was agreed to at the time of closing. Tracts 2, 3 and 4 were to be released at the time of each subsequent annual payment. Each of the four tracts was designated in the original map as contiguous and equal in size. The Deed of Trust provided for the release of the remaining three-fourths acreage as follows:

> The Beneficiary agrees to release additional tracts of land from the Deed of Trust in direct proportion to principal payments made by the Grantor to the Beneficiary under the Promissory Note which is secured by this Deed of Trust. As to such Releases,

> the Grantor and the Beneficiary have agreed as follows: Approximately 100 acres of land shall be released on each of the principal payment dates, to wit, April 7, 1989, April 7, 1990, and April 7, 1991.

On 7 April 1989, pursuant to the Contract and the Deed of Trust, a second payment of $444,676.68 was made by Weinman to North Mecklenburg for Tract 2. This payment represented a principal payment of $350,139.12, plus accrued interest through 7 April 1989 amounting to $94,537.56. After making this payment, Weinman never received or was tendered a release of Tract 2, which under the terms of the contract and the Deed of Trust, was agreed to be released simultaneously with the second payment. North Mecklenburg acknowledged this payment by letter reading:

> Receipt is hereby acknowledged of Michael Weinman Associates General Partnership check no. 1019, dated April 6, 1989, payable to North Mecklenburg Associates, in the amount of $444,676.68, representing the first payment due as of today on the above referenced Promissory Note. It is understood and agreed that the said check represents a principal payment of $350,139.12 plus accrued interest at 9% on $1,050,417.37 through April 7, 1989, of $94,537.56.

Since the description and measurement of Tracts 2, 3 and 4 on the map had been approximations, a survey was required to obtain an exact description for the release document. Weinman had not completed the legal survey at the time it submitted the second payment. North Mecklenburg stated to Weinman in its letter that when the survey was completed, then Tract 2 would be released.

Weinman failed to make the third payment due 7 April 1990. Under the terms of the Promissory Note, North Mecklenburg notified Weinman by letter dated 23 April 1990 that the Note and Deed of Trust were in default for nonpayment of principal and interest. North Mecklenburg accelerated payment and had a substitute Trustee institute foreclosure proceedings under the power of sale contained in the Deed of Trust. The Notice of Hearing for Commencement of Foreclosure Proceedings stated that the default enabling foreclosure was the failure to make payments of principal and interest as required by the Note and Deed of Trust. Prior to the hearing before the Clerk of Court pursuant to N.C.G.S. § 45-21.16, Weinman presented to North Mecklenburg and the

Trustee a release for Tract 2. North Mecklenburg refused to release Tract 2.

On 28 June 1990, at the hearing before the Clerk of Superior Court, Mecklenburg County, the Clerk denied North Mecklenburg's application for authority to proceed with foreclosure under the power of sale in the Deed of Trust, finding the trustee had failed to show he had a right to foreclose on all three tracts, Tracts 2, 3 and 4. North Mecklenburg then appealed the Clerk's ruling to the superior court for a de novo hearing. On the morning prior to the hearing before the superior court, a representative of North Mecklenburg and its attorney checked the records of the Mecklenburg County tax office. They discovered that $1,739.61 of the 1988 ad valorem taxes on a small portion of the approximately 400 acres had not been paid. Before this discovery, neither Weinman nor North Mecklenburg knew of the omission. Ad valorem taxes for 1989 had been paid by Weinman.

The superior court denied North Mecklenburg's Petition For Commencement of Foreclosure Proceedings. The Court of Appeals subsequently affirmed the trial court, ruling that the Clerk of Superior Court and the superior court had the authority to consider the defense raised by Weinman that North Mecklenburg should have released Tract 2 from the Deed of Trust and, therefore, no longer had legal title to Tract 2.

A.

[1] North Mecklenburg assigns as error the trial court's denial of North Mecklenburg's authority to proceed under the terms of the Deed of Trust to conduct a sale pursuant to the provisions of N.C.G.S. § 45-21.1 to .33. North Mecklenburg contends that the Clerk of Superior Court had no authority to determine whether there should have been a release of Tract 2. Thus, the precise issue presented is whether evidence that property is no longer or should no longer be secured by a deed of trust qualifies as a defense which can be considered by the Clerk in making the four findings required by N.C.G.S. § 45-21.16(d).

In 1975, a three judge Federal District Court panel sitting in the Western District of North Carolina declared our Power of Sale Foreclosure Statute unconstitutional. *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975). After determining that there was state action in regards to the Fourteenth Amendment, the

court in *Turner* held that the then existing power of sale statute did not provide adequate notice and an opportunity to be heard under the United States Constitution. *Id.* The court ruled that actual notice to the mortgagor and an opportunity for the foreclosed party to be heard is required to satisfy the Due Process requirements under the Fourteenth Amendment. As a result of the *Turner* decision, our legislature amended the statute into what is now Chapter 45, Article 21, Section 16 effective 6 June 1975.

Our holding is consistent with the concerns of the court in *Turner*. To satisfy the requirement that the foreclosed party has the right to be heard, the Clerk of Superior Court should have the authority to determine who has legal title to property about to be foreclosed. In the case *sub judice*, that determination was made by deciding whether North Mecklenburg should have released Tract 2 as security under the Deed of Trust.

A power of sale is a contractual arrangement in a mortgage or a deed of trust which "confer[s] upon the trustee or mortgagee the 'power' to sell the real property mortgaged without any order of court in the event of a default." James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 281, at 331 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 3d ed. 1988). The parties have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy to foreclose. "A power of sale provision in a deed of trust is a means of avoiding lengthy and costly foreclosures by action." *In re Watts*, 38 N.C. App. 90, 94, 247 S.E.2d 427, 429 (1978); *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975). N.C.G.S. § 45-21.16(d) provides the elements parties must prove before the Clerk of Superior Court to have their application for foreclosure granted. N.C.G.S. § 45-21.16(d) provides:

> The hearing provided by this section shall be held before the clerk of court in the county where the land, or any portion thereof, is situated. Upon such hearing, the clerk shall consider the evidence of the parties and may consider, in addition to other forms of evidence required or permitted by law, affidavits and certified copies of documents. If the clerk finds the existence of (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, and (iv) notice to those entitled to such under subsection (b), then the clerk shall authorize the mortgagee or trustee

> to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

N.C.G.S. § 45-21.16(d) (1991).

Judge (now Justice) Whichard writing for the Court of Appeals stated that "[l]egal defenses which negate any of these requisite findings [(the four factors set out in N.C.G.S. § 45-21.16)] are properly considered at this hearing. . . .[T]o preclude presentation of legal defenses to the four requisites to authorization of sale would render the hearing provided by this statute a largely purposeless formality." *In re Foreclosure of Deed of Trust*, 55 N.C. App. 373, 375-376, 285 S.E.2d 615, 616, *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982). It is our conclusion that determining which property is legally secured by a deed of trust is a proper issue and element of proof before the Clerk of Superior Court. Therefore, if a party contends that the property is not secured, or should no longer be secured by the deed of trust, then such contention may be raised as a defense to the four requisite findings under N.C.G.S. § 45-21.16(d).

In the case *sub judice*, only element (iii), a "right to foreclose under the instrument," is in dispute. North Mecklenburg contends that a "right to foreclose under the instrument" should be read narrowly so that if a deed of trust simply contains the requisite wording constituting a power of sale in the event of a default then there is per se a "right to foreclose under the instrument." We disagree. This Court has previously held that foreclosure under a power of sale in a mortgage is "not favored in the law, and its exercise by the mortgagee 'will be watched with jealousy.' " *Spain v. Hines*, 214 N.C. 432, 435, 200 S.E. 25, 28 (1938) (*quoting* 41 C.J. *Mortgages* § 1342, at 924 (1926)). North Carolina case law also requires that "[d]oubts as to the interpretation of the statutes should be resolved not in favor of the unrestricted power of the trustee or the automatic loss of equitable title, but in favor of preserving the equitable title of the mortgagor." *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 316, 344 S.E.2d 555, 559, *disc. rev. denied*, 318 N.C. 284, 348 S.E.2d 344 (1986); *Spain v. Hines*, 214 N.C. 432, 200 S.E. 25. In order for a trustee under a Deed of Trust to have any right to foreclose on a parcel of land, the Deed of Trust must encompass the subject property as security for the debt owed by the mortgagor.

Weinman has conceded during all stages of this action that North Mecklenburg has a right to foreclose on Tracts 3 and 4. Weinman never made payment on either of these tracts of land. In fact, prior to the foreclosure hearing on 28 June 1990, Weinman presented a Deed in Lieu of Foreclosure to North Mecklenburg. This tendered Deed conveyed the approximately 200 acres comprising Tracts 3 and 4. North Mecklenburg refused to accept the tendered Deed in Lieu Of Foreclosure.

Weinman contends that a default on Tracts 3 and 4 does not authorize North Mecklenburg to refuse to release Tract 2 and to proceed to include Tract 2 in the foreclosure. We agree. On 7 April 1989, Weinman made full payment on Tract 2. North Mecklenburg sent Weinman a letter on that same date acknowledging "that Michael Weinman Associates General Partnership, is entitled to have an acreage tract of land released from the above Deed of Trust in accordance with the understanding reached at the closing of this transaction one year ago." Because survey work on the land had not been completed, North Mecklenburg did not issue a release but further stated in its letter "[w]e agree to execute a Release containing such a proper legal description promptly upon presentation to us." Weinman, on the day of the foreclosure hearing before the Assistant Clerk of Superior Court, presented to North Mecklenburg such a release to Tract 2. North Mecklenburg, notwithstanding its statement in its letter, the agreement and Deed of Trust, and its acceptance of full payment for Tract 2, nevertheless refused to execute the release.

North Mecklenburg contends that the Clerk of Superior Court and the court on appeal de novo do not have the authority to consider and determine whether North Mecklenburg should or should not have issued a release to Tract 2, or whether it had the legal "right to foreclose under the instrument" on Tract 2, along with Tracts 3 and 4. North Mecklenburg asserts that whether Weinman is or is not entitled to a release of the second tract does not negate the "right to foreclose" on the remaining property in the third and fourth tracts. North Mecklenburg further states that the issue with respect to the entitlement to a release of the second tract is not a proper legal defense since it does not negate the right to foreclose element under N.C.G.S. § 45-21.16(d)(iii). It asserts that only legal defenses that negate one or more of the four elements required under N.C.G.S. § 45-21.16(d) may be asserted and considered at the hearing before the Clerk. North Mecklenburg con-

tends, for example, that a legal defense would exist if the Deed of Trust or Promissory Note did not contain a power of sale provision. North Mecklenburg contends that the right to a release is not a proper legal defense. Furthermore, North Mecklenburg argues that the proper procedure for resolution of the dispute over the release should have been in a separate action to enjoin the foreclosure pursuant to N.C.G.S. § 45-21.34.

For reasons of judicial economy and efficient resolution of disputes, we hold that N.C.G.S. § 45-21.16(d) provides a more appropriate process to resolve who truly is the equitable or legal owner of Tract 2 or any property sought to be sold under foreclosure. The "right to foreclose under the instrument" is more than a mere recitation of words specifying a power of sale. The Clerk of Court must decide whether the person given the power of sale under the Deed of Trust has a "right to foreclose under the instrument." In making this determination, the Clerk must decide, as was correctly decided in the instant case, who is the equitable or legal owner of Tract 2. It would be inefficient and an unnecessarily burdensome requirement for parties to have to file a subsequent action in the superior court to decide whether the land being foreclosed upon is secured by the Deed of Trust after the parties have already appeared before the Clerk of Court. We do not see the Clerk of Court in a preforeclosure hearing performing a mere perfunctory role. *Turner v. Blackburn*, 389 F. Supp. 1250, 1257 (W.D.N.C. 1975). While the parties are before the Clerk of Court, the Clerk should have the authority to determine not only whether there is a power of sale in the Deed of Trust, but also whether the property sought to be sold under foreclosure is still legally secured by the Deed of Trust. The same statute already provides a mechanism for appeal de novo in cases where the non-prevailing party believes the Clerk's decision is erroneous, in the event such party feels sufficiently aggrieved.

B.

[2] An ancillary issue raised by this appeal is whether the failure to pay a small portion of the 1988 ad valorem property taxes defeats Weinman's right to a release of Tract 2. North Mecklenburg's contention is that the Deed of Trust requires the payment of taxes within thirty days after they accrue. A small portion of those taxes was not paid within that time in 1988. Thus, North Mecklenburg asserts at a time prior to the date for making the second release

payment, the Deed of Trust was in default. Weinman's making of a timely release payment in April of 1989 did nothing to cure the default under the Deed of Trust for nonpayment of taxes; albeit, none of the parties were aware of the partial nonpayment of taxes. Moreover, North Mecklenburg contends, the nonpayment of taxes constituting default under the Deed of Trust precluded release of Tract 2 under the partial release provisions of the Deed of Trust whether at the April 1989 release payment date or any time thereafter. Thus, according to this argument, when default in the April 1990 payment occurred, North Mecklenburg was entitled to foreclose on all unreleased tracts.

At the outset, it is worth mentioning that neither party had knowledge of the omission of the payment of taxes until after the Clerk of Superior Court had made the determination and before the superior court heard the case. The superior court and Court of Appeals, vested with the knowledge of the nonpayment of a portion of the 1988 property taxes, still ruled that Weinman was entitled to a release on Tract 2, thereby denying North Mecklenburg's petition for foreclosure on Tract 2.

In the Deed of Trust Weinman covenanted as follows:

> 2. TAXES, ASSESSMENTS, CHARGES. Grantor shall pay all taxes, assessments and charges as may be lawfully levied against said Premises within thirty (30) days after the same shall become due. In the event that Grantor fails to so pay all taxes, assessments and charges as herein required, then Beneficiary, at his option, may pay the same and the amounts so paid shall be added to the principal of the Note secured by this Deed of Trust, and shall be due and payable upon demand of Beneficiary.

Weinman does not dispute that he failed to pay this portion of the 1988 property taxes within the thirty day provision under the Deed of Trust. Likewise, North Mecklenburg did not opt for paying the taxes and adding the amount to the total sum owed by Weinman. As stated, neither party knew of the omission.

The Deed of Trust further contains the following provision:

> If, however, there shall be any default (a) in the payment of any sums due under the Note, this Deed of Trust or any other instrument securing the Note and such default is not

> cured within ten (10) days from the due date; or (b) if there shall be default in any of the other covenants, terms or conditions of the Note secured hereby, or any failure or neglect to comply with the covenants, terms or conditions contained in this Deed of Trust or any other instrument securing the Note and such default is not cured *within fifteen (15) days after written notice*, then and in any such events, without further notice, it shall be lawful for and the duty of the Trustee, upon request of the Beneficiary, to sell the land herein conveyed at public auction . . . . (Emphasis added.)

Before foreclosure proceedings could begin on Tract 2 for nonpayment of property taxes, according to the contract, Weinman had to be notified in writing of the nonpayment and afterward he had fifteen days to cure the default. Since Weinman promptly fulfilled his obligation of payment for Tract 2 before he was ever notified he was in default for nonpayment of taxes, the partial release provision does not come into play. It is at the time he is given written notice that the default permits foreclosure, not beginning in October 1988 when the taxes were due. If, as North Mecklenburg contends, Weinman is precluded from a release on Tract 2 because he is in default under paragraph 2 of the Deed of Trust, then North Mecklenburg is estopped from asserting this default by its own failure to abide by the Deed of Trust in giving written notice of the default. We conclude that Weinman is not denied its right to a release of Tract 2 for failure to pay a small portion of the 1988 ad valorem property taxes.

The determination of whether Weinman is entitled to a release is one of the types of "uncomplicated matters that lend themselves to documentary proof . . . ." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 40 L. Ed. 2d 406, 415 (1974). The Clerk of Court has the ability and the authority to make this type of decision. We recognize that N.C.G.S. § 45-21.34 exists as a means of extraordinary injunctive relief. Our decision does not impair or modify that right to relief. Our decision rests upon the conclusion that the issue of whether the release should have been granted is a type of defense that under our law should be determined by the Clerk of Court, with such determination subject to de novo review by the superior court in the event the party failing to prevail before the Clerk feels sufficiently aggrieved.

Accordingly, the decision of the Court of Appeals is

AFFIRMED.

DONALD RAY PENDERGRASS AND SARAH PERRY PENDERGRASS v. CARD CARE, INC.; CARROLL H. GIBSON; KEITH LAKE; AND TEXFI INDUSTRIES, INC.

No. 335PA91

(Filed 8 January 1993)

1. **Master and Servant § 89.1 (NCI3d) — workers' compensation — exclusivity rule — fellow employees — no willful, wanton, or reckless negligence**

Defendants Gibson and Lake's motion to dismiss was properly allowed in a negligence action arising from an injury received by plaintiff when his arm was caught in a textile machine which had unguarded pinch-points. Plaintiff alleged that Gibson and Lake were grossly and wantonly negligent in directing him to work at the machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards; however, the negligence alleged does not support a claim independently of the Workers' Compensation Act. Although they may have known that certain dangerous parts of the machine were unguarded when they instructed plaintiff to work at the machine, this does not support an inference that they intended that plaintiff be injured or that they were manifestly indifferent to the consequences of his doing so.

Am Jur 2d, Negligence §§ 286-289; Workers' Compensation §§ 62, 64, 75, 79-80.

Willful, wanton, or reckless conduct of coemployee as ground of liability despite bar of workers' compensation law. 57 ALR4th 888.

What conduct is willful, intentional, or deliberate within workmen's compensation act provision authorizing tort action for such conduct. 96 ALR3d 1064.

2. Master and Servant § 87 (NCI3d)— workers' compensation—negligence action—dual capacity of employer

A negligence claim against defendant Texfi was properly dismissed where a plaintiff injured when his arm was caught in a textile machine brought a negligence rather than a workers' compensation claim, contending that Texfi was acting in a dual capacity as the textile manufacturer for whom plaintiff worked and as a manufacturer of textile machinery when it modified the machine in which plaintiff was injured. If there is a dual capacity doctrine which allows a claim when an employer is acting in a capacity other than the business for which a person is employed, it does not apply in this case because Texfi modified the machine as part of its engagement in the textile business.

Am Jur 2d, Workers' Compensation § 67.

Modern status: "dual capacity doctrine" as basis for employee's recovery from employer in tort. 23 ALR4th 1151.

3. Master and Servant § 87 (NCI3d)— workers' compensation—negligence action—no claim under Woodson

Plaintiffs did not have a claim under *Woodson v. Rowland*, 329 N.C. 330, where plaintiff Ray Pendergrass was injured when his arm was caught in a textile machine with unguarded pinch-points where the negligence does not rise to the higher level of substantial certainty of injury as defined in *Woodson*.

Am Jur 2d, Workers' Compensation § 75.

4. Partnership § 9 (NCI3d)— negligence—worker injured in machine—machine owned by corporation—incorporated after accident occurred—mere continuation rule

The mere continuation of business rule did not apply to a negligence action by a plaintiff injured by a textile machine where defendant Card Care was not incorporated until after the accident occurred, the entity which sold the machine to the textile manufacturer was a partnership, the principals in the partnership formed a corporation, Card Care, which continued the business in which the partnership had been engaged, and it is undisputed that the members of the partnership had no knowledge of the accident at the time Card Care was incorporated. Assuming the mere continuation rule would apply as to corporations, it should not apply to this transfer

of the assets of a partnership because, when a partnership transfers its assets, the partners remain liable.

Am Jur 2d, Partnership §§ 841, 890.

5. **Partnership § 9 (NCI3d)— worker injured in textile machine—machine manufactured by partnership—liability of corporate successor**

Card Care, Inc. was not liable under N.C.G.S. § 59-71(d) for an injury suffered by plaintiff Ray Pendergrass in a textile machine manufactured by a partnership which was the predecessor of Card Care. Although N.C.G.S. § 59-71(d) provides that creditors of the dissolved partnership are creditors of the person or partnership continuing the business when all of a partnerships's assets are assigned and the person or persons to whom the assignment is made promise to pay the assigning partnership's debts and continue the business of the dissolved partnership, Card Care did not promise to pay the creditors of the dissolved partnership.

Am Jur 2d, Corporations §§ 53-54; Partnership §§ 917, 920.

6. **Fraudulent Conveyances § 39 (NCI4th)— transfer of partnership assets to successor corporation—liability of corporation for negligence claim—bulk transfer without notice to plaintiff**

Defendant Card Care, Inc. was not liable under the Bulk Sales Act for an injury received in a machine manufactured by the partnership which preceded it where plaintiffs argue that Card Care is liable because it did not provide the required notice to creditors and that the transfer is therefore void. N.C.G.S. § 25-6-195 provides that notice of the transfer must be sent to all creditors known to the transferee, but here the transferee had no knowledge at the time of the transfer that the plaintiffs were asserting a claim against the partnership.

Am Jur 2d, Fraudulent Conveyances §§ 267-270.

Bulk transfers: construction and effect of UCC Article 6, dealing with transfers in bulk. 47 ALR3d 1114.

Character or class of creditors within contemplation of Bulk Sales Law. 85 ALR2d 1211.

On discretionary review of the decision of the Court of Appeals, in an unpublished opinion, 103 N.C. App. 526, 407 S.E.2d

624 (1991), affirming judgments by Winberry, J., at the 10 April 1989 term of Superior Court, Nash County and by Butterfield, J., at the 27 July 1990 term of Superior Court, Nash County. Heard in the Supreme Court 13 May 1992.

This action grew from an accident in which the plaintiff, Donald Ray Pendergrass, received serious injury when his arm was caught in a final inspection machine which he was operating as an employee of Texfi on the premises of Texfi. The plaintiffs alleged that the defendant Card Care was the manufacturer of the machine and was negligent in several ways in the manufacture and distribution of the machine, which negligence was a proximate cause of Mr. Pendergrass' injury. The plaintiffs also alleged a breach of warranty by Card Care, a strict liability for Card Care based on the unreasonably dangerous and defective condition of the machine and absolute liability based upon the allegation that the machine was a dangerous instrumentality.

The plaintiffs alleged that defendants Carroll Gibson and Keith Lake, employees of defendant Texfi Industries, were grossly and wantonly negligent and their negligence was imputed to their employer Texfi. They alleged that the gross and wanton negligence consisted of designing a final inspection machine which had latent defects and would be used with a textile machine in which safety devices, including necessary guards had not been made available, permitting the use of the machine which they knew contained improper and hazardous pinch-points without required guarding, designing and constructing a machine which had unguarded pinch-points in violation of OSHA requirements and industry standards. The plaintiffs alleged these negligent acts were proximate causes of the injury to Mr. Pendergrass.

The plaintiffs also alleged that the defendants Gibson, Lake, and Texfi are liable to the plaintiffs under the doctrine of dual capacity because they acted as manufacturer and designer of the machine. Sarah Perry Pendergrass asserted a claim for loss of consortium. Both plaintiffs prayed for punitive damages.

The defendants Gibson, Lake, and Texfi moved to dismiss the action pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). The defendant Card Care, Inc. made a motion for summary judgment pursuant to N.C.G.S. § 1A-1, Rule 56. The materials filed in support of the motion for summary judgment showed that Card Care was incor-

porated on 31 December 1987, which was after the accident in this case had occurred. The entity that dealt with Texfi was a partnership.

The superior court allowed the motions of all the defendants and dismissed the action. The plaintiffs appealed to the Court of Appeals. The Court of Appeals affirmed and we allowed discretionary review.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Douglas B. Abrams, for plaintiffs appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr. and G. Lee Martin, for defendant appellee Texfi Industries, Inc.

Haynsworth, Baldwin, Johnson and Greaves, P.A., by Charles P. Roberts III and Gregory P. McGuire, for defendants appellees Gibson and Lake.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Grady S. Patterson, Jr., David H. Batten and Kari L. Russwurm, for defendant appellee Card Care, Inc.

Patterson, Harkavy, Lawrence, Van Noppen & Okun, by Donnell Van Noppen III, for North Carolina Academy of Trial Lawyers, amicus curiae.

WEBB, Justice.

[1] We consider first the case against the defendants Gibson and Lake. Gibson and Lake were employees of Texfi, as was Mr. Pendergrass, at the time of the accident. Ordinarily, the plaintiffs' exclusive remedy would be a claim pursuant to the Workers' Compensation Act and they would not have a claim against Gibson or Lake in tort. *Strickland v. King*, 293 N.C. 731, 239 S.E.2d 243 (1977).

The plaintiffs contend that they have claims against Gibson and Lake under *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985), which held that there is an exception to the exclusivity rule as to actions against fellow employees in the case of injury caused by the willful, reckless and wanton negligence of the fellow employees. We adopted such a rule in *Pleasant* and the superior court was in error in dismissing the case against Gibson and Lake under Rule 12(b)(6), unless the complaint affirmatively disclosed

that the plaintiffs had no cause of action against them. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

The plaintiffs alleged that Gibson and Lake were grossly and wantonly negligent. They alleged that the acts of negligence were in directing Mr. Pendergrass to work at the final inspection machine when they knew that certain dangerous parts of the machine were unguarded, in violation of OSHA regulations and industry standards. The question we face is whether these allegations support a finding of willful, wanton, and reckless negligence pursuant to *Pleasant*.

In *Pleasant*, we defined willful, wanton and reckless negligence, which will support a claim independently of the Workers' Compensation Act. In that case, a fellow employee drove a truck in a parking lot with the intention of getting as close to the plaintiff as he could without hitting him. The plaintiff was struck by the truck and we said the defendant's action constituted willful, wanton and reckless negligence. In defining such negligence, we said a constructive intent to injure may be inferred when the conduct of the defendant is manifestly indifferent to the consequences of the act. We held that driving a truck as close to the plaintiff as possible was manifestly indifferent to the consequences of the act.

The negligence alleged as to Gibson and Lake does not rise to the level of the negligence in *Pleasant*. Although they may have known certain dangerous parts of the machine were unguarded when they instructed Mr. Pendergrass to work at the machine, we do not believe this supports an inference that they intended that Mr. Pendergrass be injured or that they were manifestly indifferent to the consequences of his doing so. The motion to dismiss was properly allowed as to Gibson and Lake.

[2] The plaintiffs contend they have stated a good claim against Texfi on the ground of dual capacity and on the ground that the pleadings show that the injury was caused by intentional conduct, which Texfi knew was substantially certain to cause the injury. *See Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). We deal first with the dual capacity claim.

The plaintiffs rely on *Tscheiller v. Weaving Co.*, 214 N.C. 449, 199 S.E. 623 (1938), to argue that we should allow the action against Texfi because it was acting in a dual capacity in regard to Mr. Pendergrass. They contend that in one capacity it was

acting as a textile manufacturer and Mr. Pendergrass was hired to work for it in that capacity. The plaintiffs say that Texfi acted in the capacity of a manufacturer of textile machinery when it modified the final inspection machine and it should be liable to the plaintiffs for negligence as would be a third party manufacturer of such a machine.

In *Tscheiller*, the plaintiff was employed in a textile mill. She sued her employer for selling her a sandwich unfit to eat which caused her to become ill. The defendant in *Tscheiller* sold food and drinks to its employees during the course of employment for their refreshment and the plaintiff based her action on such a purchase. This Court affirmed the dismissal of the action and said that while it was alleged that the defendant was engaged in the textile manufacturing business and also in the business of selling sandwiches and cold drinks, it was not alleged that the sandwiches and cold drinks were offered for sale to the public. We said that under these circumstances the plaintiff was limited to her claim under the Workers' Compensation Act.

The risk to Mr. Pendergrass from the alteration of the machine by Texfi was not a risk shared by the public and he does not have a claim under *Tscheiller*. If there is a dual capacity doctrine which allows a claim when an employer is acting in a capacity other than the business for which a person is employed, it does not apply in this case. The defendant Texfi modified the machine as part of its engagement in the textile business. Mr. Pendergrass was employed in that business.

[3] We also hold that the plaintiffs do not have a claim under *Woodson*. In that case, we held that a person could maintain a claim in tort against his employer, although the parties were subject to the Workers' Compensation Act, if the evidence shows that the injury was caused by intentional conduct of the employer which the employer knew was substantially certain to cause an injury. The conduct must be so egregious as to be tantamount to an intentional tort. We made it clear in that case that there had to be a higher degree of negligence than willful, wanton and reckless negligence as defined in *Pleasant*. The plaintiffs contend that they have a tort claim against Texfi under the *Woodson* exception to the exclusivity rule.

The plaintiffs rely on the same allegations of negligence to support their claim against Texfi that they relied upon in their

claim against Gibson and Lake. We have held, in affirming the dismissal as to Gibson and Lake, that the negligence alleged did not rise to the level of willful, wanton, and reckless as defined in *Pleasant*. By this token, it does not rise to the higher level of negligence as defined in *Woodson* of substantial certainty of injury.

[4] The appellants also argue it was error to dismiss their claim against Card Care, Inc. Card Care was not incorporated until after the accident occurred and it argues it should not be liable for something that happened before it was incorporated. The entity which sold the final inspection machine to Texfi was a partnership. After the sale of the machine, the principals in the partnership formed a corporation which continued the business in which the partnership had been engaged. It is undisputed that the members of the partnership had no knowledge of the accident at the time Card Care was incorporated.

The plaintiff relies on *Budd Tire Corp. v. Pierce Tire Co.*, 90 N.C. App. 684, 370 S.E.2d 267 (1988), a case in which a corporation was held liable to a creditor for a fraudulent transfer of the assets of another corporation. In that case, the Court of Appeals said that a corporation is liable to a creditor of the other corporation if the transfer of the assets was fraudulent or if the purchasing corporation is a mere continuation of the selling corporation.

The plaintiffs contend that Card Care, Inc. is a mere continuation of the business conducted by the partnership and it should be liable for torts committed by the partnership. We cannot find a case in this state applying the mere continuation rule. The plaintiffs have cited cases from other jurisdictions which deal with this rule. *Stratton v. Garvey Intern, Inc.*, 9 Kan. App. 2d 254, 676 P.2d 1290 (1984); *Tift v. Forage King Industries, Inc.*, 108 Wis. 2d 72, 322 N.W.2d 14 (1982); *Rawlings v. D.M. Oliver, Inc.*, 97 Cal. App. 3d 890, 159 Cal. Rptr. 119 (1979).

Assuming the mere continuation rule would apply as to corporations, we do not believe it should apply to this transfer of the assets of a partnership. If all the assets of a corporation are transferred, a claim against the transferring corporation might be worthless. When a partnership transfers its assets, the partners remain liable. We do not believe this is a case in which the mere continuation rule should apply.

[5] The plaintiffs contend that Card Care is liable to them under N.C.G.S. § 59-71(d). That section is part of the Uniform Partnership Act and it provides that when all of a partnership's assets are assigned and the person or persons to whom the assignment is made promise to pay the assigning partnership's debts and continue the business of the dissolved partnership, creditors of the dissolved partnership are creditors of the person or partnership continuing the business. In this case, Card Care did not promise to pay the creditors of the dissolved partnership. Card Care is not liable under N.C.G.S. § 59-71(d).

[6] Finally, the plaintiffs argue that Card Care is liable to them because it did not comply with the Uniform Commercial Code-Bulk Transfers. N.C.G.S. § 25-6-105 provides that a bulk transfer is void if notice is not given to creditors before a transfer is made. The plaintiffs assert that this makes Card Care liable. If we held the transfer of the assets from the partnership to Card Care was void, we are not sure this would help the plaintiffs in an action against Card Care. *See Goldman and Co. v. Chank*, 200 N.C. 384, 156 S.E. 919 (1931) and *Rubber Co. v. Morris*, 181 N.C. 184, 106 S.E. 562 (1921). Assuming the transfer of assets from the partnership to the corporation was voidable by creditors of the partnership, it is not helpful to the plaintiffs. N.C.G.S. § 25-6-107(3) provides that notice of the transfer must be sent to all creditors known to the transferee. In this case, the papers filed in regard to the motion for summary judgment showed the transferee had no knowledge at the time of the transfer that the plaintiffs were asserting a claim against the partnership. Card Care is not liable under the Bulk Sales Act.

AFFIRMED.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 153, JAMES E. MARTIN, RESPONDENT

No. 553A91

(Filed 8 January 1993)

Judges, Justices and Magistrates § 36 (NCI4th)— censure of district court judge—reckless driving convictions when impaired driving charged

A district court judge is censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon his convictions of defendants for reckless driving when they were charged with impaired driving and when he knew that such actions were improper and ultra vires. Canons 2A and 3A(1) of the Code of Judicial Conduct.

Am Jur 2d, Judges §§ 19, 79.

This matter is before the Court upon a recommendation by the Judicial Standards Commission, filed with the Court on 6 December 1991, that Judge James E. Martin, a Judge of the General Court of Justice, District Court Division, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Calendared in the Supreme Court 13 March 1992.

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

PER CURIAM.

The Judicial Standards Commission (Commission) notified Judge James E. Martin on 16 April 1991 that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. The subject matter of the investigation included allegations that the respondent had willfully engaged in the improper practice of convicting defendants of reckless driving in violation of N.C.G.S. § 20-140 when they were charged with impaired driving in violation of N.C.G.S. § 20-138.1.

On 2 October 1991 Special Counsel for the Commission filed a complaint alleging, *inter alia*,

> 3. The respondent presided over the September 25, 1990, criminal session of Craven County District Court at which *State v. Richard Valles Villegas*, Craven County file number 90 CR 04682, was heard and presided over the December 7, 1990, criminal session of Pamlico County District Court at which *State v. John Towers Faulds*, Pamlico County file number 90 CR 113, was heard. In each case the defendant had been charged with and tried for driving while subject to an impairing substance in violation of G.S. 20-138.1. However, in each case the respondent found the defendant guilty of careless and reckless driving in violation of N.C.G.S. sec. 20-140, an offense with which neither defendant had been charged and to which neither had pleaded. The respondent rendered these guilty verdicts and entered judgments in the *Villegas* and *Faulds* cases knowing that they were improper . . . .

Respondent answered the complaint, admitting the truth of these allegations; he admitted "knowing that such actions were inappropriate."

On 8 November 1991 respondent was served with a Notice of Formal Hearing concerning the charges alleged. Respondent, through counsel, by letter addressed to the Commission, stated that he would waive any hearing and would rely upon the complaint and admissions in his answer. Respondent added in the letter that he recognized his mistake, that he had never intentionally done anything to bring the judicial office into disrepute or which was prejudicial to the administration of justice. He assured the Commission that his mistake was no more than an error in judgment that would not be repeated, and he urged that neither censure nor removal would be necessary to insure that such conduct would not be repeated.

A hearing was nevertheless held before the Commission on 22 November 1991. Respondent did not appear. Evidence was presented tending to support the allegations in the complaint. After hearing the evidence the Commission concluded that respondent's actions constituted

> a. conduct in violation of Canons 2A and 3A(1) of the North Carolina Code of Judicial Conduct[1] and

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1. Canon 2A of the North Carolina Code of Judicial Conduct provides: "A judge should respect and comply with the law and should conduct himself at all

> b. willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

The Commission recommended that this Court censure the respondent. Respondent, through counsel, informed the Court that he elected not to petition the Court for a hearing.

Prior to the rewriting of section 20-140(c) of the North Carolina General Statutes in 1973, the offenses of reckless driving and driving under the influence of intoxicating liquor were regarded by the courts of this State as separate and distinct violations of the law, even when such charges arose out of the same transaction. *State v. Fields*, 221 N.C. 182, 183, 19 S.E.2d 486, 487 (1942); *State v. Craig*, 21 N.C. App. 51, 54, 203 S.E.2d 401, 403 (1974). As rewritten, however, section 20-140(c) provided that reckless driving was a lesser included offense of driving while intoxicated, as defined in section 20-138, the predecessor to section 20-138.1. Sections 20-138 and 20-140(c) were repealed effective 1 October 1983 as part of the Safe Roads Act. This legislation was intended, as its title indicated, "To Provide Safe Roads by . . . Providing an Effective Deterrent to Reduce the Incidence of Impaired Driving, and Clarifying the Statutes Related to Drinking and Driving." 1983 N.C. Sess. Laws ch. 435. By repealing section 20-140(c) the legislature clearly intended to return the offenses of reckless driving and impaired driving to their status as separate offenses. The purpose of the repeal was to eliminate the ability of courts to treat reckless driving as a lesser included offense of impaired driving.

Separate offenses must be separately charged:

> [A]n indictment . . . is insufficient to charge the accused with the commission of a minor offense, or one of less degree, unless, in charging the major offense, it necessarily includes within itself all of the essential elements of the minor offense or sufficiently sets them forth by separate allegations in an added count.

41 Am. Jur. 2d *Indictments and Informations* § 97 (1968). There can be no conviction for a crime without formal and sufficient

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times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(1) provides, in pertinent part: "A judge should be faithful to the law and maintain professional competence in it. . . ."

accusation. "In the absence of an accusation the court acquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17 (1966) (quoting 42 C.J.S., *Indictments and Informations*, § 1 (1944)).

We have carefully examined the evidence presented to the Commission and conclude that the Commission's findings of fact are supported by clear and convincing evidence and by admissions in the pleadings. *See generally, e.g., In Re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992). Convicting defendants of reckless driving when they were charged with driving while impaired were acts which respondent knew to be improper and *ultra vires*, or beyond the powers of his office.

We conclude that respondent's actions constitute conduct in violation of Canons 2A and 3A(1) of the Code of Judicial Conduct. We wish to make it clear that respondent's actions did not result from error of judgment nor error of law. Judges may not be disciplined for these kinds of errors. Respondent is being disciplined because he purported to exercise jurisdiction when he knew none existed. Judges especially must be vigilant to act within the bounds of their judicial power. When judges knowingly act beyond these bounds, it amounts to willful misconduct which brings the judicial office into disrepute and prejudices the administration of justice. In such cases censure at least is proper.

A proceeding before the Judicial Standards Commission is "an inquiry into the conduct of one exercising judicial power . . . . Its aim is not to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *In re Harrell*, 331 N.C. at 110, 414 S.E.2d at 38 (quoting *In Re Nowell*, 293 N.C. 235, 241, 237 S.E.2d 246, 250 (1977)).

Now, therefore, it is ordered that the respondent, Judge James E. Martin, be, and he is hereby, censured for the conduct determined herein to be conduct prejudicial to the administration of justice and which brings the judicial office into disrepute.

SAMUEL L. OSBORNE v. THE CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA

No. 45PA92

(Filed 8 January 1993)

Pensions § 1 (NCI3d)— judges—retirement system—purchase of credit

There is nothing in N.C.G.S. § 135-4(f)(6), which gave plaintiff the right to purchase retirement credits based on military service, stating the time the right remains open, and it is not inconsistent for N.C.G.S. § 135-4(m) to require the right to be exercised within three years. Although N.C.G.S. § 135-4(f)(6) began with the phrase "Notwithstanding any other provision of this Chapter," which plaintiff contends excludes the application of N.C.G.S. § 135-4(m), the two subsections can be read so as to give effect to both, and such an interpretation is reinforced by legislative history.

Am Jur 2d, Pensions and Retirement Systems § 1738.

On discretionary review pursuant to N.C.G.S. § 7A-31, from a decision of the Court of Appeals, 106 N.C. App. 299, 416 S.E.2d 204 (1992), affirming a judgment entered by Freeman, J., in the Superior Court, Wilkes County, on 19 November 1991. Heard in the Supreme Court 2 November 1992.

This appeal involves the interpretation of the statute governing the right of a judge, who is a member of the Consolidated Judicial Retirement System, to purchase retirement credits based upon his prior military service. The appellee instituted this action by filing a petition for a contested case hearing pursuant to N.C.G.S. § 150B-23, on 13 August 1990, in which he challenged respondent's method of calculating the cost to him to purchase credits in the Consolidated Judicial Retirement System for his military service as allowed by N.C.G.S. § 135-4.

The facts of this case are not in dispute. The appellee has been a district court judge for the Twenty-third Judicial District and a member of what is now the Consolidated Judicial Retirement System since 1970. On 7 December 1980, the appellee became eligible, pursuant to N.C.G.S. § 135-4(f)(6), to purchase three years and ten months retirement credit based on his military service.

On 3 December 1986, the appellee requested from the Retirement System an estimate of the cost to purchase service credits for military service. The cost was calculated based on the full actuarial cost rather than the reduced costs to which the appellee contends he was entitled under N.C.G.S. § 135-4(f)(6).

An administrative law judge, on 23 August 1991, recommended that summary judgment be entered for the appellee. The Board of Trustees of the Consolidated Judicial Retirement System, on 29 October 1991, refused to adopt the recommendation and denied relief to the appellee. On 19 November 1991, the superior court held that the final agency decision of the Board of Trustees was erroneous as a matter of law and entered a judgment for the appellee. The Court of Appeals affirmed.

We allowed discretionary review.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for petitioner appellee.

Lacy H. Thornburg, Attorney General, by Alexander McC. Peters, Assistant Attorney General, for respondent appellant.

WEBB, Justice.

The resolution of this case depends on the interpretation of certain subsections of N.C.G.S. § 135-4, which were in effect on 7 December 1980 when the appellee became eligible to purchase a retirement credit based on his military service. At that time, N.C.G.S. § 135-4(f)(6), which was repealed in 1981 without diminishing any rights of a member thereunder, 1981 N.C. Sess. Laws ch. 636, § 1, provided in part as follows:

> Notwithstanding any other provision of this Chapter, teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment to be determined by the Board of Trustees and assessed the member at the time of payment . . . .

At the time the appellee became eligible to purchase the retirement credit, N.C.G.S. § 135-4(m) provided in part:

> [A]ll repayments and purchases of service credits, allowed under the provisions of this section or of any repealed provision of this section that was repealed with inchoate and accrued rights preserved, must be made within three years after the member first becomes eligible to make such repayments and purchases.

It is under these two subsections that we must determine whether the appellee may purchase a credit for time in service at a reduced rate.

The appellee argues and the Court of Appeals held that the phrase at the beginning of N.C.G.S. § 135-4(f)(6), which says, "[n]otwithstanding any other provision of this Chapter" excluded the application of N.C.G.S. § 135-4(m), which requires that the purchase must be made within three years of a member's eligibility to do so. The appellee says the plain meaning of these words is that no other provision of Section 135 can prevent him from purchasing his military service credit at the reduced cost at any time following his completion of ten years as a member of the system.

We do not believe the meaning of the phrase is as clear as the appellee contends. Although the phrase gave him the right to purchase retirement credits based on his time in service, there is nothing in N.C.G.S. § 135-4(f)(6) which says how long this right remains open. If the right is required to be exercised within three years by N.C.G.S. § 135-4(m), we do not believe this makes the two subsections inconsistent. This is the way we read the two subsections. By doing so, we give effect to both subsections.

We are reinforced in our belief as to the proper interpretation of these subsections by their legislative history. The two subsections were first adopted by Chapter 1311 of the 1973 Session Laws. The Chapter, in its first section, provided for the purchase of credit for military service. In the second section, it provided for the repurchase of credits by those who have withdrawn their contributions from the system. The third section provided for the purchase of retirement credits based on employment by other states. Each of the three sections began with the phrase "[n]otwithstanding any other provision of this Chapter."

Section 5 of Chapter 1311 provided "[a]ll repayments must be made within three years after the member first becomes eligible to make such repayment." Thus, in the very act which created the right to purchase retirement credits, it was provided it must be done within three years of first becoming eligible to do so. If Section 5 applies only to the second section of the Chapter, because Section 2 is the only one which provides for a repayment, it nevertheless shows that requiring a purchase of credits within three years of eligibility to do so is not inconsistent with the phrase "[n]otwithstanding any other provision of this Chapter," because that is a phrase used at the beginning of Section 2.

In 1979, N.C.G.S. § 135-4(m) was amended to read as it did when the appellee became eligible to purchase credit for his time in military service. It said specifically that "purchases of service credits, allowed under the provisions of this section or of any repealed provision of this section that was repealed with inchoate and accrued rights preserved, must be made within three years after the member first becomes eligible to make such . . . purchases." This is a plain and unambiguous statement and we hold it must be followed. It is not overruled by the more ambiguous phrase "[n]otwithstanding any other provision of this Chapter."

In 1992, the General Assembly revised N.C.G.S. § 135-4(m), to make it clear that its intention was that credits for military service had to be purchased within three years of the date a member first becomes eligible to do so. Although we are not bound by the interpretation a session of the General Assembly gives for an act passed by a previous session, we can give it some consideration in determining how such an act should be interpreted. *See State ex rel. Cobey v. Simpson*, 333 N.C. 81, 423 S.E.2d 759 (1992).

Our decision in this case is consistent with other cases interpreting N.C.G.S. § 135-4. *See In re Ford*, 52 N.C. App. 569, 279 S.E.2d 122 (1981).

For the reasons stated in this opinion, we conclude that the order of the Court of Appeals should be reversed and the final agency decision should be affirmed. The decision of the Court of Appeals is, therefore,

REVERSED.

NEWBERRY METAL MASTERS FABRICATORS, INC. v. MITEK INDUSTRIES, INC., AS SUCCESSOR-IN-INTEREST TO GANG-NAIL SYSTEMS, INC.; DURAND-RAUTE CORPORATION AND INDUSTRIAL MILL INSTALLATIONS, INC.

No. 114PA92

(Filed 8 January 1993)

Liens § 26 (NCI4th)— action to perfect lien—voluntary dismissal—right to refile action

Plaintiff subcontractor's voluntary dismissal of its action to perfect a lien did not discharge the lien under N.C.G.S. § 44A-16(4) in light of the requirement of the statute that a judgment must be filed to discharge a lien, and plaintiff could refile its action to perfect the lien pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) within one year after the voluntary dismissal was taken.

Am Jur 2d, Mechanics' Liens § 315.

On discretionary review of an unpublished decision of the Court of Appeals, 105 N.C. App. 445, 414 S.E.2d 108 (1992), reversing an order for summary judgment in favor of defendants Mitek Industries, Inc. and Durand-Raute Corporation entered by Phillips, J., in Superior Court, New Hanover County on 11 July 1990. Heard in the Supreme Court 5 October 1992.

This case involves the perfecting of a lien on funds the plaintiff alleges are due from Mitek Industries, Inc. and Durand-Raute Corporation to Industrial Mill Installations, Inc., as well as the perfecting of a lien on the interest Mitek has in certain real property in New Hanover County. The plaintiff filed a notice of a claim of lien and a claim of lien on 2 August 1985. In December 1985, the plaintiff filed an action to perfect its liens. The plaintiff alleged that it was a second tier subcontractor, that Durand-Raute Corporation was the contractor and Industrial Mill Installations, Inc. was the first tier subcontractor on the project. On 30 November 1987, the plaintiff took a voluntary dismissal without prejudice of its action to perfect the liens. On 29 November 1988, the plaintiff refiled its action to perfect the liens.

On 11 July 1990, the superior court allowed a motion for summary judgment by defendants Mitek and Durand-Raute. The Court of Appeals reversed the order for summary judgment.

We allowed petitions for discretionary review.

Kenneth A. Shanklin and John G. Rhyne for plaintiff appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Michael Murchison, for defendants appellants.

WEBB, Justice.

The question posed by this appeal is whether a party may refile an action to perfect a lien after taking a voluntary dismissal without prejudice pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1). This rule, by its plain words, provides that "a new action based on the same claim may be commenced within one year after such dismissal[.]" *See Danielson v. Cummings*, 300 N.C. 175, 265 S.E.2d 161 (1980). If the plaintiff is barred from pursuing its action to perfect the liens, it would not be under Rule 41(a)(1) but under Article 2 of Chapter 44A of the General Statutes dealing with statutory liens on real property.

N.C.G.S. § 44A-16 governs the discharge of liens. There is nothing in this section which says a lien is discharged by the taking of a voluntary dismissal without prejudice pursuant to Rule 41(a)(1). The appellants contend that the liens were discharged under N.C.G.S. § 44A-16(4) which says a lien is discharged:

> By filing in the office of the clerk of superior court the original or certified copy of a judgment or decree of a court of competent jurisdiction showing that the action by the claimant to enforce the lien has been dismissed or finally determined adversely to the claimant.

This subsection requires that a judgment be filed showing that the action to perfect a lien has been dismissed or otherwise decided adversely to the lien claimant in order to discharge the lien. The appellants concede that a voluntary dismissal is not a judgment. They say, relying on *Carter v. Clowers*, 102 N.C. App. 247, 401 S.E.2d 662 (1991) and *Ward v. Taylor*, 68 N.C. App. 74, 314 S.E.2d 814, *cert. denied*, 311 N.C. 769, 321 S.E.2d 157 (1984), that voluntary dismissals under Rule 41(a)(1) "have many of the earmarks of traditional judgments" and we should so treat the dismissal in this case. In *Carter*, the Court of Appeals held that a voluntary dismissal under Rule 41(a)(1) could be amended pursuant to N.C.G.S. § 1A-1, Rule 60(b). In *Ward*, the Court of Appeals held that after a party has taken a voluntary dismissal he may be taxed with the costs

under N.C.G.S. § 1A-1, Rule 41(d). It is said in both these cases that a voluntary dismissal is not a judgment. In light of the requirement of N.C.G.S. § 44A-16(4) that a judgment must be filed to discharge a lien, we do not believe we should hold that a lien may be cancelled by taking a voluntary dismissal without prejudice.

The appellants argue further that N.C.G.S. § 44A-16(4) includes a voluntary dismissal because an involuntary dismissal constitutes an adverse judgment by a court which would be a judgment of a court. The appellants say there was no need to put the word "dismissal" in this part of the statute if the General Assembly had not intended it to include voluntary dismissals. The statute says there must be a judgment or decree showing that the action to enforce the lien has been dismissed. In this case, there is no judgment or decree. The liens have not been dismissed.

The appellants make a persuasive argument that in order to insure the stability of titles to real property we should hold that the liens in this case have been discharged. This argument should be addressed to the General Assembly. We are bound by the statutes.

For the reasons stated in this opinion, we affirm the decision of the Court of Appeals.

AFFIRMED.

WIREWAYS, INC. v. MITEK INDUSTRIES, INC., AS SUCCESSOR-IN-INTEREST TO GANG-NAIL SYSTEMS, INC.; DURAND-RAUTE CORPORATION AND INDUSTRIAL MILL INSTALLATIONS, INC.

No. 115PA92

(Filed 8 January 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 105 N.C. App. 445, 414 S.E.2d 108 (1992), reversing summary judgment entered 11 July 1990 by Phillips, J., in Superior Court, New Hanover County. Heard in the Supreme Court on 5 October 1992.

Kenneth A. Shanklin and John G. Rhyne for the plaintiff-appellee.

Murchison, Taylor, Kendrick, Gibson & Davenport, by Michael Murchison, for the defendant-appellants.

PER CURIAM.

The issue before this Court on discretionary review in the present case is identical to that discussed and resolved in *Newberry Metal Masters Fabricators v. Mitek Industries*, 333 N.C. 250, 424 S.E.2d 383 (1993). For the reasons stated and applied by this Court in *Newberry*, the decision of the Court of Appeals in the present case is affirmed.

Affirmed.

BATCHELDOR v. BOYD

No. 9P93

Case below: 108 N.C.App. 275

Petition by plaintiffs for writ of supersedeas and temporary stay denied 20 January 1993. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 20 January 1993.

BERRIER v. THRIFT

No. 359P92

Case below: 107 N.C.App. 356

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

BORG-WARNER ACCEPTANCE CORP. v. JOHNSTON

No. 329P92

Case below: 97 N.C.App. 575

Petition by defendants for writ of certiorari to the North Carolina Court of Appeals denied 7 January 1993.

BORG-WARNER ACCEPTANCE CORP. v. JOHNSTON

No. 330P92

Case below: 107 N.C.App. 174

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

BOWLES v. MUNDAY

No. 327PA92

Case below: 107 N.C.App. 118

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993.

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

CANADY v. MANN

No. 349PA92

Case below: 107 N.C.App. 252

Upon motion by plaintiffs to dismiss for failure to comply with the Rules of Appellate Procedure, the following order is entered: Defendant appellants shall have to and including 8 February 1993 within which to file a new brief which complies with the requirements of Rule 28 of the Rules of Appellate Procedure. If defendant appellants fail to file such a brief on a timely basis, it is the intent of the Court to allow plaintiff appellees' motion to dismiss. The costs for filing the current brief shall in any event be taxed against the defendant appellants. By order of the Court in Conference this the 17th day of January, 1993.

HILL v. BECHTEL

No. 303PA92

Case below: 106 N.C.App. 675

Petition by defendants (Bechtel and Hamrick) for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993. Petition by defendant (Department of Human Resources) for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993.

IN RE ESTATE OF McCANN

No. 408P92

Case below: 107 N.C.App. 762

Petition by Larry Dean McCann for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

IN RE WILL OF JARVIS

No. 310PA92

Case below: 107 N.C.App. 35

Petition by Kenneth R. Jarvis and James R. Jarvis for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993.

NORTH CAROLINA STATE BAR v. NELSON

No. 396PA92

Case below: 107 N.C.App. 543

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993. Temporary stay allowed 25 January 1993 pending determination of defendant's appeal.

STATE v. BAYMON

No. 25A93

Case below: 108 N.C.App. 476

Petition by Attorney General for writ of supersedeas and temporary stay denied 1 February 1993.

STATE v. HEMMINGWAY

No. 415P92

Case below: 108 N.C.App. 104

Petition by defendant for writ of supersedeas denied and temporary stay dissolved 7 January 1993. Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 January 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

STATE v. JOHNSON

No. 5P93

Case below: 108 N.C.App. 550

Petition by Attorney General for temporary stay allowed 14 January 1993.

STATE v. NOBLES

No. 401A92

Case below: 107 N.C.App. 627

Motion by Attorney General to dismiss appeal as to additional constitutional question for lack of substantial constitutional question allowed 7 January 1993.

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

STATE v. RAMSEUR

No. 409P92

Case below: 107 N.C.App. 762

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

STATESVILLE MEDICAL GROUP v. DICKEY

No. 296P92

Case below: 106 N.C.App. 669

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

TAYLOR v. VOLVO NORTH AMERICA CORP.

No. 410PA92

Case below: 107 N.C.App. 678

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 7 January 1993.

WATTS v. RIDENHOUR

No. 388P92

Case below: 107 N.C.App. 763

Petition by defendants (Mr. and Mrs. Ridenhour) for discretionary review pursuant to G.S. 7A-31 denied 7 January 1993.

HASSELL HYLER v. GTE PRODUCTS CO. AND AMERICAN MOTORISTS INSURANCE CO.

No. 96PA92

(Filed 12 February 1993)

1. **Master and Servant § 69 (NCI3d)— workers' compensation— components of award**

There are two distinct components of an award under the Workers' Compensation Act: (1) payment for the cost of medical care, now denominated "medical compensation," which consists of the employee's medical expenses incurred as a result of a job-related injury; and (2) general "compensation" for financial loss other than medical expenses, which includes payment to compensate for an employee's lost earning capacity and payment of funeral expenses.

Am Jur 2d, Workers' Compensation §§ 379, 435.

2. **Master and Servant § 75 (NCI3d)— workers' compensation— future medical expenses—change of condition not required**

While N.C.G.S. § 97-47 requires a claimant to show a "change of condition" before the Industrial Commission may amend an order awarding general "compensation," N.C.G.S. § 97-25 permits the Industrial Commission to order the employer to pay new or additional medical expenses even if there has been no material change in the employee's condition or in available medical treatment. The opinion of the Court of Appeals holding to the contrary in *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, is overruled. Therefore, the Industrial Commission could order the employer to pay plaintiff's future medical expenses incurred as a result of his knee injury even though the Commission had previously approved the parties' final agreement for compensation where the plaintiff underwent a knee replacement and the parties agree that there is a substantial risk that plaintiff's prosthetic knee will fail and will have to be replaced and that plaintiff's condition must be monitored regularly by a physician for this reason.

Am Jur 2d, Workers' Compensation § 435.

Justice MEYER dissenting.

Justices WEBB and PARKER did not participate in the consideration or decision of this case.

On discretionary review of an unpublished decision of the Court of Appeals, 105 N.C. App. 443, 413 S.E.2d 801 (1991), reversing a decision of the Industrial Commission, entered 31 August 1990, which denied the plaintiff's request under N.C.G.S. § 97-25 for continuing medical expenses. Heard in the Supreme Court on 2 November 1992.

Patterson, Harkavy, Lawrence, Van Noppen & Okun, by Henry N. Patterson, Jr., Jonathan R. Harkavy, and Martha A. Geer, for the plaintiff-appellee.

Tuggle, Duggins & Meschan, P.A., by Joseph Brotherton and J. Reed Johnston, Jr., for the defendant-appellants.

Kathleen Shannon Glancy, for the North Carolina Academy of Trial Lawyers, amicus curiae.

MITCHELL, Justice.

Certain facts are uncontroverted in this worker's compensation action. The plaintiff, Hassell Hyler, suffered a compensable injury to his left knee on 2 January 1980, while employed by the defendant, GTE Products. The plaintiff underwent six knee surgeries between January of 1980 and June of 1983; in the June 1983 surgery, the plaintiff's knee joint was replaced. By 24 May 1984, the plaintiff's knee had reached its maximum medical improvement, but he was left with permanent partial disability of his left leg.

The parties agree that there is a substantial risk that the plaintiff's prosthetic knee will fail and that the knee replacement surgery will have to be performed again. Because of this risk, the plaintiff must be seen at least annually by his orthopedist in order to monitor the condition of his knee. The condition of the plaintiff's knee has not materially deteriorated since June 1984.

On 14 February 1985, the Industrial Commission approved the parties' final agreement entered on Commission Form 26 in which the defendants agreed to pay compensation to the plaintiff for the permanent partial disability of his left leg. This form agreement contained no provision concerning the plaintiff's medical expenses related to his compensable injury. The plaintiff was last paid compensation by the defendants on 25 February 1985. On 19 February 1986, the plaintiff sought to reopen his claim before the Industrial Commission, asking for additional compensation for his disability based on the grounds of a change of condition as provided in N.C.G.S.

§ 97-47. On 10 March 1987, the plaintiff further requested that the Commission order GTE Products and its insurance carrier, American Motorists Insurance Co., to pay the plaintiff's continuing medical expenses as mandated by N.C.G.S. § 97-25. A deputy commissioner entered an award on 16 August 1989 requiring the defendants to pay the plaintiff's continuing medical expenses incurred as a result of his knee injury. On 31 August 1990, the Industrial Commission entered an order reversing the deputy commissioner's award on the ground that N.C.G.S. § 97-47 required the plaintiff to demonstrate, as a condition for payment of future medical expenses under N.C.G.S. § 97-25, either that his condition had changed for the worse or that evidence bearing on the need for future medical care had developed or had become available following the Commission's approval of the parties' last agreement for compensation.

The plaintiff appealed to the Court of Appeals, which reversed the Commission's order after concluding, in an unpublished opinion, that the defendants must pay for the plaintiff's "future medical expenses which his artificial knee will assuredly require." The defendants' petition for discretionary review of the decision of the Court of Appeals was allowed by this Court on 24 June 1992.

Because we conclude that the "change of condition" requirement of N.C.G.S. § 97-47 does not apply to the plaintiff's request for medical expenses under N.C.G.S. § 97-25, we also conclude that the defendants were required to provide for those expenses. Therefore, we affirm the holding of the Court of Appeals.

Relevant portions of the version of N.C.G.S. § 97-25 applicable at the time the present case arose[1] provide as follows:

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer. In

1. Effective 15 June 1991, the General Assembly made certain technical amendments to N.C.G.S. § 97-25. 1991 N.C. Sess. Laws ch. 703, § 3. Those amendments are discussed at other points in this opinion.

case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

In *Little v. Penn Ventilator Co.*, 317 N.C. 206, 211, 345 S.E.2d 204, 208 (1986), we stated that the legislature intended N.C.G.S. § 97-25 to require that employers provide medical treatments which either will lessen an employee's period of disability, will effect a cure, or will give relief. We also determined that where, as in the present case, an injured employee's condition appeared stable but required monitoring to detect and prevent possible deterioration, medical expenses incurred in monitoring the employee's condition would give "relief" of the type that would require his employer to pay those expenses. *Id.* at 213-214, 345 S.E.2d at 209-10.

The dissent argues that this Court in *Little* announced a "change in law." To the contrary, this Court in *Little* merely interpreted the version of N.C.G.S. § 97-25 which has been in effect since 1973. Until 1973, treatment to "effect a cure or give relief" was limited to a period of ten weeks following the injury; any treatment provided beyond the ten-week period was required to "lessen the period of disability." 1931 N.C. Sess. Laws ch. 274, § 4. In 1973, the legislature broadened an employee's right to recover under this statute by removing the time limitation on an employee's right to treatments which would "effect a cure or give relief." 1973 N.C. Sess. Laws ch. 520, § 1. In *Little*, this Court simply explained for the first time the obvious effect of the 1973 amendment. The legislature's 1991 amendment of N.C.G.S. § 97-25, which merely moved the "effect a cure or give relief" portion of the statute to the definition of "medical compensation" in the new subsection (19) of N.C.G.S. § 97-2, indicates that, when this Court rendered the *Little* opinion in 1986, we correctly interpreted the legislature's

intent as expressed in the 1973 amendment of the statute. 1991 N.C. Sess. Laws ch. 703, §§ 1,3.

In the present case, the defendants concede that there is a substantial risk that the plaintiff's prosthetic knee will fail and will have to be replaced and that the plaintiff's condition must be monitored regularly by a physician for this reason. All parties agree that the plaintiff's condition has not materially changed since the Industrial Commission approved the parties' last Form 26 agreement on 14 February 1985 and, thereby, entered its award. The defendants argue that, despite the fact that he otherwise might be entitled under N.C.G.S. § 97-25 to future medical expenses, the plaintiff is not entitled to have the defendants pay such expenses in this instance because N.C.G.S. § 97-47 requires him first to show that his condition has changed materially since the entry of the Industrial Commission's award. We do not agree.

In determining the meaning of statutes, we follow 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), *quoted in Evans v. AT&T Technologies*, 332 N.C. 78, 86, 418 S.E.2d 503, 508-09 (1992). "Statutory interpretation properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) (citing *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms. *Id.* (citing *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)).

Nothing in the language of N.C.G.S. § 97-25 implies that the "change of condition" requirement of N.C.G.S. § 97-47 applies to any request by an employee for the payment of his medical expenses by his employer. To the contrary, since 1931, N.C.G.S. § 97-25

has mandated that an injured employee's medical care "*shall* be provided by the employer" and that, "*[i]n case of a controversy* arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, *the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.*" (Emphasis added.) Additionally, the statute provides that "[t]he Commission may *at any time* upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission." N.C.G.S. § 97-25 (1985) (amended 1991) (emphasis added). Accordingly, this Court long ago concluded that "in case of a controversy arising relative to the continuance of any treatment the Industrial Commission may order such further treatment as may in its discretion be necessary, and . . . the Commission may change the treatment or designate other treatment suggested by the injured employee." *Hedgepeth v. Casualty Co.*, 209 N.C. 45, 47, 182 S.E. 704, 705 (1936). The complete absence of an express or implied reference in N.C.G.S. § 97-25 to any "change of condition" requirement, in addition to that statute's clear language permitting the Commission to review the medical treatment an employee is receiving and order further treatment *at any time* if an employee requests such a review, compel us to conclude that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury.

[1] We also conclude that the foregoing interpretation of N.C.G.S. § 97-25 is consistent with the terms of N.C.G.S. § 97-47. The legislature provided in N.C.G.S. § 97-47 that:

> Upon . . . the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months

> from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

This statute applies only to reviews of previously entered awards and provides that "on such review [the Commission] may make an award ending, diminishing, or increasing the *compensation* previously awarded." *Id.* (emphasis added). "Compensation" is defined in the Workers' Compensation Act as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includ[ing] funeral benefits provided herein." N.C.G.S. § 97-2(11) (1991). "Compensation" in the context of the Workers' Compensation Act refers to "money relief afforded according to a scale established and for the person designated in the Act." *Ivey v. Prison Department*, 252 N.C. 615, 619-20, 114 S.E.2d 812, 815 (1960) (quoting *Branham v. Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867 (1943)). The amount of such "compensation" to be awarded to a claimant is based on the claimant's lost earning capacity. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 83, 155 S.E.2d 755, 761 (1967) (quoting *Hill v. DuBose*, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951)). Medical and hospital expenses which employers must provide pursuant to N.C.G.S. § 97-25 are not a part of "compensation" as it always has been defined in the Workers' Compensation Act. *Id.* at 82, 155 S.E.2d at 760. We previously have determined that the General Assembly intended medical and other payments rendered under N.C.G.S. § 97-25 to "be in addition to the compensation to which [the employee] is entitled under the Act." *Morris v. Chevrolet Co.*, 217 N.C. 428, 432, 8 S.E.2d 484, 486 (1940). We would have difficulty stating matters more clearly than we did when we said that:

> In many jurisdictions the payment of medical expenses is held to be tantamount to the payment of compensation. However, under the definition of the word "compensation" contained in . . . [N.C.G.S. § 97-2(11)], payment of medical or hospital expenses constitutes no part of compensation under the provisions of our Workmen's Compensation Act. *Morris v. Chevrolet Co.*, 217 N.C. 428, 8 S.E. (2d), 484. Compensation is defined in our statute as the money allowance payable to an employee or his dependents, including funeral benefits.

Whitted v. Palmer-Bee Co., 228 N.C. 447, 453, 46 S.E. 109, 113 (1948); *but cf. Biddix v. Rex Mills*, 237 N.C. 660, 666, 75 S.E.2d 777, 782 (1953) (quoting with approval an opinion of an Industrial

Commissioner which erroneously implied that the payment of medical bills was compensation).

The legislature's 1991 amendments to N.C.G.S. § 97-25 and N.C.G.S. § 97-2, although not yet in effect or controlling when the present case arose, merely clarified the legislative intent already expressed in our Workers' Compensation Act by emphasizing the legislature's continuing differentiation between medical expenses and "compensation" under the Act. In "An Act to make certain technical amendments to the Workers' Compensation Act and to increase assessments by the Industrial Commission for the Second Injury Fund," the legislature in 1991 added a new subsection (19) to N.C.G.S. § 97-2, creating and defining the term "medical compensation," and also inserted the term "medical compensation" into N.C.G.S. § 97-25 to replace the previous description of expenses covered under that section. 1991 N.C. Sess. Laws ch. 703, §§ 1,3.[2] The term "compensation," however, continues to be defined separately in N.C.G.S. § 97-2(11) as "the money allowance payable to an employee or to his dependents as provided for in this Article, and includ[ing] funeral benefits provided herein." The 1991 amendments made it clear that under the Act, the relief obtainable as general "compensation" is different and is separate and apart from the medical expenses recoverable under the Act's definition of "medical compensation."

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2. The General Assembly amended N.C.G.S. § 97-25, effective 15 June 1991, by striking the following language and replacing it with the phrase "Medical compensation":

> Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period. . . .

1991 N.C. Sess. Laws ch. 703, § 3. The legislature also added subsection (19) to N.C.G.S. § 97-2, which reads:

> Medical Compensation.—The term 'medical compensation' means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period.

1991 N.C. Sess. Laws ch. 703, § 1.

The dissent would include medical payments provided under N.C.G.S. § 97-25 within the meaning of general "compensation" in the Act, thereby ignoring the interpretation of the term "compensation" which is supported by the language of the Workers' Compensation Act and which we have applied for over 50 years. *See Morris v. Chevrolet Co.*, 217 N.C. 428, 432, 8 S.E.2d 484, 486 (1940). As we have observed in the past, an interpretation

> consistently given to the statute is as much a part of the statute as if expressly written in it. We have no right to change or ignore it. If it is to be changed, it must be done by the Legislature, the law-making power. If, in its wisdom, a change is desirable, it can readily do so.

Hensley v. Cooperative, 246 N.C. 274, 281, 98 S.E.2d 289, 294 (1957), *quoted in O'Mary v. Clearing Corp.*, 261 N.C. 508, 511, 135 S.E.2d 193, 195 (1964). In our interpretation of the meaning of "compensation" under the Workers' Compensation Act, we adhere to the time-honored doctrine of *stare decisis*, and we decline to take the contrary position set out by the dissent.

We acknowledge that the terms of N.C.G.S. § 97-47 tend to be ambiguous and somewhat confusing. In interpreting provisions of the Workers' Compensation Act, we note that the legislature intends "for the Workers' Compensation Act to be construed liberally in favor of the injured worker to the end that its benefits not be denied upon technical, narrow or strict interpretation." *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 578, 336 S.E.2d 47, 54 (1985) (citing *Cates v. Hunt Construction Co.*, 267 N.C. 560, 148 S.E.2d 604 (1966)). While a court should not construe the Act liberally in favor of an employee if such construction contravenes "the plain and unmistakable language of the statute," ambiguous provisions properly are interpreted in the employee's favor. *See Rorie v. Holly Farms*, 306 N.C. 706, 709-10, 295 S.E.2d 458, 461 (1982).

[2] Bearing in mind the well-established definition of "compensation" within the Workers' Compensation Act and the legislative intent that provisions of the Act be interpreted liberally in favor of an employee-claimant, we conclude that N.C.G.S. § 97-47 does not apply to an employee's right to claim medical payments under the Act. This section allows the Commission to review a prior award only for the purpose of making "an award ending, diminishing, or increasing the *compensation* previously awarded." (Emphasis added). Because "compensation" does not include the payment of

medical expenses, this provision does not affect the Commission's grant or denial of an employee's request for the payment of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of N.C.G.S. § 97-25, which mandates that certain medical treatments "shall be provided by the employer" and establishes the conditions which must be present before the Commission may order the employer to pay for treatments.

The dissent's reliance on the portion of N.C.G.S. § 97-47 which states that "except in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment," is inapposite. This provision, although it does refer to cases in which the Commission's prior award allowed medical payments only, nonetheless applies only to the Commission's review for the purpose of "ending, diminishing, or increasing the *compensation* previously awarded." (Emphasis added). The provision applies to situations in which the Commission in its first award found that, while a workplace injury did require medical treatment, the injury did not result in any decreased earning capacity which would entitle the employee to general "compensation." If, within the time limitation following the Commission's award, the employee developed a decreased earning capacity as a result of the injury, the Commission then could reopen the case and award the general "compensation" which it previously had denied. This is not such a case.

In sum, we conclude that the legislature always has provided for, and continues to provide for, two distinct components of an award under the Workers' Compensation Act: (1) payment for the cost of medical care, now denominated "medical compensation," which consists of payment of the employee's medical expenses incurred as a result of a job-related injury; and (2) general "compensation" for financial loss other than medical expenses, which includes payment to compensate for an employee's lost earning capacity and payment of funeral expenses. While N.C.G.S. § 97-47 requires a claimant to show a "change of condition" before the Industrial Commission may amend an order awarding general "compensation" as that term is and always has been defined in the Act, N.C.G.S. § 97-25 permits the Industrial Commission to order the employer to pay new or additional medical expenses, even if there has been no material change in the employee's condition or in available medical treatments. The opinion of the Court of Appeals holding to the

contrary in *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 577, 227 S.E.2d 627, 631 (1976), is overruled.

This interpretation of N.C.G.S. § 97-25 and N.C.G.S. § 97-47 is consistent with the overall intent of the Workers' Compensation Act to allow recovery by employees for work-related injuries. *See Evans v. AT&T Technologies*, 332 N.C. 78, 86, 418 S.E.2d 503, 509 (1992). As we so often have stated in the past, the Act should be liberally construed to effectuate its purpose; we will not deny an employee's benefits by a "narrow, technical, and strict construction" of the Act. *Gunter v. Dayco Corp.*, 317 N.C. 670, 677, 346 S.E.2d 395, 399 (1986) (citing *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E.2d 342 (1963)). Construing the Act as the defendants and the dissent propose would require a narrow interpretation of the Act, contrary to its terms and contrary to the legislature's intent to "compel industry to take care of its own wreckage." *Barber v. Minges*, 223 N.C. 213, 216-17, 25 S.E.2d 837, 839 (1943). We are not free to give the Act any such narrow interpretation. Accordingly, the unpublished decision of the Court of Appeals, reversing the order of the Industrial Commission in favor of the defendants and remanding this case to the Commission, is affirmed.

Affirmed.

Justices WEBB and PARKER did not participate in the consideration or decision of this case.

Justice MEYER dissenting.

The claimant was injured on 2 January 1980. The parties entered into a Form 21 Agreement (Agreement for Compensation for Disability), which was approved by the Industrial Commission on 27 February 1980. The Form 21 Agreement and two Form 26 Agreements (Supplemental Memorandum of Agreement as to Payment of Compensation), both of which were approved by the Commission, became the final decision of the Commission. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976) (upon approval by the Industrial Commission, Forms 21 and 26 have the full force and effect of a final award by the Commission). The claimant was paid all benefits for temporary-total disability and for permanent-partial disability (50% of the left leg) and all medical expenses due him under the law. The claimant's last check for compensation was forwarded to him on 25 February 1985. A Form 28B dated two

days later, 27 February 1985, summarizing benefits paid, was issued by the employer and contained the form language "that upon receipt of this form your compensation stops. If you claim further benefits, you must notify the Commission in writing within two (2) years from the date of the receipt of your last compensation check." The Form 28B was on file with the Commission, was considered by the Commission in its determination of the claim, and there is no suggestion in the record that Mr. Hyler, who was represented throughout by counsel, did not receive this form.

There was nothing unusual about the case up to this point, as everything was handled in strict compliance with the procedures and forms properly prescribed by the Commission. The claimant received *everything* he was entitled to under the law as it was then understood to be. The overwhelming majority of workers' compensation claims are resolved consensually in exactly the same manner as this case was originally resolved—compensability is admitted; medical expenses are paid; the injured claimant is compensated for temporary-total and permanent-partial disability pursuant to Form 21 and Form 26 Agreements; and subject to a change in condition, this resolution of the claim is approved by the Commission and becomes final, a Form 28 is filed, and the claim is closed.

On 19 February 1986, the claimant, through counsel, made an application for additional compensation based upon a claimed change in condition, which, by stipulation of the parties, cannot be shown.

After the final determination of the claimant's workers' compensation claim, and after the last payment of compensation to the claimant, this Court rendered its decision in *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (filed 2 July 1986), allowing the recovery of future medical expenses in the original award of the full Commission. Thus, pursuant to *Little*, the precise relief sought in this case may now be awarded in all cases in the Commission's original determination of the claim.

Some eight months following our decision in *Little*, by letters dated 10 March 1987 and 15 July 1987, the claimant expanded his application to include a request for additional medical benefits as well as compensation, thus seeking to take advantage of the change in the law announced in this Court's decision in *Little*, and thereby to obtain an award of future medical expenses.

The matter of the claimant's entitlement to additional benefits for a change of condition and future medical expenses came on for hearing on 9 January 1989. The parties stipulated and agreed that the claimant could produce no evidence of a change in condition. On 16 August 1989, the Deputy Commissioner's opinion and award was filed. The Deputy Commissioner concluded (1) that the claimant had not sustained a material change for the worse in his condition, and (2) that the claimant was entitled to future medical expenses for treatment to the extent that such treatment tended to effect a cure of, give relief from, or lessen his disability from the compensable knee injury.

The opinion for the full Commission was filed on 31 August 1990. The full Commission held that, absent a finding of entitlement to future medical benefits at the time of the original determination, the provisions of N.C.G.S. § 97-47 apply and require a showing of change of condition before future medical benefits could be awarded. Because it was admitted that there was no change in condition, the full Commission held that the claimant was not entitled to an award of future medical benefits. However, the full Commission went on to treat the claimant's motion to reopen pursuant to N.C.G.S. § 97-47 as a "mislabeled" motion based upon newly discovered evidence and remanded the case to the Deputy Commissioner for a determination as to whether or not the claimant has or could present medical evidence showing his entitlement to future medical benefits, which evidence he could not, with reasonable diligence, have discovered and produced prior to the final payment of compensation under the Form 26 Agreements.

On appeal, the Court of Appeals first found that the full Commission had correctly interpreted and applied the Workers' Compensation Act when it held that the claimant's claim for future medical expenses was barred by N.C.G.S. § 97-47 because the claimant could not show a change of condition subsequent to the last payment of compensation. Astoundingly, however, the Court of Appeals then ruled that the claimant, on "equitable considerations," was entitled to an award of future medical expenses despite the statutory bar to such an award that the court had just recognized to exist, remanded the case for the entry of an award of future medical expenses, and reported its decision unpublished. It is apparent to me that the supposed "equitable considerations" are nothing more than the recognition that the law had changed after the original determination of the claim at issue and that the claimant

would be better off if his claim were handled under the law as it now exists under *Little*.

This Court in *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985), expressly and unequivocally held that the Industrial Commission was without power to reopen an otherwise final decision solely because of subsequent developments in the law.

I believe that the majority grievously errs in holding that N.C.G.S. § 97-47 is applicable only to awards of "compensation" and not to claims for awards of medical expenses only. By its holding, the majority has, first, dispensed with the requirement of a showing of a change of condition as a prerequisite for reopening, for additional medical or treatment expenses, a claim previously closed by a final award of the Industrial Commission, and, second, has abrogated the one-year statute of limitations for reopening final awards where the award was for medical expenses only, leaving no time limitation for reopening such claims. These consequences of the majority's decision in this case all grow out of the majority's basic error in concluding that the word "compensation" as used in N.C.G.S. § 97-47 means only compensation paid for lost wages and earning capacity and that it does not include "medical and hospital expenses . . . as it always has been defined in the Workers' Compensation Act." Admittedly, that definition of compensation is referred to in a number of our cases and can be supported by the statutory definition. However, when read as a whole, our Act does not support that limited definition. It requires only a cursory reading of the Act to conclude that the meaning of the word "compensation" depends on the context in which it is used in the Act. There are many provisions of the Act that will not accommodate the narrow definition of "compensation" afforded it by the majority, particularly in the context of the basic provision stating the circumstances under which an employer is liable to pay benefits. Indeed, to construe "compensation" to exclude medical and hospital expenses would wholly exclude medical treatment from employers' duties in many contexts:

N.C.G.S. § 97-3 (duty of employer and employee, respectively, to accept the provisions of the Article to respectively pay and accept "compensation" for injury or death).

N.C.G.S. § 97-7 (the state, municipal corporations, and other political subdivisions and their employees may not reject Chapter 97 "relative to payment and acceptance of compensation").

N.C.G.S. § 97-9 (every employer shall secure the payment of "compensation to his employees" in the manner prescribed in the Act).

N.C.G.S. § 97-13(c) (state prisoners may be entitled to "compensation" under the Act).

N.C.G.S. § 97-20 (employee's "rights of compensation granted by this Article" have priority on employer's assets).

N.C.G.S. § 97-21 (employee's claims for "compensation" not assignable; employee may not "waive his right to compensation under this Chapter").

N.C.G.S. § 97-22 ("no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death").

N.C.G.S. § 97-23 ("[n]o defect or inaccuracy in the notice shall be a bar to compensation" unless the employer proves prejudice).

N.C.G.S. § 97-24 ("right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years"; any claimant whose "claim for compensation" is determined not to be covered by the Act shall have one year after the rendition of final judgment declaring coverage to exist to file suit).

N.C.G.S. § 97-25 (employee's refusal to accept treatment bars the employee from "further compensation").

N.C.G.S. § 97-27 (employee who "claims compensation" shall submit himself for examination; if he refuses, his "right to compensation" is suspended until the refusal ceases).

N.C.G.S. § 97-32 (if, before determination of disability, the employee refuses employment suitable to his capacity, he shall not be entitled to "any compensation" during continuance of his refusal).

N.C.G.S. § 97-36 (if employee's injury occurs out of state, he is entitled to "compensation" as if it had occurred in this state only under certain conditions).

N.C.G.S. § 97-51 (where employee has two or more employers, all contribute to "compensation" payable to employee unless otherwise agreed by employers).

N.C.G.S. § 97-58 (the right to "compensation" for occupational diseases and radiation injuries is barred unless timely filed).

N.C.G.S. § 97-64 ("compensation" is paid for silicosis and asbestosis under this Act).

N.C.G.S. § 97-82 (memorandum of agreement between employee and employer "in regard to compensation" shall be filed with the Commission and becomes enforceable by court decree).

N.C.G.S. § 97-83 (if employee and employer fail to reach agreement "in regard to compensation" within fourteen days of the injury, application for a hearing may be filed).

N.C.G.S. § 97-94 (employers subject to the "compensation provisions" of this Article shall file evidence of compliance, and those who fail to do so shall be guilty of a misdemeanor).

The Court of Appeals, in *Shuler v. Talon Div. of Textron*, 30 N.C. App. 570, 227 S.E.2d 627 (1976), was presented with a claim for future medical expenses, which claim was made after the filing of Form 28B and the last payment of compensation. The Court of Appeals in *Shuler* correctly and squarely held that N.C.G.S. § 97-47, and the express requirement of a showing of a change in condition embodied therein, applied and precluded an award of future medical expenses. The Court of Appeals stated:

> Therefore claimant's procedure was inextricably tied to G.S. 97-47, which requires notice within twelve months of the last payment of compensation and a showing of change of condition. Where an award directs the payment of both compensation and medical expenses, then the injured employee has one year (two years effective 1 July 1974, G.S. 97-47 as amended) from the last payment of compensation pursuant to the award in which to file claim for further compensation upon an alleged change of condition. Where the award directs the payment of medical bills only, an extension of the award would not be permissible unless there is a showing of change of condition since the original award. If the legislature had intended that no showing of a change of condition was necessary where only additional medical expense payments are sought, it would have so provided.

Id. at 576-77, 227 S.E.2d at 631 (emphasis added) (citation omitted). The majority, without any analysis or discussion of *Shuler*, overrules it.

In the case sub judice, the claimant has stipulated that he cannot show a change in condition. Hence, he clearly is statutorily barred from reopening this claim for an award of future medical expenses.

N.C.G.S. § 97-47 is the provision in the Workers' Compensation Act that authorizes the reopening and modification of a final award. N.C.G.S. § 97-47 expressly provides:

> Upon . . . the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Article . . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

N.C.G.S. § 97-47 (1991) (emphasis added).

Many, if not most, workers' compensation claims are closed by a final award of medical expenses only. N.C.G.S. § 97-47 clearly recognizes and provides for review of "cases in which only medical or other treatment bills are paid." The statute provides in the clearest terms that "on the grounds of a change in condition the Industrial Commission may review any award." (Emphasis added.) The statute clearly provides that a change of condition is a prerequisite to a review of "any" previous award. It does not limit review only to cases where there has been an award of "compensation," that is, compensation as defined by the majority to be payments for lost wages and earning capacity. The statute authorizes the Commission on such a review to end, diminish, or increase a previous award of "compensation," and it is clear to me that that authority extends to previous awards of medical expenses only.

The underlined words relating to medical expenses are meaningless if, as the majority has ruled, the Commission is limited to "ending, diminishing, or increasing the compensation previously awarded" (emphasis added), if compensation does not include medical and treatment expenses. If the Commission may end, diminish, or increase only "compensation" for lost wages and earning capacity, there would be no need to limit the time for review of "bills for medical or other treatment, paid pursuant to this Article." *Id.*

I fail to see how the majority can conclude that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment. If that conclusion were correct, what possible meaning would one attribute to the underlined words limiting the time for review of a previous award that related only to medical and treatment expenses?

The majority complains that reliance in this dissent on the language of N.C.G.S. § 97-47 is inapposite. I strongly disagree. If, as the majority contends, the provision relating solely to medical expenses applied to allow only a subsequent award of "compensation" where none was originally made, the words would not be "end, diminish, or increase the compensation previously awarded." These words clearly contemplate a termination of or change in an award previously made. If the legislature had intended otherwise, it would have used words such as "may award" or "may grant an award" or words of similar import that do not contemplate a termination or change in an award of compensation previously entered.

It is important to note that the effect of the majority opinion is not only to no longer require a showing of a change of condition, but also to do away with any statutory time limitation, after a final award of medical benefits only, to file for additional benefits for "medical, surgical, hospital, nursing, and rehabilitation services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief" (now defined as "medical compensation"). N.C.G.S. § 97-2(19) (1991); N.C.G.S. § 97-25 (1991). I simply cannot believe the legislature intended that such awards might be reopened without any limitation as to time whatsoever. Not surprisingly, the majority does not discuss or even evidence an awareness of this effect of its decision.

If the legislature had intended that there should be no time limitations for reopening claims to recover additional medical expenses (now defined as "medical compensation"), it would not have provided that employers may destroy records of claims five years after a claim is closed by an award. N.C.G.S. § 97-24. Under the majority's holding today, many cases can be reopened for additional medical and treatment expenses in which the records of the original awards have already been destroyed. It seems clear to me that the legislature fixed the five-year period after which records may be destroyed because it contemplated that no case could be reopened for any purpose after the final award except where there is a change of condition and a claim is asserted within two years of the final award where "compensation" for lost earnings was awarded and within one year if the original award was only for medical expenses. The records would then be available for a reasonable period beyond any possible reopening.

The majority implies that its decision in this case does not constitute a change in existing law. Nothing could be further from the truth. Employees, employers, and the Commission have heretofore constantly observed the change of condition and time limitations requirements of N.C.G.S. § 97-47 in reopening all cases where the final award has been entered, specifically including cases where the claimant sought only additional medical expenses. Any practitioner with even limited experience in the workers' compensation field will recognize that the majority opinion is a major change in the law rivaling those changes wrought by *Woodson*, *Gupton*, *Whitley*, *Kennedy*, and *Bridges*.[1]

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1. *Gupton v. Builders Transport*, 320 N.C. 38, 357 S.E.2d 674 (1987) (a claimant entitled to a remedy under either scheduled benefits under N.C.G.S. § 97-31 or permanent-partial disability benefits under N.C.G.S. § 97-30 may select the remedy offering the more generous benefits); *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986) (an employee who qualifies as being totally and permanently disabled is not precluded by the "in lieu of all other compensation" clause of N.C.G.S. § 97-31 from recovering lifetime compensation under N.C.G.S. § 97-29); *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990) (once the claimant proves that his wage earning capacity has been impaired by injury, respondent-employer must come forward to show not only that suitable jobs are available, but also that claimant is capable of getting one); *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 368 S.E.2d 388 (shifting burden from employee to employer to show that claimant is employable and therefore no longer disabled under the Act, that jobs are not only generally available, but that claimant can obtain a job taking into account his specific limitations), *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988); *see also Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) (permitting tort actions by employees against their employers

I make no personal judgment as to the overall desirability of the change. I do, however, recognize that the majority has wrought a major change, and I strenuously object to that change being made in an already precariously balanced compensation system by this Court rather than by the legislature. I would remind the writer of the majority opinion of his words in his recent dissent in *Woodson*, in which I joined: " 'Changes in the Act's delicate balance of interests [between employee and employer] is more properly a legislative prerogative than a judicial function.' " *Woodson v. Rowland*, 329 N.C. 330, 362, 407 S.E.2d 222, 241 (1991) (quoting language of the opinion of the Court of Appeals in *Woodson v. Rowland*, 92 N.C. App. 38, 42, 373 S.E.2d 674, 677 (1988)).

Changes of this magnitude in our state's workers' compensation plan require public policy considerations that fall within the exclusive province of the legislature, and rightly so. When this Court makes such a drastic change in long-settled workers' compensation law, it does so with little or no information upon which to weigh the fallout of the change. When it is done by the legislature, there is discussion and debate and input from interested and informed parties, and benefits and detriments of the change may be weighed. Legislative changes of this magnitude are ordinarily made effective prospectively only, N.C.G.S. § 97-31.1; and there is generally sufficient lead time before the effective date of the change to allow employers and their carriers to adjust premiums and set up reserves to cover anticipated increases in payments to injured employees. When this Court makes such changes, they may or may not apply retroactively, and there is no time for appropriate alterations in premiums and reserves. Such is the case here. It appears that the result of the majority's opinion will be that future cases will require open-ended reserves. The losses will apparently fall on the carrier who covered the risk at the time the injury occurred. If the original carrier no longer covers the risk, it will be unable to recoup the loss through loss experience based rates. If that carrier is no longer writing workers' compensation coverage, the loss will be borne by the Workers' Compensation Security Fund, N.C.G.S. § 97-114, in which funds must also be

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for nonintentional acts resulting in injury); *Pickrell v Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988) (creating a presumption that employee's death occurred by a work-related cause, thereby making the death compensable whether the medical cause of death is known or unknown).

adjusted. If the legislature makes such a change, these problems are unlikely to arise.

Because of tough policy decisions made by our legislature through the years, North Carolina has traditionally been more conservative in the benefits provided and has had among the lowest workers' compensation premiums in the nation. While this is but one of many factors that influence industries and businesses that are considering locating or relocating facilities with significant employment opportunities, it is an important one and one that has been and continues to be influential in our ability to attract new industry and to diversify our economy. The need to create new jobs and attract new industry can hardly be overstated in these difficult economic times. This consideration obviously comes to the forefront as premiums rise more rapidly in this state than in our sister adjoining states.

In August 1991, the North Carolina Rate Bureau requested a 41.8% rate increase, the Commissioner of Insurance approved a 15.8% increase, and the Rate Bureau and the Commissioner settled at that figure. A year later, in October 1992, the Rate Bureau requested a 58.4% increase; the Commissioner approved a 23.4% increase; and, after the Rate Bureau and the Commissioner failed to agree on the increase, the Rate Bureau implemented a 40.3% increase subject to refund. The requested increase for 1992 in the surcharge for the Workers' Compensation Assigned Risk Pool for high risk employers who cannot purchase coverage on the market was 20%, the Commissioner has approved a 14% increase for 1993, and the increase was settled at that figure. There exists a real threat that if the companies currently writing workers' compensation insurance do not receive significant rate relief, a number of them will stop writing coverage in North Carolina. That this is a real possibility and not an idle threat is evidenced by the fact that the nation's largest workers' compensation carrier, Liberty Mutual, served notice in December 1991 that in December 1992, it would no longer write new workers' compensation policies in seventeen states, including North Carolina.

The impact of the aforementioned decisions which have drastically changed the law has been very substantial. It has resulted in sharply higher medical costs (resulting from increased premiums) and an increasing number of lawsuits by injured workers against their employers. It is noteworthy that the average medical cost

in workers' compensation cases has nearly tripled since 1985. The increased premiums are felt by the small businessman as well as the larger employer, as the law requires that virtually every employer of three or more persons carry the coverage. When these increased costs are passed on, as they surely will be, they will ultimately be borne by the members of the general public, most of whom are employees themselves, who are the consumers of manufactured products and services.

In summary, at no time has the claimant attacked the propriety of the Form 21 and Form 26 Agreements as of the time they were entered and approved. There is no claim of fraud, mistake, overreaching, or even inadvertence with respect to these agreements. As stipulated by the parties, all of the facts now asserted in support of the claimed entitlement of an award of future medical benefits were fully known to the parties prior to the 1 November 1984 date of the second Form 26 and well before the date of the last payment of compensation on 25 February 1985. By virtue of the Form 21 and Form 26 Agreements, the claimant was provided with all benefits to which he was entitled under the law as it was then understood to be.

The majority opinion will potentially permit the reopening of a vast and indeterminate number of final awards of the Industrial Commission. What is at stake here is the concept of finality that is essential to the proper, economical, and efficient operation of administrative, quasi-judicial, and judicial bodies. If the final determinations of such bodies can be reopened without any time limitation whatsoever, nothing would ever be decided. A strong adherence to the doctrine of finality is as essential to the sound economical and efficient operation of the Industrial Commission as it is to the operation of the courts. It is essential to the effective operation of the whole workers' compensation system that consensual resolutions of cases such as the one here be encouraged. A holding depriving such agreements of finality can only do great harm to the efficient functioning of the Industrial Commission and to the operation of the entire workers' compensation system.

In view of the drastic changes wrought by this and other cases cited herein, perhaps it is time for the legislature to review and reassess the delicate balance of interests between employee and employer under our Workers' Compensation Act.

STATE OF NORTH CAROLINA v. JEFFREY BRIAN MEDLIN

No. 76A92

(Filed 12 February 1993)

1. **Arrest and Bail § 69 (NCI4th)— warrantless arrest—probable cause**

A homicide defendant's arrest was made with probable cause and the trial court did not err in denying suppression of defendant's statements and the evidentiary fruits of those statements where a homicide and robbery were committed at a restaurant in Wake County; Wake County officers determined in the early hours of the investigation that defendant had previously worked in the restaurant where the robbery and murder occurred; defendant had knowledge of the unique location of the money taken; was personally known to the victim; was a resident of the area; was a recently released robber; Wake County officers, after speaking with Atlantic Beach officers, were aware that defendant was in possession of a large amount of cash, both small bills and quarters; Atlantic Beach officers were aware of the above information; defendant told Atlantic Beach officers that the quarters were for amusement games and that he had left Zebulon in Wake County at about 4:00 a.m. that morning; the Atlantic Beach police officers discovered independently that defendant had paid a motel bill in cash with small bills; and Atlantic Beach officers were aware that defendant had attempted to exchange small bills for larger ones with the hotel clerk and later at a bank had exchanged small bills which the teller said smelled like food. This information was sufficient to warrant a cautious man in believing the accused to be guilty.

Am Jur 2d, Arrest § 44.

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

2. **Evidence and Witnesses § 1235 (NCI4th)— incriminating statements—right to counsel—interrogation not custodial**

There was no custodial interrogation, and the trial court correctly denied defendant's motion to suppress his statements and their evidentiary fruits, where defendant was initially arrested in Atlantic Beach on the understanding that there was

an outstanding arrest warrant for defendant; after being advised by Wake County officers that there was no warrant for defendant, Chief Duke instructed his officers to tell defendant he was free to leave and personally told defendant that he could leave; Chief Duke informed defendant that Wake County officers were on their way and wanted to talk to him and that defendant was free to go or that he could stay and speak with Wake County officers; defendant was told that he would be free to move around the police station if he stayed; defendant said that he knew a little about what the Wake County officers wanted to talk about and that he wanted to stay and talk with an officer; defendant remained at the station with his money and cigarettes on a table in front of him; a public phone was available to him throughout the time he was at the station; defendant was constantly in the presence of at least one uniformed officer and was escorted by an officer to the rest room; the Atlantic Beach Police Department facility is small and anyone who was there would have been constantly in the presence of police officers; it is unlikely that anyone would have been permitted to wander unmonitored around police headquarters; defendant repeatedly told Atlantic Beach officers that he wanted to go ahead and make a statement, but Chief Duke wanted defendant to talk to Wake County officers since they were more familiar with the case; and Chief Duke and Captain Wrenn agreed to take defendant's statement after numerous requests. The trial court's findings that defendant was told that he was free to go and that he subsequently volunteered to stay and repeatedly sought interviews with the officers are supported by competent and substantial evidence.

Am Jur 2d, Criminal Law § 788; Evidence § 555.

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.

3. Evidence and Witnesses § 1264 (NCI4th)— right to counsel—waiver

Assuming that a murder and robbery defendant was in custody and had a right to counsel when he sought to give a statement, he waived that right where, in response to the

question concerning the desire for counsel, defendant stated, "Yes—I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial"; after the police chief indicated that he would get a telephone book for defendant so that he could look up an attorney, defendant responded, "No, sir, I don't want an attorney"; and when defendant was later asked by a detective whether he wanted a lawyer prior to that questioning, defendant stated and wrote on the *Miranda* form, "Not at this time but when I go to court." Defendant waived his right to counsel during questioning and preserved his right to an attorney at trial. Defendant did not reverse his position, and, as for whether his statement was ambiguous, the police chief was arguably attempting to clarify whether defendant in fact wanted an attorney when he stated that he was not going to personally go out and get an attorney for defendant, but that he would get a telephone so that defendant could find an attorney. It is clear that defendant responded that he did not want an attorney.

Am Jur 2d, Criminal Law § 797; Evidence § 555.

4. **Constitutional Law § 277 (NCI4th)— right to counsel—waiver—knowing, intelligent, and voluntary**

A trial court did not err in a murder and robbery prosecution by refusing to suppress defendant's statements on the grounds that his waiver of counsel was not knowing, intelligent, and voluntary. Although defendant contended that his waiver could not have been voluntary because he did not fully understand the nature of the right, defendant was read his *Miranda* rights, which explained that defendant was entitled to counsel during questioning and not just at trial; defendant was no stranger to the process, having been charged and convicted of robbery and having been twice advised and waived his rights in connection therewith; defendant insisted on giving a statement in an attempt to divert suspicion to another individual; numerous officers testified that defendant's faculties seemed in no way impaired; and defendant had cigarettes available to him, took bathroom breaks, was provided with food and drink, and was given the opportunity to see his girlfriend.

Am Jur 2d, Criminal Law § 797; Evidence § 555.

5. Constitutional Law § 262 (NCI4th)— waiver of right to counsel—no violation of N.C. Constitution

There was no authority for applying Article I, Section 23 of the North Carolina Constitution differently from the pertinent sections of the federal Constitution where defendant's warrantless felony arrest was based on probable cause, defendant was released and was told he could leave and was not thereafter in custody, and defendant was therefore not entitled to the presence of counsel when he made his statements.

Am Jur 2d, Criminal Law § 797; Evidence § 555.

Justice FRYE concurring in the result.

Chief Justice EXUM and Justice MITCHELL join in this concurring opinion.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment upon defendant's plea of guilty and conviction of first-degree murder entered by Thompson, J., at the 22 April 1991 Criminal Session of Superior Court, Wake County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to his robbery with a dangerous weapon conviction, for which he received a consecutive forty-year sentence following his plea of guilty, was allowed by this Court on 13 March 1992. Heard in the Supreme Court 3 November 1992.

Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

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

MEYER, Justice.

On 24 September 1990, defendant, Jeffrey Brian Medlin, was indicted for robbery with a dangerous weapon and the first-degree murder of Darla Cline. On 18 February and 5 March 1991, defendant filed four motions to suppress, seeking to exclude statements made by defendant to law enforcement officials on 11 September 1990

and the resulting physical evidence. A hearing upon defendant's motions to suppress was conducted at the 11 March 1991 Criminal Session of Superior Court, Wake County, before Judge Robert L. Farmer. Upon oral and written denials of the suppression motions, defendant entered pleas of guilty to first-degree murder and to robbery with a dangerous weapon at the 22 April 1991 Criminal Session of Superior Court, Wake County, before Judge Jack A. Thompson. Pursuant to N.C.G.S. § 15A-979(b), defendant reserved his right to appeal from the denial of the suppression motions. Thereafter, a capital sentencing hearing was conducted before a jury, following which the jury recommended a sentence of life imprisonment for the murder. Judge Thompson sentenced defendant to a term of forty years' imprisonment for the robbery with a dangerous weapon conviction and a consecutive term of life imprisonment for the first-degree murder conviction. From those judgments and from the denial of defendant's suppression motions, defendant appealed to this Court.[1]

Defendant brings forward two assignments of error: whether the trial court erred in denying defendant's motions to suppress incriminating statements and their evidentiary fruits (1) because this evidence was obtained as a direct result of an illegal, warrantless arrest; and (2) because the statements were obtained from defendant in violation of his statutory and state and federal constitutional right to counsel. After a thorough review of the motion hearing transcript and sentencing proceeding, the record on appeal, and the briefs of defendant and the State, we conclude that the trial judge properly denied defendant's motions to suppress, and we therefore affirm his convictions and sentences.

At the 11 March 1991 suppression hearing, the State presented evidence that tended to show the following facts and circumstances. Shortly before 5:00 a.m. on 11 September 1990, the body of Darla Cline was found at her place of employment, Johnson's Forks Restaurant, an all-night restaurant near Zebulon, North Carolina. She was found in the kitchen, lying face down in a pool of blood around her upper torso and head area. She had last been seen alive by a newspaper carrier approximately forty-five minutes earlier.

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1. Defendant's appeal challenges the denial of three of his four suppression motions. Defendant has abandoned his assignment of error to the denial of the motion to suppress the hair and blood samples taken from defendant's person on 22 October 1990.

Detective Kenneth E. Duckworth, an investigator with the Wake County Sheriff's Department, determined that Ms. Cline had been beaten about the head and upper body and stabbed in the face and upper chest. An autopsy later revealed that she had been struck in the head six times and stabbed sixteen times. The fatal wound was a stab wound to the throat which severed the jugular vein and from which she would have taken approximately fifteen to twenty minutes to die as a result of exsanguination.

Wake County sheriff's deputies at the scene determined that a cash box, containing $800 to $1,500 in change and paper money in small denominations used for amusement games, was missing from its usual place in the kitchen. The quarters in the box were rolled in orange wrappers and were stamped "AM Amusement." The location of the money box was known only to employees. Later that morning, the Wake County deputies received information from Ike Strickland, a local convenience store operator, that he knew who committed the murder, that it was committed by "Medlin" (defendant), that defendant was a former employee of the restaurant that had been robbed, and that defendant had recently been released from prison following a robbery conviction.

At approximately 2:45 or 3:00 p.m., Detective Duckworth received a telephone call from the Atlantic Beach Police Department concerning a traffic stop that had occurred there. During a consent search of the vehicle, in which defendant was a passenger, the officers found what appeared to be burglary tools on the back floorboard and a Crown Royal bag containing a large amount of quarters and one- and five-dollar bills. The money appeared to be $700.00 or more. Defendant informed the officers that he owned amusement machines, that he had left Zebulon about 4:00 a.m. that day, and that he was staying at the Iron Steamer in Atlantic Beach. The driver, Dana Bylsma, was cited for an expired registration, and they were released. Upon receiving this information, Detective Duckworth informed Atlantic Beach Detective Galizia that a robbery and murder had occurred in Zebulon around 4:00 or 5:00 a.m., that the prime suspect was defendant, and that a large amount of one-dollar bills, five-dollar bills, and quarters was missing. Detective Duckworth told Detective Galizia that there were no outstanding warrants but that he wanted to interview defendant and Bylsma. Detective Duckworth was concerned that money or other evidence might be disposed of before the Wake County officers could make the two-and-a-half to three-hour drive to Atlantic

Beach. Therefore, he requested that the Atlantic Beach Police Department locate defendant and Bylsma and hold them. At 3:45 p.m., Detective Duckworth sent a PIN message to confirm the request, which stated: "Att: Detective Galizia: Please locate Red Datsun, CXX4134. Stop and hold ref: homicide occurred this a.m. this jurisdiction. Authority, Detective Duckworth." Following the receipt of this message, Atlantic Beach police determined that the motel bill had been paid in advance in cash and that both defendant and Bylsma had attempted to exchange small-denomination bills for larger ones with the motel clerk. They also discovered that defendant and Bylsma had exchanged $700.00 in five-dollar bills at a local bank. According to a bank teller, the bills exchanged smelled like food.

Several Atlantic Beach detectives and police officers took up positions at some condominiums next door to the Iron Steamer. From his vantage point at the condominiums, Officer Harris heard, over his walkie-talkie, Chief Duke ask the dispatcher whether a warrant had been issued. The dispatcher's response was "Ten-four." Apparently, the dispatcher misunderstood and in error confirmed the existence of outstanding warrants. As he watched, Officer Harris saw defendant come out of the hallway onto the breezeway, walking fast and looking around. At that moment, Detective Guthrie came around the corner, and Officer Harris called out to him that defendant was the subject they had been seeking. Defendant attempted to flee, and Detective Guthrie drew his weapon and apprehended defendant. Defendant, Bylsma, and Cari Childers (a female in defendant's motel room) were transported to the Atlantic Beach Police Department at approximately 4:30 p.m.

Chief Duke directed the dispatcher to send a PIN message to Wake County that the three people were in custody. Chief Duke requested that copies of the arrest warrants be "faxed" to him and that the Wake County officers come to Atlantic Beach. Afterwards, Chief Duke learned from Detective Galizia that no warrants were on file. Chief Duke then called Detective Duckworth, who confirmed that no warrants existed and that he was in the process of getting them. Following that conversation, Chief Duke told his officers that they were to explain to defendant, Bylsma, and Childers that they were not under arrest and that they were free to leave. He also instructed his officers to inform defendant and the others that police officers were en route from Wake County and would like to talk to them. Before defendant was told that he could go,

Captain Wrenn served him with a citation for resisting, delaying, and obstructing a law enforcement officer. Chief Duke personally told defendant that he was free to go, that there was an investigation underway involving incidents that took place in the Wake County area, that investigators were en route and wanted to talk to him, that he could leave or that he could stay and move around the police department at will, and that if he needed anything, to let them know. Defendant indicated that he wanted to stay. According to Chief Duke's testimony, defendant said that he knew a little about what Wake County wanted to talk to him about and that he would like to talk with an officer. Defendant not only remained at the station, but began actively pursuing local officers in an attempt to give a statement. According to Captain Wrenn, defendant repeatedly said, "I want to talk to you about what happened."

Captain Wrenn and Chief Duke finally agreed to take defendant's statement at about 7:00 p.m. on 11 September 1990. Using a standard *Miranda* warning form, Chief Duke advised defendant of his rights. Defendant responded that he understood each one. When Chief Duke asked if he wanted a lawyer, defendant said, "Yes—I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial." Chief Duke responded to the defendant that he was not personally going to go out and get an attorney for defendant but he would get a telephone book for the defendant so that he could look up an attorney. Defendant replied, "No, sir, I don't want an attorney." Chief Duke then asked defendant if he wanted to talk to them; defendant answered "Yes" and signed the waiver form. Chief Duke terminated the interview with defendant after fifteen minutes because defendant was talking too fast. Chief Duke suggested that defendant might want to make a written statement. Defendant then made a written statement and two tape-recorded statements. Chief Duke called Wake County and spoke to Detective Pearce at about 7:40 p.m. with the information obtained from defendant regarding his participation in the robbery. Detective Pearce prepared an affidavit to that effect, and Detective Duckworth completed drawing the search warrant for defendant's motel room and car. Detective Duckworth then obtained the search warrant and an arrest warrant charging defendant with robbery with a dangerous weapon, which he faxed to Atlantic Beach. Detective Duckworth requested that the Atlantic Beach officers serve only the search warrant.

Captain Wrenn gave the written statement to Detective Toler, who arrived from Wake County at approximately 9:15 p.m. Before Detective Toler interviewed defendant, he advised him of his rights using a standard *Miranda* form. Defendant stated that he understood his rights. When asked if he wanted a lawyer, defendant stated and wrote on the form, "Not at this time but when I go to court." Defendant responded "Yes" when asked if he wanted to talk now, and then he signed the waiver. Defendant gave Detective Toler substantially the same statement he had earlier given to Captain Wrenn. Defendant stated that Richard Baker, a friend of his, went into Johnson's Forks Restaurant and committed the robbery and murder while defendant waited in the car. Defendant thought that Baker was going into the restaurant to use the bathroom until Baker ran out with the money and blood on his clothes. Detective Toler interviewed defendant until about 12:50 a.m.

At approximately 1:00 a.m. on 12 September 1990, Detective Pearce entered the office alone while defendant was sitting at the desk. Pearce told defendant that defendant was not telling the truth concerning the events of the murder and robbery. Defendant stood up and told Pearce that he had personally killed Darla Cline. Defendant stated that he was relieved to have told what happened. Pearce interviewed defendant for approximately two hours, with breaks at 1:55 and 2:20 a.m. Defendant gave Pearce a detailed statement admitting to robbing and killing Darla Cline by beating her with brass knuckles and stabbing her with a knife. Defendant illustrated his confession by drawing sketches of the restaurant, and he described where he had thrown the knife and brass knuckles. Pearce wrote down what defendant told him and then read the statement to defendant. Defendant then signed the statement. Defendant was taken to the magistrate's office in Carteret County and was served with a robbery warrant, then was transported to Wake County. Defendant was served with an arrest warrant for murder at approximately 2:00 p.m. on 12 September 1990.

On 13 September 1990, defendant made a request to the jail supervisor to see Detective Duckworth. After being advised of his rights and signing a waiver form, defendant made additional statements about the crime to Duckworth. Defendant described the murder weapon and told Duckworth the location where he had thrown it.

[1] Defendant contends that the trial court erred by denying his motions to suppress the incriminating statements and their evidentiary fruits on the basis that this evidence was obtained by law enforcement officers as a result of his illegal, warrantless arrest without probable cause. We disagree. Based upon evidence introduced at a voir dire hearing, during which numerous Atlantic Beach and Wake County police officers testified, the trial court made findings and concluded that "the Wake County Sheriff's Department investigators had probable cause on September 11, 1990, before the defendant was detained by the Atlantic Beach Police Department officers at the Iron Steamer Motel[,] to believe that the defendant had committed a felony, and thus the detention of the defendant at the Iron Steamer Motel and removal to the Atlantic Beach Police Department was lawful." The trial court's findings that led to this conclusion are supported by substantial evidence and are thus binding on this Court. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992); *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982). The record indicates that defendant was apprehended in a breezeway outside of his motel room. A warrantless felony arrest is valid if supported by probable cause. N.C.G.S. § 15A-401(b)(2)(a) (1988); *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879, *reh'g denied*, 338 U.S. 839, 94 L. Ed. 513 (1949); *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1984). We have previously held:

> A warrantless arrest is based upon probable cause if the facts and circumstances known to the arresting officer warrant a prudent man in believing that a felony has been committed and the person to be arrested is the felon. "Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty."

State v. Shore, 285 N.C. 328, 335, 204 S.E.2d 682, 686 (1974) (citations omitted); *quoted in State v. Smith*, 328 N.C. 99, 111-12, 400 S.E.2d 712, 719 (1991); *State v. Zuniga*, 312 N.C. at 259, 322 S.E.2d at 145.

During the early hours of the investigation, Wake County officers determined that defendant, a recently released convicted robber, was a resident of the area, had previously worked in the restaurant, had knowledge of the unique location of the money

that was taken, and was personally known to the victim. After speaking with the Atlantic Beach officers regarding the traffic stop, the Wake County officers were aware that defendant was in possession of a large amount of cash, both small bills and quarters. Defendant told the Atlantic Beach officers that the quarters were for amusement games and that he had left Zebulon at about 4:00 a.m. that morning. In addition to this information, the Atlantic Beach police officers discovered independently that defendant had paid a $108.00 motel bill in cash, with small-denomination bills. Atlantic Beach officers were aware that defendant had attempted to exchange small bills for larger ones with the hotel clerk and later, at a local bank, had exchanged small bills that, according to the bank teller, smelled like food. The Atlantic Beach officers possessed all of the above information at the time of defendant's initial apprehension at the Iron Steamer Inn, and we conclude that this information was sufficient "to warrant a cautious man in believing the accused to be guilty." *Shore*, 285 N.C. at 335, 204 S.E.2d at 686. We conclude that defendant's arrest was made with probable cause. We therefore hold that the trial court did not err in denying suppression of defendant's statements or the evidentiary fruits of those statements, on the basis that defendant's arrest was based upon probable cause. The fact that defendant was later released (and subsequently rearrested) does not affect the validity of the original arrest.

[2] In his remaining assignment of error, defendant contends that the trial court erred by denying defendant's motions to suppress incriminating statements and their evidentiary fruits because the statements were obtained from defendant in violation of his rights under the Fifth and Fourteenth Amendments to have counsel present during custodial interrogation. *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); *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, *reh'g denied by California v. Stewart*, 385 U.S. 890, 17 L. Ed. 2d 121 (1966). We disagree. After a careful review of the evidence, we conclude that defendant was not in custody when he gave the statements in question. The rule of *Miranda* requiring that suspects be informed of their constitutional rights before being questioned by the police and the rule of *Edwards* guaranteeing the right to remain silent and the presence of counsel during such questioning apply only to *custodial* interrogation. It is well established that the test for whether a person is "in custody" for *Miranda* purposes

is whether a reasonable person in the suspect's position would feel free to leave at will or feel 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. This test is necessarily an objective one to be applied on a case-by-case basis considering all the facts and circumstances. Evidence before the trial court tended to show that defendant initiated his initial interview with officers of the Atlantic Beach Police Department at approximately 7:00 p.m. on 11 September 1990.

Based upon evidence introduced at a voir dire hearing where Chief Duke and Captain Wrenn testified, the trial court made findings and concluded that defendant was not "in custody" at the time of his initial interview with Chief Duke and Captain Wrenn. After being advised by the Wake County officers that there was no outstanding arrest warrant for defendant, Chief Duke instructed his officers to tell defendant he was free to leave. Chief Duke personally told defendant that he could leave. The record indicates that defendant was told he was free to go approximately one-half hour after the initial arrest. Chief Duke informed defendant that Wake County officers were on the way to Atlantic Beach and wanted to talk with him. Chief Duke indicated to defendant that he was free to go or that if he chose to remain and speak with the Wake County officers, he was free to move about the police station while he waited. Defendant told Chief Duke that he knew a little about what the Wake County officers wanted to talk with him about and that he wanted to stay and talk with an officer. Defendant remained at the station, with his money and cigarettes on a table in front of him. The record indicates that a public phone was available to defendant throughout the time he remained at the station.

Defendant contends that while he was able to move about the police station freely, it is significant that he was constantly in the presence of at least one uniformed officer and that when he needed to use the rest room, he was escorted by a police officer. We disagree. The record indicates that the Atlantic Beach Police Department facility is a small one and that during the time defendant was waiting for the Wake County officers to arrive, numerous Atlantic Beach officers continued about their duties. Anyone who was there would have been constantly in the presence of police officers. It is also unlikely that anyone would have been permitted to wander unmonitored around police headquarters, and therefore

it is not unusual that defendant would have been escorted to the rest room. It is not determinative on the issue of custody that defendant was in the presence of uniformed officers and was escorted to the rest room. *State v. Davis*, 305 N.C. at 416-17, 290 S.E.2d at 580-81.

Defendant repeatedly told Atlantic Beach police officers that he wanted to go ahead and make a statement to them. Chief Duke told defendant that he would rather that defendant talk to the Wake County officers when they arrived because they would be more familiar with the facts of the case. The record indicates that after numerous requests, Captain Wrenn and Chief Duke agreed to take defendant's statement. The trial court's findings that defendant was told that he was free to go and that he subsequently volunteered to stay and repeatedly sought interviews with Atlantic Beach officers are supported by competent and substantial evidence and are thus binding on this Court. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58; *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574. Furthermore, those findings compelled the trial court's conclusion that defendant was not "in custody" and "that a reasonable person in the defendant's situation would have believed that he was free to leave the Atlantic Beach police department." Because we find that defendant was not in custody at the time he gave his statement to Chief Duke and Detective Wrenn, defendant did not have a right to have counsel present. Thus, it is unnecessary for us to determine whether defendant properly waived his right to counsel.

[3] Assuming *arguendo* that defendant was in custody and did have a right to counsel when he sought to give a statement, he nonetheless effectively waived this right. Although defendant was free to leave, he was read his *Miranda* rights. The trial court's findings of fact and the supporting record indicate that in response to the question concerning the desire for counsel, defendant stated, "Yes—I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial." The record indicates that at this point Chief Duke indicated to defendant that he was not personally going to go out and get an attorney for defendant but he would get a telephone book for the defendant so that he could look up an attorney. Defendant then responded, "No, sir, I don't want an attorney."

Defendant contends that his response, "Yes—I know you can't get one now but I want to talk to you. I'll get a lawyer for my

trial," constitutes an unambiguous invocation of the right to counsel, and all further exchanges with him should have ceased. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707. Additionally, defendant argues that his subsequent statements, made following his assertion of a desire for counsel, may not be used to cast doubt on his initial invocation of his rights. *Smith v. Illinois*, 469 U.S. 91, 83 L. Ed. 2d 488 (1984). We disagree. When asked if he wanted a lawyer, defendant did not simply respond, "Yes"; he continued immediately with the qualification, "I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial." "There are no 'magic words' which must be uttered in order to invoke one's right to counsel." *Torres*, 330 N.C. at 528, 412 S.E.2d at 26. The issue becomes whether defendant has indicated "in any manner" that he desires the presence or aid of counsel while being interrogated. *Miranda*, 384 U.S. at 444-45, 16 L. Ed. 2d at 707. We hold that defendant did not invoke his right to counsel while being interrogated, as he did not indicate that he wanted the aid of counsel during questioning. Defendant waived his right to counsel during questioning and preserved his right to an attorney at trial. This interpretation of defendant's statement is further supported by defendant's later response when asked by Wake County Detective Toler whether he wanted a lawyer prior to questioning. Defendant stated and wrote on the *Miranda* form, "Not at this time but when I go to court."

This case is distinguishable from *Smith v. Illinois*, where the defendant initially invoked his right to counsel by saying, "[Y]eah. I'd like to do that," and then was questioned further by police until he finally reversed his position by saying, "All right. I'll talk to you then." *Smith*, 469 U.S. 91, 93, 83 L. Ed. 2d 488, 492 (1984). Defendant did not reverse his position here. He initially stated that he did not want a lawyer at that time but wanted a lawyer for his trial. Then he said, "No, sir, I don't want an attorney."

Alternatively, defendant contends that should his statement be read as ambiguous, it still constitutes an invocation of counsel because "when faced with an ambiguous invocation of counsel, interrogation must immediately cease except for narrow questions designed to clarify the person's true intent." *Torres*, 330 N.C. at 529, 412 S.E.2d at 27. Defendant contends that in this case, the officers made no attempt to clarify defendant's true intent. This argument must also fail. Defendant was asked if he wanted an attorney, to which he replied, "Yes—I know you can't get one

now but I want to talk to you. I'll get a lawyer for my trial." Chief Duke indicated to defendant that he was not personally going to go out and get an attorney for defendant but he would get a telephone book for the defendant so that he could look up an attorney. Defendant then responded, "No, sir, I don't want an attorney." "Miranda does not require that attorneys be producible on call . . . ." *Duckworth v. Eagan*, 492 U.S. 195, 204, 106 L. Ed. 2d 166, 178 (1989). By telling defendant that while he could not get an attorney for him personally but would provide defendant with the means of acquiring one himself, Chief Duke was arguably attempting to clarify whether defendant in fact wanted an attorney. It is clear from the record that, at this point, defendant responded, "No, sir, I don't want an attorney." We conclude that the evidence supports the trial judge's conclusion that this was defendant's true intent.

[4] Additionally, defendant argues in the alternative that defendant's statements must be suppressed because his waiver of counsel was not knowing, intelligent, and voluntary. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707. We disagree. We must look to the totality of the circumstances to determine whether a confession is voluntarily made. *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984). Defendant contends that his waiver could not have been voluntary because he did not fully understand the nature of the right being abandoned. We disagree. Defendant was read his *Miranda* rights, which explained that defendant was entitled to counsel during questioning, not just at trial. Additionally, defendant was no stranger to the process. Defendant had previously been charged and convicted of robbery and, in connection therewith, had twice been advised and waived his rights.

Finally, the record indicates that defendant insisted on giving a statement to the Atlantic Beach officers in an apparent attempt to divert suspicion to another individual before the Wake County officers arrived. The record indicates that numerous officers testified that defendant's faculties seemed in no way impaired. Defendant had cigarettes available to him. Defendant took bathroom breaks and was provided with food and drink. When defendant asked to see his girlfriend, he was given this opportunity. Our review of the entire record leads us to conclude that the trial court's findings were supported by substantial and competent evidence. Those findings in turn support the trial court's conclusion that

defendant voluntarily, knowingly, and intelligently waived his right to counsel before he gave his statements to the officers.

In addition to arguing that his statements during his initial interview with Atlantic Beach officers should be suppressed, defendant contends that his subsequent statements made during all later interviews and all resulting physical evidence should be suppressed under the "fruits of the poisonous tree" doctrine because they are the product of an illegal arrest and the fruit of an initially unconstitutional interrogation without counsel. Having concluded that defendant's initial arrest was lawful and that he was neither in custody nor entitled to the presence of counsel when the initial statement was made, his subsequent statements and the resulting evidentiary fruits were not tainted.

[5] Defendant makes one further argument. Defendant moved for exclusion of all of his statements and the resulting evidentiary fruits on the basis of our state Constitution as well as the federal Constitution. Throughout his brief, defendant has suggested that, even if we should reach the result we have reached under the pertinent amendments to the United States Constitution, Article I, Section 23 of the North Carolina Constitution requires a different result, that is, that all such evidence be excluded. We disagree. We have held herein (1) that defendant's initial warrantless felony arrest was based on probable cause and was therefore lawful, (2) that defendant was released and told he could leave and was not thereafter in custody, and (3) that defendant was therefore not entitled to the presence of counsel. Defendant has cited no authority, and we know of none, wherein Article I, Section 23 has been applied differently in regard to these three particulars.

We hold that the trial judge properly denied defendant's motion to suppress his statements (and resulting physical evidence) made subsequent to his initial statement.

We conclude that the trial court properly denied defendant's motions to suppress.

NO ERROR.

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

Justice FRYE concurring in result.

Having concluded that defendant was not in custody at the time he gave his statement to Chief Duke and Detective Wrenn and therefore did not have a right to have counsel present, the majority then proceeds to the question of whether defendant waived his right to counsel. I find it unnecessary to decide the question of whether defendant waived a right which he did not have. Thus, I do not join that portion of the opinion which assumes *arguendo* that defendant was in custody, had a right to counsel, but nevertheless waived that right.

Chief Justice EXUM and Justice MITCHELL join in this concurring opinion.

STATE OF NORTH CAROLINA v. JOHNNY BRADLEY GLENN

No. 60A92

(Filed 12 February 1993)

1. **Jury § 257 (NCI4th)— peremptory challenge—racial basis—prima facie case not shown**

A defendant on trial for two first degree murders failed to establish a prima facie case that the prosecutor peremptorily challenged a prospective juror solely on the basis of race where defendant and both victims are black; the record does not reflect that the prosecutor peremptorily challenged any other black venire person; and the prosecutor stated that he peremptorily challenged this prospective juror because his statement that he "would let [the death penalty] be the last alternative" was indicative of greater equivocation toward the death penalty than had been expressed by other jurors.

Am Jur 2d, Jury § 173.

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

2. **Appeal and Error § 150 (NCI4th)— challenge to evidence on appeal—failure to object at trial**

Where defendant did not object at trial to the admission of a 911 tape recording on the basis of a "suggestive" identifica-

tion procedure, he will not be allowed to challenge the admission of the recording on that ground for the first time on appeal.

Am Jur 2d, Appeal and Error § 602.

Admissibility of tape recording or transcript of "911" emergency telephone call. 3 ALR5th 784.

3. Evidence and Witnesses § 959 (NCI4th)— hearsay rule—state of mind exception—victim's fear of defendant

Testimony by a witness that a murder victim told him that she wanted to move in with him because defendant had attacked her, pinned her to the bed, and attempted to stab her was admissible under the state of mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3) to show the victim's fear of defendant where similar testimony by the witness on voir dire provided a plausible reason and factual basis for the victim's fear of defendant, and the victim's fear of defendant was relevant 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. Furthermore, the trial court did not abuse its discretion in its determination that the probative value of this evidence outweighed its tendency to unfairly prejudice defendant since the evidence was highly relevant to show motive or intent as well as to show the status of the victim's relationship with defendant prior to her death.

Am Jur 2d, Evidence § 650.

4. Appeal and Error § 439 (NCI4th)— transcript of testimony—assignments of error—exclusion of questions—failure to comply with Rules of Appellate Procedure

Defendant's assignments of error to the trial court's exclusion of testimony by certain witnesses were dismissed for failure to comply with Appellate Procedure Rule 28(d) where the transcript of the proceedings was filed pursuant to Rule 9(c)(2), and defendant has not identified the specific questions or answers which he wants the appellate court to review, has not included the portions of the transcript containing those questions or answers in the appendix, and has not included a verbatim recitation of those questions or answers in his brief.

Am Jur 2d, Appeal and Error § 658.

Justice WEBB concurring in the result.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two consecutive life sentences entered by Ferrell, J., at the 19 August 1991 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 14 January 1993.

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

Isabel Scott Day, Public Defender, by Grady Jessup, Assistant Public Defender, for defendant-appellant.

MEYER, Justice.

Defendant was indicted by a Mecklenburg County grand jury on 11 March 1991 for the murders of Johnnie Sampson and Subrina Osborne. Defendant was tried capitally in Superior Court, Mecklenburg County, in August 1991, and the jury returned verdicts finding defendant guilty of the first-degree murders of Sampson and Osborne. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended sentences of life imprisonment for both convictions of first-degree murder. In accordance with the jury's recommendation, Judge Ferrell sentenced defendant to two life sentences for the murders. Defendant appeals to this Court as of right.

Evidence presented at defendant's trial shows the following. On 1 December 1990, the two victims, defendant, and Forist Foster lived in Sampson's residence at 1932 Umstead Street in Charlotte, North Carolina. Osborne and defendant were dating and shared a bedroom. In the afternoon prior to the murders, Foster and Sampson were sitting in the house watching football. Osborne ran into the house and asked Sampson if she could hide in his bedroom because she "was scared of [defendant] . . . [b]ecause he had been drinking." Osborne then went into Sampson's bedroom and hid. Some time later, defendant ran into the house and went into his and Osborne's bedroom. After rummaging around in the room, defendant returned to the living room and started talking to Sampson. Defendant then started hitting Sampson. Foster asked defendant to leave, and when defendant ignored him, Foster went to call the police. Foster ran to the Villa Heights Store and found that he could not use the phone there. Foster then ran to Louis Cunningham's house and told Cunningham that defendant was

"beatin' [the victim Sampson] up." Foster asked Cunningham to walk back down to Sampson's with him. Upon arriving at Sampson's house, Foster found the front door ajar. When Foster and Cunningham went into the house, they saw Sampson lying on the floor, with blood all over his face. They then walked down the hallway and found Osborne, with blood all over her, lying in the hallway. Foster then went to John Kirby's Mart and called the police.

That evening at approximately 6:22 p.m., Charlotte Police Officer David Schwob went to 1932 Umstead Street in response to a dispatcher's call. As Officer Schwob approached the front door, he saw a male figure, later identified as Johnnie Sampson, lying on the floor in the living room. Upon opening the storm door, Schwob noticed drops of blood on the floor just inside the doorway and a large amount of blood underneath Sampson's body. Schwob then looked down a hallway and observed a female victim, later identified as Subrina Osborne, lying on her back. The female victim's face, neck, and chest area were covered with blood. Schwob subsequently advised his supervisor that he had located two deceased subjects and requested crime scene search technicians and a homicide investigator.

On 2 December 1990 at approximately 11:00 a.m., Officer G.L. Robbins with the Charlotte Police Department was dispatched to Number 11, 1530 Hawthorne Lane. Defendant, or someone on his behalf, had called the police department and requested that an officer come down and carry defendant to the Law Enforcement Center to talk to an investigator. Upon Robbins' arrival at the apartment, he was met by defendant and his three sisters. Robbins told defendant and his sisters that defendant was not under arrest. Officers Brandon and Hobson arrived at 1530 Hawthorne Lane approximately five minutes after Robbins. Brandon and Hobson had a conversation with defendant's sisters as defendant and Robbins were leaving en route to the Law Enforcement Center. Pursuant to the conversation, one of defendant's sisters gave Hobson a grocery bag containing personal property of the defendant. Hobson turned the bag over to Robbins, who was already in his police car with defendant in the back seat.

Robbins transported defendant to the Law Enforcement Center along with the bag of defendant's personal effects. At the Law Enforcement Center, Robbins introduced defendant to Investigator L.D. Walker. After Walker seated defendant in an interview room,

he then walked back out to talk with Robbins. While Robbins was explaining that the bag belonged to defendant, Robbins looked down into the bag, which was partially open, and saw a spot of blood on a boot inside the bag. Robbins told Walker about the spot of blood on the boot. Robbins then gave the bag to Brandon, who turned the bag of clothes in to the Property Control Room.

Walker went back into the interview room, where he began questioning defendant at approximately 12:00 p.m. Defendant initially told Walker that he did not commit the offenses but that he might know who did. Walker then advised defendant that since one of the victims was defendant's girlfriend, this may indicate he was a suspect. At this point, Walker advised defendant of his *Miranda* rights, and defendant then signed a waiver of rights form. Walker then told defendant that he was considered a suspect in the case, but defendant denied any involvement in the murders. Walker asked defendant about the blood on defendant's boot that was in the bag of clothes. Initially, defendant told Walker that around midnight, he had walked into the house after the murders had been committed and that was how he had gotten blood on his shoes. Walker told him that this was impossible based on the fact that the police had already roped off the area. Walker then asked defendant why he killed the two victims. At this point, "tears came into [defendant's] eyes, and he stated, 'I did it because I caught them f---ing in bed.'" Defendant then gave a statement to Walker which Walker reduced to writing and had defendant sign.

In his confession, defendant stated that on 1 December 1990, he and Osborne rented a room from Sampson. After defendant sat around drinking with Sampson, Foster, and Osborne, he left the house to go walking around. When he arrived back at the house, he did not see anyone. He walked down to Sampson's room and "looked into the bedroom and saw [Sampson] and [Osborne] f---ing in the bed." Defendant stated that he "totally flipped out" and "went into a fit of rage." At this point, he said that he grabbed a steak knife from his back pocket and stabbed Osborne in the back. Defendant said he then went after Sampson. Defendant stabbed Sampson "several times," and he stated that he thought he left the knife in Sampson. Defendant then went to the kitchen to get another knife. He found a butter knife and then went and stabbed Sampson some more. Defendant stated that as he was walking down the hallway, Osborne grabbed his legs. He "turned and kicked her and then . . . stomped her with [his] foot." Defendant confessed

that he was not sure how many times he stabbed the victims but that he meant "to kill them."

Investigator R.A. Holl arrived at the Law Enforcement Center at 1:00 p.m. on 2 December 1990. Officers Brandon and Robbins were outside the interview room in which defendant was located. Walker exited the room and told Holl about defendant's confession. Upon entering the interview room, Holl questioned defendant, and defendant related to Holl substantially the same statement he had given to Walker. Holl then went to the magistrate's office to obtain arrest warrants.

Dr. James M. Sullivan, medical examiner for Mecklenburg County, testified as an expert in forensic pathology. Dr. Sullivan performed autopsies on both Osborne and Sampson. He testified that Osborne had multiple external wounds about her head, face, and neck. Specifically, Sullivan found seventeen cutting wounds to the area of the head, nine of which were cutting wounds to the neck. The injuries to Osborne's chest were six stab wounds and several superficial cutting wounds. Sullivan opined that any one of the three stab wounds to the heart could have been potentially lethal wounds. Sullivan testified that Sampson suffered multiple cutting wounds to the face, blunt trauma injuries, and a black eye. Sampson also had twenty-one stab wounds on his buttocks and upper leg area and two stab wounds to the neck. Sullivan opined that the two stab wounds to the neck were the most significant wounds contributing to the cause of death. In Sullivan's opinion, all the wounds inflicted on both victims were premortem wounds, meaning they were inflicted prior to death.

Additional facts will be set forth as necessary with respect to the various issues.

[1] As defendant's first assignment of error, he contends that he is entitled to a new trial because the prosecutor violated his state and federal constitutional rights by peremptorily challenging a prospective juror solely on the basis of race. Article I, Section 26 of the Constitution of North Carolina prohibits peremptory challenges based solely on the race of the prospective juror. *State v. Smith*, 328 N.C. 99, 119, 400 S.E.2d 712, 723 (1991). The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution also prohibits such discrimination. *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). In *Batson*, the Supreme Court of the United States admonished that "the Equal Protection

Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89, 90 L. Ed. 2d at 83.

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

> To establish such a case, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v Georgia*, 345 US [559], 562, 97 L Ed 1244, [1247-48], 73 S Ct 891 [(1952)]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

Id. at 96, 90 L. Ed. 2d at 87-88 (citation omitted). The initial burden is on the defendant who alleges such racial discrimination to make a prima facie showing that the prosecutor used peremptory challenges to exclude jurors because of their race. *State v. Thomas*, 329 N.C. 423, 430, 407 S.E.2d 141, 146 (1991). In *Hernandez v. New York*, --- U.S. ---, ---, 114 L. Ed. 2d 395, 405 (1991), the United States Supreme Court held that where the prosecutor offers racially neutral explanations for his peremptory challenges and the trial court finds them to be true and not pretextual, the issue of the prima facie case is moot.

In this case, defendant and both victims are black. The record shows that at the time the prosecutor sought to remove prospective juror Brown, he had used four peremptory challenges to remove three otherwise qualified white jurors. Therefore, before challenging juror Brown, the prosecution had not used a peremptory challenge against a black venire person. In fact, defendant does not argue, and the record does not reflect, that the prosecution peremptorily challenged any black venire person other than juror Brown. Defense counsel objected to the excusal of juror Brown, referring to *Batson v. Kentucky*. The trial court asked the prosecutor if he wanted

to place the reasons for his challenge on the record. The prosecutor stated that Brown's statement, during his examination of Brown, that he "would let [the death penalty] be the last alternative" was indicative of greater equivocation toward the death penalty than had been expressed by other jurors. This reason is " 'clear and reasonably specific' and 'related to the particular case to be tried.' " *Thomas*, 329 N.C. at 431, 407 S.E.2d at 147 (quoting *State v. Porter*, 326 N.C. 489, 497, 391 S.E.2d 144, 150 (1990)).

Defendant has failed to establish a prima facie case that the State was acting out of any racial bias or any desire to exclude black persons from the jury on the basis of race. Defendant has not met the *Batson* test, and this assignment of error is overruled.

[2] Defendant next contends that the trial court erred by denying his motion in limine and admitting into evidence a 911 tape recording on the grounds that the recording was not properly authenticated in that the identification procedure was impermissibly suggestive. On 2 December 1990 at 1:57 a.m., Officer Wayne Watkins received a call on the 911 line at the Charlotte Police Department. During his conversation with Watkins, the caller stated, "I killed two people on Umstead." State's witness Johnny Glenn, Jr., defendant's son, met Investigator Holl in the office of Glenn's former employer to listen to the tape recording. The witness, Johnny Glenn, Jr., identified the voice on the tape as that of his father.

Defendant asserts that at the time Glenn listened to the recording, he not only knew that his father was in custody charged with murder, but also felt that his father had confessed to the two murders. Based upon the totality of the circumstances, defendant argues that the identification procedure was impermissibly suggestive.

Prior to the State's efforts to place this recording in evidence, defendant filed a motion in limine to exclude the tape recording on the grounds of authenticity. Following a voir dire hearing, the trial court made certain findings of fact and denied defendant's motion to exclude the recording.

Our examination of the record discloses that defendant did not object to the admission of the recording on the basis of a "suggestive" identification procedure so as to place this contention at issue before the trial judge at the voir dire hearing. Rather, the gravamen of defendant's motion was the chain of custody of

the 911 tape and the reliability of State's witness, Johnny Glenn, Jr. Having failed to challenge at trial the admission of the 911 tape on the ground that the identification procedure was impermissibly suggestive, the defendant will not be allowed to do so for the first time on his appeal to this Court. *State v. McPhail*, 329 N.C. 636, 641, 406 S.E.2d 591, 595 (1991); N.C. R. App. P. 10(b)(1). We specifically reject defendant's assignment of error for this reason.

[3] Defendant further contends that the trial court erroneously allowed into evidence the hearsay testimony of Otis Lewis. We find no merit in this assignment of error.

On the afternoon of 26 November 1990 (five days prior to the murders), one of the victims, Subrina Osborne, talked to Otis Lewis. Osborne told Lewis that she wanted to move in with him "because [defendant] was trying to kill her the night before." Osborne stated that the defendant "had pinned her down to the bed with a knife and tried to stab her in the throat with the knife." Osborne further told Lewis that she did not want to go back to the house on Umstead Street. After pretrial motions and objections at trial, Lewis was permitted to testify to this conversation. The trial court instructed the jury that the testimony was "admissible only for the purpose of proving motive, intent or identification of the defendant, or fear of the defendant by Sabrina [sic] Osborne." Defendant contends that admission of this testimony under N.C.G.S. § 8C-1, Rule 803(3) was reversible error because the State failed to demonstrate a factual basis or plausible reason for any alleged fear by the victim.

Rule 803 of the North Carolina Rules of Evidence establishes the admissibility of state of mind evidence. Rule 803 reads, in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . .

N.C.G.S. § 8C-1, Rule 803(3) (1992). "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. 689, 695, 392 S.E.2d 346, 349 (1990); *see also State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990); *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). In *Meekins*, this Court held that the trial court did not err in admitting the testimony of the victim's niece that the victim told her "that she was afraid of [the defendant]" and that the victim had previously said several times that she was fearful of defendant. *Meekins*, 326 N.C. at 694-95, 392 S.E.2d at 349. We held in *Meekins* that the niece's testimony on voir dire that the victim told her two weeks before her murder that she feared defendant because defendant had asked for one hundred dollars and she had refused to give it to him provided a plausible reason and factual basis for the victim's fear of defendant. *Id.* at 696, 392 S.E.2d at 349.

Here, Lewis' testimony on voir dire that Osborne told him that defendant attempted to kill her and that Osborne wanted to move in with Lewis provides a plausible reason and factual basis for the victim's fear of defendant. The victim's fear of defendant was relevant 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. At trial, Lewis testified that the victim told him that defendant tried to kill her five days before the murder. The victim's statement to Lewis that defendant had attacked her, pinned her to the bed, and attempted to stab her in the throat with a knife provided the factual basis for the victim's fear of the defendant and her desire to move in with Lewis. Therefore, the admission of Lewis' testimony was consistent with the limits that this Court imposed on such testimony in *State v. Alston*, 307 N.C. 321, 328, 298 S.E.2d 631, 637 (1983).

Initially, it is within the trial court's discretion to determine whether the probative value of relevant evidence is outweighed by its tendency to unfairly prejudice defendant. *Meekins*, 326 N.C. at 696, 392 S.E.2d at 350. We do not find that the trial court abused its discretion in its determination that the evidence in question met this test. The evidence was highly relevant to show the status of the victim's relationship with the defendant prior to the victim's death, as well as being relevant to the issues of motive or intent. We find that the trial court did not abuse its discretion

when it permitted Lewis to testify about the conversation that he had with the victim.

[4] In defendant's final arguments, he contends that (1) the trial court erred when it sustained objections to defendant's questions of witnesses during the voir dire hearing conducted to determine the admissibility of a tape recording of the defendant's voice, (2) the trial court erred when it sustained objections to certain questions of defense counsel on cross-examination, (3) the trial court erred when it sustained the State's objection to defense counsel's questions to a psychologist regarding defendant's ability to think and plan, and (4) the prosecutor made highly improper and prejudicial remarks in his closing argument. These assignments of error are deemed waived for failure to comply with Rule 28(d) of the Rules of Appellate Procedure.

Rule 28(d)(1) of the Rules of Appellate Procedure provides that when the transcript of proceedings is filed pursuant to Rule 9(c)(2), a party must either reproduce as an appendix to its brief "those portions of the transcript of proceedings which must be reproduced verbatim in order to understand any question presented in the brief" or "those portions of the transcript showing the pertinent questions and answers when a question presented in the brief involves the admission or exclusion of evidence." N.C. R. App. P. 28(d)(1)(a), (d)(1)(b). Under Rule 28(d)(2)(a), appendixes to defendant's brief are not required "whenever the portion of the transcript necessary to understand a question presented in the brief is reproduced verbatim in the body of the brief." N.C. R. App. P. 28(d)(2)(a). In *State v. Edmonds*, 308 N.C. 362, 302 S.E.2d 223 (1983), this Court held that if a defendant's brief did not contain portions of the transcript sufficient to understand the question presented, then the defendant's appeal on that question was subject to dismissal under Rule 28(b)(4), the predecessor to Rule 28(d).

Contrary to Rule 28(d) of the Rules of Appellate Procedure, defendant in the case *sub judice* has not identified the specific questions or answers which he wants this Court to review, has not included the portions of the transcripts containing those questions or answers in the appendix, and has not included a verbatim recitation of those questions or answers in his brief. Therefore, in accordance with *State v. Edmonds*, 308 N.C. 362, 302 S.E.2d 233, these assignments of error are dismissed.

We have carefully reviewed each of the defendant's exceptions and assignments of error and find that his trial was free of prejudicial error.

NO ERROR.

Justice WEBB concurring in the result.

I concur in the result reached by the majority although I believe the testimony by Otis Lewis as to what Subrina Osborne told him before she died was inadmissible hearsay testimony. It is true, as the majority says, that N.C.G.S. § 8C-1, Rule 803(3) allows, as an exception to the hearsay rule, testimony as to what an extrajudicial declarant says in order to prove the declarant's state of mind. The state of mind of the declarant must be relevant to some issue in the case, however, to be admissible. *State v. Meekins*, 326 N.C. 689, 392 S.E.2d 346 (1990). I do not believe Subrina Osborne's state of mind was relevant to the matters that had to be proved to convict the defendant.

The evidence against the defendant was so strong that I do not believe what I perceive to be error in the admission of testimony demonstrates there is a reasonable possibility that had the error not been made there would have been a different result. I would hold that this was harmless error. N.C.G.S. § 15A-1443 (1988).

THOMAS HASSETT v. DIXIE FURNITURE COMPANY, INC.

No. 39PA92

(Filed 12 February 1993)

1. Contracts § 154 (NCI4th)— breach of contract for personal services—instructions—damages—costs avoided by breach

The trial court erred in an action for breach of a personal services contract by instructing the jury that, if defendant breached the contract, it could find that plaintiff was entitled to recover the total amount of payments due as if performance had been rendered. There was evidence that plaintiff would have had a considerable amount of expense had he performed. A party injured by a breach of contract is entitled to be placed

in the same position which would have been occupied if the contract had been performed, insofar as possible with money damages, but is not entitled to recover for any cost avoided by the breach of contract.

Am Jur 2d, Damages § 552.

2. **Accord and Satisfaction § 1 (NCI4th); Compromise and Settlement § 9 (NCI4th)— breach of personal services contract— accord and satisfaction and compromise and settlement— evidence sufficient**

There was sufficient evidence to submit to the jury the defenses of accord and satisfaction and compromise and settlement in an action for breach of a personal services contract where defendant's president, Young, met with plaintiff and told him that he felt that plaintiff had breached the contract by engaging in design services for another furniture manufacturer; Young testified that he informed plaintiff that he considered the contract to be terminated and that defendant would stop making payments to plaintiff; the parties discussed a settlement under which the defendant would continue to pay the plaintiff at the same rate of commission for four months, at the end of which the contract would be terminated; Young testified that the parties agreed to the accord; plaintiff wrote a letter to Young setting forth his understanding of the terms and asking that defendant prepare a document incorporating its terms; defendant had a contract prepared and mailed to plaintiff but plaintiff claimed that it included additional items not in the agreement and refused to sign; and defendant paid plaintiff a commission for four months during which time plaintiff performed no duties for defendant.

Am Jur 2d, Accord and Satisfaction § 55; Compromise and Settlement § 46.

3. **Contracts § 96 (NCI4th)— breach of personal services contract—defenses of waiver, estoppel and ratification not submitted—no error**

The trial court did not err in an action for breach of a personal services contract by not submitting to the jury the defenses of waiver, estoppel and ratification where plaintiff contended that he was entitled to payments under the original contract. He should not be compelled to refuse these payments,

which would be in the same amount as the payments under the alleged new contract, at the risk of being estopped to deny the new contract, being held to have waived his rights under the original contract, or to have ratified the new contract. The action of plaintiff in accepting the payments was too ambiguous to support a defense of waiver, estoppel, or ratification.

Am Jur 2d, Estoppel and Waiver §§ 36, 158.

4. Contracts § 154 (NCI4th)— breach of personal services contract—instructions—damages—cost of replacement services—offset for amount to have been paid plaintiff

The trial court did not err in an action for breach of a personal services contract by instructing the jury that defendant could recover on its counterclaim only in the amount that the expenditure by defendant to replace plaintiff exceeded the amount defendant would have paid plaintiff. This amounted to a peremptory instruction because the replacement cost, $216,666, cannot exceed $325,556, the amount plaintiff would have been paid. To have allowed defendant to recover the amount of the replacement services without reduction for the amounts that were to be paid to plaintiff under the terms of the contract would result in unjust enrichment of the defendant.

Am Jur 2d, Damages §§ 45, 121.

5. Pleadings § 34 (NCI3d)— motion to amend complaint to add party—denied—no abuse of discretion

The trial court did not abuse its discretion in an action for breach of a personal services contract by denying plaintiff's motion to amend his complaint to add a new party where the motion was heard thirteen months after the action was instituted and only three months before the case was calendared for trial. A new party and a new claim would have been added if the motion had been allowed.

Am Jur 2d, Pleading § 312.

Timeliness of amendments to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 ALR Fed 123.

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

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of an opinion of the Court of Appeals, 104 N.C. App. 684, 411 S.E.2d 187 (1991), affirming the judgment for the plaintiff entered by Seay, J., in the Superior Court, Davidson County on 24 May 1990. Heard in the Supreme Court 5 October 1992.

The plaintiff filed this action against the defendant alleging breach of a personal services contract. The defendant filed a counterclaim seeking damages for the plaintiff's alleged failure to provide his services on a full-time and exclusive basis as required under the contract.

The evidence adduced at trial tended to show that the plaintiff and another individual, Charles Taylor, are furniture designers. The plaintiff lives in New Jersey. The defendant is a furniture manufacturer located in North Carolina. On 1 March 1986, the defendant executed a contract with the plaintiff and Taylor whereby the plaintiff and Taylor agreed to perform services for the defendant in connection with the defendant's establishment of an "Import Dining Room Program." Both the plaintiff and Taylor agreed to perform various services for the defendant on a full-time basis. The parties also agreed that the plaintiff was not to perform services related to import dining room furniture for any other entity during the term of the contract which was to run through 30 April 1990. In return for services rendered, the plaintiff and Taylor were to be paid, pursuant to a set formula, a percentage of the defendant's sales.

In late 1986 and early 1987, a dispute developed between the plaintiff and Taylor concerning their individual responsibilities for the performance of their joint obligations under the contract. In the spring of 1987, both parties and Taylor met in North Carolina at which time they agreed to modify the contract with regard to the percentages of the defendant's sales due to the plaintiff and Taylor under the contract. All parties exchanged drafts of their new agreement, but no formal written modification was ever executed. Nevertheless, the parties acted in accordance with this modification until the occurrence of the events which led to this action.

The defendant introduced evidence that it learned that the plaintiff, contrary to the terms of the contract, had performed design services for defendant's competitor and that he was not devoting himself to his duties under the contract on a full-time

basis. On 21 October 1987, plaintiff and the defendant's president, Smith Young, met to discuss the plaintiff's work for the defendant's competitor. Mr. Young testified at trial that during this meeting, he and the plaintiff orally agreed to terminate the contract. Mr. Young further testified that he and the plaintiff agreed that the plaintiff would continue to be paid under the terms of the contract for the succeeding four months at which time the parties' obligations under the contract would cease.

On 26 October 1987, the plaintiff sent Mr. Young a letter which stated:

> To review our meeting of October 21st, 1987, in reference to our March 1986 agreement, if I terminate my participation, Dixie Furniture agrees to pay Tom Hassett at the current commission rate of ¾ of 1% of sales for a period of four (4) months, (November, December of 1987, January, February of 1988), and there would be no future conditions or covenants between Tom Hassett and Dixie Furniture.
>
> If that is your understanding then please have your attorney draw up a proper document as soon as possible.

The defendant prepared and executed a termination agreement which he sent to the plaintiff on 16 November 1987. The defendant thereafter made payments to the plaintiff, in accordance with this agreement, through the following four months, ending February 1988. At the end of this four month period, the defendant hired two new furniture designers to perform the duties that had previously been performed by the plaintiff.

The plaintiff contended that this action by the defendant constituted a breach of contract and sought to recover as damages the amount he would have received if he had been allowed to complete the contract. The plaintiff introduced evidence that he would have earned $325,566.00 if the contract had not been breached. In its counterclaim, the defendant sought to recover the costs it incurred as a result of having to obtain replacement services. The defendant contended that if the parties' contract had not been terminated at their meeting on 21 October 1987, or thereafter, the plaintiff breached the contract by performing design services for the defendant's competitor, and that the defendant was entitled to recover the costs it incurred in obtaining replacement services.

The defendant presented evidence that the costs of replacement services totaled $216,666.00.

At the close of all the evidence, the defendant submitted written requests for instructions. The defendant requested an instruction that would require the jury to reduce any award in the plaintiff's favor by the amount of expenses he saved as a result of not having to perform the remainder of the contract. The defendant also requested that the jury be instructed on the affirmative defenses of accord and satisfaction, compromise and settlement, estoppel, waiver and ratification. The trial court refused to give these requested instructions and the jury returned a verdict in favor of the plaintiff awarding damages in the amount of $325,556.00. The Court of Appeals affirmed the judgment of the trial court and this Court allowed the defendant's petition for discretionary review.

Ben Farmer for plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey, John H. Small and James H. Jeffries IV, for defendant appellant.

WEBB, Justice.

[1] The appellant's first assignment of error deals with the jury instructions in regard to damages. The court instructed the jury that if it found the defendant had breached the 1 March 1986 contract, it could find that the plaintiff was entitled to recover as damages the total amount of the payments due to the plaintiff as if performance had been rendered under the contract.

There was evidence, some of it uncontradicted, that had the plaintiff performed he would have had a considerable amount of expense, including travel between his home in New Jersey and the defendant's facilities in North Carolina, travel to visit dealers throughout the United States, and trips to the Far East to supervise production. The defendant says it was error not to instruct the jury that the damages must be reduced by the amount of expenses the plaintiff would have incurred if he had performed his duties under the contract. We agree that this was error.

A party injured by a breach of contract is entitled to be placed in the same position he would have occupied if the contract had been performed, insofar as this can be done by an award of money damages. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E.2d 9

(1963). He is not entitled to recover for any cost avoided by the breach of the contract. Professor E. Allan Farnsworth in his treatise on the law of contracts says:

> [a breach of contract] may have a beneficial effect on the injured party by saving him the further expenditure that he would have incurred if he had performed. This saving will be referred to as *cost avoided.* If, for example, the injured party is a builder under a construction contract who stops work after the owner's breach, the additional expenditure he has saved is *cost avoided.*

E. Allan Farnsworth, *Contracts* § 12.9, at 846 (1982).

We have applied this rule in *Peasley v. Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973) and *Tillis v. Cotton Mills and Cotton Mills v. Tillis*, 251 N.C. 359, 111 S.E.2d 606 (1959), by holding that in order to determine damages costs avoided must be deducted from revenue which would have been received if the contract had not been breached.

The appellee argues that pursuant to *Arnold v. Charles Enterprises*, 264 N.C. 92, 141 S.E.2d 14 (1965), expenses he would have incurred if he had been allowed to complete the contract should not be deducted from the amount he would have received in order to determine damages. *Arnold* is not precedent for this case. In that case, we held that the plaintiff's damages for the defendant's breach of a contract by failing to appear for a concert as he had contracted to do did not have to be reduced by the plaintiff's expected expenses. In that case, all expenses incurred by the plaintiff in performing his part of the contract had apparently been paid. There was nothing to be deducted from the damages awarded to the plaintiff.

[2] In its second assignment of error, the defendant contends that the court erred when it failed to charge as requested by the defendant on its defenses of accord and satisfaction, compromise and settlement, estoppel, waiver, and ratification. The question raised by this assignment of error is whether there was sufficient evidence for a jury to find that any of these defenses apply.

> An accord is a contract under which the obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. . . . Not until performance, which is called *satisfac-*

> *tion*, however, is the original duty discharged. Discharge in this way is therefore said to be by *accord and satisfaction.*

E. Allan Farnsworth, *Contracts* § 4.24, at 285 (1982) (footnote omitted); *Allgood v. Trust Co.*, 242 N.C. 506, 88 S.E.2d 825 (1955); *Sharpe v. Nationwide Mut. Fire Ins. Co.*, 62 N.C. App. 564, 302 S.E.2d 893, *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983).

Compromise and settlement is provided for by statute and is close kin to accord and satisfaction. N.C.G.S. § 1-540 provides:

> In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same.

In support of its contention that there was sufficient evidence to submit to the jury on the defenses of accord and satisfaction and compromise and settlement, the defendant relies on the evidence that Mr. Young met with plaintiff and told him that he felt plaintiff had breached the contract by engaging in design services for another furniture manufacturer. Mr. Young testified that he informed the plaintiff that he considered the contract to be terminated and the defendant would stop making payments to the plaintiff. The parties discussed a settlement under which the defendant would continue to pay the plaintiff at the same rate of commission for four months at the end of which time the contract between the parties would be terminated. Mr. Young testified that the parties agreed to this accord.

Following the meeting between the plaintiff and Mr. Young, the plaintiff wrote a letter to Mr. Young setting forth his understanding of the terms of the agreement and asking that the defendant prepare a document incorporating its terms. The defendant had such a contract prepared and mailed an executed copy to the plaintiff. The plaintiff refused to sign the document because, he said, there were things in it which were not part of the agreement. The defendant paid to the plaintiff a commission for four months during which time the plaintiff performed no duties for the defendant.

We hold that this evidence would support a finding by the jury that the parties had reached an accord on the plaintiff's claim against the defendant and the defendant had performed on this

agreement, making it an accord and satisfaction. The jury could find this accord and satisfaction from the evidence that the parties discussed a settlement under which the plaintiff would be relieved of all further duties under his contract with the defendant. The defendant's evidence was that the parties agreed to this accord. The agreement was not put in writing and signed by both parties, but the plaintiff accepted the payments for four months and acknowledged by letter that the parties had agreed to an accord. He did not perform any duties for the defendant. The jury could have also found from this evidence that there was a compromise and settlement. The plaintiff introduced evidence contra to the defendant's evidence. Which evidence to believe should be determined by the jury.

[3] The defendant also contends that from the evidence introduced in this case he was entitled to have submitted to the jury the defenses of waiver, estoppel and ratification. It bases its argument on the evidence that the plaintiff accepted payments for four months, knowing that the defendant contended it had no further obligation to the plaintiff under the original contract. It argues that this evidence of acceptance by the plaintiff of performance by the defendant was evidence from which the jury could conclude there was a waiver of the conditions of the original contract. *See Wheeler v. Wheeler*, 299 N.C. 633, 263 S.E.2d 763 (1980); *Towery v. Dairy*, 237 N.C. 544, 75 S.E.2d 534 (1953); *Lithograph Co. v. Mills*, 222 N.C. 516, 23 S.E.2d 913 (1943).

The defendant also says the acceptance of payments for four months by the plaintiff was a misrepresentation of an existing fact upon which the defendant relied to its detriment. The defendant says the misrepresentation was that the plaintiff was accepting the payments pursuant to the new contract between the parties and the plaintiff is estopped to deny the new contract. *See Harris v. Harris*, 50 N.C. App. 305, 274 S.E.2d 489, *appeal dism'd*, 302 N.C. 397, 279 S.E.2d 351 (1981).

Finally, the defendant says that the jury could find that by accepting the benefits of the new contract, the plaintiff ratified the contract. *See* 17 C.J.S. *Contracts* § 69 (1969). We hold it was not error for the court to refuse to submit the defenses of waiver, estoppel, or ratification. The plaintiff contended he was entitled to the payments under the original contract. He should not be compelled to refuse these payments which would be in the same

amount as the payments under the alleged new contract at the risk of being held to have waived his rights under the original contract, being estopped to deny the new contract, or to have ratified the new contract. In light of these circumstances, we hold that the action of the plaintiff in accepting the payments was too ambiguous to support a defense of waiver, estoppel, or ratification.

[4] The defendant next contends that the superior court erroneously instructed the jury with regard to the amount of damages recoverable on its counterclaim. The defendant sought to recover $216,666.00, the amount it paid to two designers it hired to perform the services that would have been performed by the plaintiff. The court instructed the jury that it could award damages only in an amount that the expenditure of the defendant to replace the plaintiff exceeded $325,556.00.

The defendant argues that the court's charge on this feature of the case amounted to a peremptory instruction because $216,666.00 cannot exceed $325,556.00. We agree that the court gave what amounted to a peremptory instruction. If there was error, however, it was in submitting the counterclaim to the jury. The evidence showed defendant was not damaged by the plaintiff's breach of the contract, if there was a breach.

There was no conflict in the evidence concerning the plaintiff's compensation rate under the contract. Both the plaintiff and the defendant's president testified that under the contract, as modified in March of 1986, the defendant was to be paid at the rate of ¾ of 1% of the defendant's sales. In addition, the parties stipulated that the defendant's monthly sales under the defendant's "Import Dining Room Program" for the period of March 1988 through April 1990 totaled $43,407,518.00. Thus, the total amount the defendant would have paid the plaintiff under the contract between March 1988 and April 1990, was $325,556.00 ($325,556.00 = .0075% of $43,407,518.00). Thus, the total amount of commissions the defendant would have paid under the contract if it had been fully performed was not a fact in issue.

As stated above, a party injured by a breach of contract is entitled to be placed as much as possible in the same position it would have occupied if not for the other party's breach, but the injured party is not to be unduly enriched. *Troitino v. Goodman*, 225 N.C. 406, 35 S.E.2d 277 (1945). Here, the defendant, if not for the plaintiff's alleged breach, would have paid the plaintiff

$325,556.00 during the remainder of the contract. The defendant hired two furniture designers to replace the plaintiff because of the plaintiff's alleged breach. The plaintiff paid these designers a total of $216,666.00 for their replacement services.

A party seeking damages for breach of a contract to perform services, where the injured party has obtained replacement services, is only entitled to recover as money damages the amount by which the cost of the replacement services exceeded the cost of the services that were to be provided under the contract. *See Norwood v. Carter*, 242 N.C. 152, 87 S.E.2d 2 (1955). To allow the defendant to recover the amount of these replacement services without reduction for the amounts that were to be paid to the plaintiff under the terms of the contract would result in an unjust enrichment of the defendant. This rule is the counterpart of the rule cited above which requires a party claiming damages for breach of contract for the performance of services to reduce his damages by the costs and expenses he was able to save in not performing those services.

We overrule this assignment of error.

[5] The plaintiff assigns error to the denial of his motion to amend his complaint to add a new party. The plaintiff made the motion to make Smith Young a party defendant and to allege unfair and deceptive trade practices. We agree with the Court of Appeals that the court did not abuse its discretion by denying this motion. The motion was heard thirteen months after the action was instituted and only three months before it was calendared for trial. If the motion had been allowed, a new party and a new claim would have been added. This supports the court's conclusion that the amendment "would cause undue delay in the trial of this matter and prejudice" the defendant. The court did not abuse its discretion by denying this motion. *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992); *Smith v. McRary*, 306 N.C. 664, 295 S.E.2d 444 (1982); *Calloway v. Motor Co.*, 281 N.C. 496, 189 S.E.2d 484 (1972).

For errors committed in the trial, we reverse the Court of Appeals and order a new trial.

NEW TRIAL.

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

OCEAN HILL JOINT VENTURE v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, AN AGENCY OF THE STATE OF NORTH CAROLINA AND WILLIAM W. COBEY, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 77PA92

(Filed 12 February 1993)

Environmental Protection § 124 (NCI4th)— Sedimentation Pollution Control Act—civil penalty—statute of limitations inapplicable

The one-year statute of limitations of N.C.G.S. § 1-54(2) does not apply to the assessment of a civil penalty by the Secretary of the Department of Environment, Health and Natural Resources pursuant to the Pollution Sedimentation Control Act, N.C.G.S. § 113A-64(a), because the assessment of a penalty is not an "action or proceeding" as those terms are used in N.C.G.S. § 1-54. Therefore, the Court of Appeals erred in applying N.C.G.S. § 1-54(2) to bar the administrative assessment of civil penalties pursuant to N.C.G.S. § 113A-64(a).

Am Jur 2d, Limitation of Actions § 80.

Justice WEBB dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of the decision of the Court of Appeals, 105 N.C. App. 277, 412 S.E.2d 681 (1992), reversing judgment entered by Watts, J., in the Superior Court, Currituck County, on 31 January 1991, affirming a civil penalty ordered by the Secretary of the Department of Environment, Health and Natural Resources against Ocean Hill Joint Venture. Heard in the Supreme Court 3 November 1992.

Hornthal, Riley, Ellis & Maland, by M.H. Hood Ellis, for petitioner-appellee.

Lacy H. Thornburg, Attorney General, by Daniel F. McLawhorn and Kathryn Jones Cooper, Special Deputy Attorneys General, for respondent-appellants.

FRYE, Justice.

This case presents two issues for our review. First, does N.C.G.S. § 1-54(2), a one-year statute of limitations, apply to the administrative assessment of civil penalties pursuant to N.C.G.S. § 113A-64(a)? Second, if N.C.G.S. § 1-54(2) is applicable, does it bar the assessment of civil penalties more than one year after the date of the last event giving rise to the penalty? Because we conclude that N.C.G.S. § 1-54(2) is not applicable to the assessment of civil penalties by an administrative agency, we do not reach the second issue.

The facts are not in dispute. On 3 February 1987, personnel of the Department of Natural Resources and Community Development [NRCD, hereinafter referred to as "DEHNR" or "the Department"][1] inspected a construction project in Currituck County owned by Ocean Hill Joint Venture (Ocean Hill). The Department sent a Notice of Violation to Ocean Hill for various violations of the Sedimentation Pollution Control Act of 1973 [hereinafter referred to as "SPCA" or "the Act"], N.C.G.S. §§ 113A-50 to -66 (1989). The notice set deadlines for compliance with the Act and was received by Ocean Hill on 25 February 1987. An inspection of the site on 4 March 1987 revealed an additional violation of the Act for which the Department sent a Notice of Additional Violations on 20 March 1987. Although Ocean Hill submitted an erosion and sedimentation control plan on 9 March 1987, the Department sent it a Notice of Continuing Violations on that same date because other corrective measures had not been taken. On 1 May 1987, the Director of the Division of Land Resources notified Ocean Hill that a civil penalty would be assessed against it. For purposes of assessing the penalty, the Director determined that the site was in violation of the Act from 25 February through 22 May 1987.

On 10 January 1990, pursuant to N.C.G.S. § 113A-64(a) and acting pursuant to a delegation of authority under 15A NCAC 4C .0003 (1988), the Director assessed a civil penalty against Ocean Hill for one hundred dollars per day for the eighty-seven-day period during which Ocean Hill was in violation of the Act, totalling eight thousand seven hundred dollars. On 13 March 1990 Ocean Hill

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1. NRCD was the predecessor agency to the Department of Environment, Health and Natural Resources (DEHNR). NRCD was merged into a new agency, DEHNR, on 1 July 1989 and its duties transferred to DEHNR. 1989 N.C. Sess. Laws ch. 727. Section 227 of Chapter 727 ratified the actions of NRCD taken prior to the change and adopted them as actions of DEHNR.

responded by filing a petition for a contested case hearing with the Office of Administrative Hearings pursuant to N.C.G.S. § 150B-23 and 15 NCAC 4C .0008. On 16 May 1990 Ocean Hill moved for summary judgment on the ground that the 10 January 1990 civil penalty was barred by N.C.G.S. § 1-54(2), the one-year statute of limitations. On 1 June 1990 the Administrative Law Judge entered an order denying this motion. The parties entered into a Consent Order and Final Decision in which they agreed that six thousand ninety dollars would be a fair settlement of the amount in controversy should it be determined that the civil penalties were assessed in a timely fashion. The Secretary of DEHNR adopted the Consent Order and Final Decision as the final agency decision and expressly reserved the right of Ocean Hill to seek judicial review of the applicability of N.C.G.S. § 1-54(2). The parties agreed that if no timely appeal was taken or if the issue was decided adversely to Ocean Hill on review, Ocean Hill would pay as a penalty the amount upon which the parties agreed.

Ocean Hill filed a petition for judicial review in superior court, as authorized by N.C.G.S. § 150B-45. The matter was heard before Judge Thomas S. Watts at the 14 January 1991 Civil Session of Superior Court, Currituck County. Judge Watts affirmed the Consent Order and Final Decision after determining that N.C.G.S. § 1-54(2) "does not apply to the assessment of a civil penalty by the Secretary of the Department pursuant to G.S. 113A-64(a)." On appeal, the Court of Appeals reversed, holding that the one-year statute of limitations 1) applies to administrative actions taken pursuant to N.C.G.S. § 113A-64(a), and 2) bars the assessment of a civil penalty more than one year after the date of the last violation. *Ocean Hill*, 105 N.C. App. at 283, 412 S.E.2d at 685. Thus, the Court of Appeals reversed both the trial court and the Administrative Law Judge and remanded for entry of an order dismissing the assessment. DEHNR's petitions for writ of supersedeas and for discretionary review were allowed by this Court on 21 April 1992. We now reverse the Court of Appeals.

N.C.G.S. § 1-54 prescribes a statute of limitations as follows:

> Within one year an action or proceeding—
>
> . . .
>
> (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone . . . except where the statute imposing it prescribes a different limitation.

N.C.G.S. § 1-54(2) (1983). Clearly, a prerequisite for application of N.C.G.S. § 1-54 is that there must be an "action or proceeding." The Court of Appeals concluded that the administrative agency's assessment of civil penalties under the SPCA constitutes an "action or proceeding" within the meaning of N.C.G.S. § 1-54. After careful review of the precise language of the statute and the definitions found in Chapter 1 of the North Carolina General Statutes, we reach the opposite conclusion.

An "action" as defined in N.C.G.S. § 1-2 "is an ordinary proceeding in a court of justice . . . ." (Emphasis added.) Although "proceeding" itself is not defined in Chapter 1, the terms "ordinary proceeding" and "special proceeding" are both used. The definition of "action" encompasses "ordinary" proceedings while a "special proceeding" includes every other remedy in a court of justice. *See* N.C.G.S. §§ 1-1 to 1-3 (1983); *see also Tate v. Powe*, 64 N.C. 644 (1870). From these definitions we conclude that, as the term is used in Chapter 1 of the General Statutes, a "proceeding," like an "action," must take place in a court of justice.

We have recognized that "[a]rticle IV, section 3 of the Constitution contemplates that discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes." *In the Matter of Appeal from the Civil Penalty Assessed for Violations of the SPCA*, 324 N.C. 373, 379, 379 S.E.2d 30, 34 (1989). However, an agency so empowered is not a part of the "general court of justice." N.C. Const. art. IV, § 2. In fact, "[a]ppeals from administrative agencies shall be to the general court of justice." N.C. Const. art. IV, § 3 (emphasis added). Thus, the grant of limited judicial authority to an administrative agency does not transform the agency into a court for purposes of the statute of limitations. The issuance, by the agency, of a notice of civil penalty is not the institution of an action or proceeding in a court. Rather, the notice gives rise to the right of a person against whom the penalty has been assessed to institute a contested case proceeding under the Administrative Procedure Act. N.C.G.S. § 150B-22 (1991).

In concluding that N.C.G.S. § 1-54(2) applies to the assessment of civil penalties under the SPCA, the Court of Appeals relied, in part, on *Holley v. Coggin Pontiac*, 43 N.C. App. 229, 259 S.E.2d 1, *disc. review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). In *Holley* the court held that the one-year statute of limitations in

N.C.G.S. § 1-54(2) did not apply to the treble damages provision of the Unfair Trade Practices Statute. *Id.* at 234-35, 259 S.E.2d at 5. In reaching its decision, the Court of Appeals contrasted the treble damages provision in N.C.G.S. § 75-16 with the civil penalty provision in N.C.G.S. § 75-15.2, which would be subject to the one-year statute of limitations in N.C.G.S. § 1-54(2). Not only is *Holley* inapplicable because the court was addressing a different issue than the one before us, it is also inapplicable because the civil penalty assessment procedure was different from that in the instant case. The civil penalty provision in N.C.G.S. § 75-15.2 provided that the court in its discretion may impose a civil penalty against a violator of the Unfair Trade Practices Statute where suit has been instituted by the Attorney General. N.C.G.S. § 75-15.2 (1977). Clearly, there is an "action or proceeding" as contemplated by N.C.G.S. § 1-54(2) in that instance. Similarly, in *Hewlett v. Nutt*, cited by the Court of Appeals in *Holley*, this Court held that an action against a court clerk for a penalty, if not brought within one year, is barred by the limitations provision of N.C.G.S. § 1-54(2). *Hewlett*, 79 N.C. 202, 204 (1878). In contrast, the civil penalty at issue in the instant case was established by an administrative agency, not by court action. Thus, neither *Holley* nor *Hewlett* applies.

Ocean Hill argues that to focus on the "action or proceeding" language in N.C.G.S. § 1-54 or on whether an administrative agency is a court is to focus on form rather than substance and reality. Ocean Hill contends that the focus should be on whether or not the assessment was upon a statute for a penalty given to the State alone. We disagree. We are, of course, bound by the language of the statute. *See Correll v. Division of Social Services*, 332 N.C. 141, 418 S.E.2d 232 (1992). "Statutory interpretation properly begins with an examination of the plain words of the statute." *Id.* at 144, 418 S.E.2d at 235. By its express terms, N.C.G.S. § 1-54 applies to an "action or proceeding." We cannot ignore this language. The statute makes no reference to the "assessment" of a penalty. The question is whether the assessment of a penalty by an administrative agency is an "action or proceeding" as those terms are used in this statute of limitations. We observe, as did the Court of Appeals, that "a statute of limitations should not be applied to cases not clearly within its provisions." *Carolina Beach Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968). In addition, we note that in light of the common law immunity

held by the sovereign, statutes of limitation which run against the State must be strictly construed. *See Rowan Co. Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992); *State v. West*, 293 N.C. 18, 235 S.E.2d 150 (1977). Thus, we believe that our focus on the precise language of the statute is proper and does not elevate form over substance.

Although N.C.G.S. § 1-54 may apply[2] to a civil action by the State to collect unpaid civil penalty assessments, it cannot, by its terms, apply unless there is an "action or proceeding." There cannot be an action or proceeding, as those terms are used in Chapter 1 of the General Statutes, until a cause of action accrues. A cause of action generally accrues when "the right to institute and maintain a suit arises." *Thurston Motor v. General Motors*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962). "In no event can a statute of limitations begin to run until plaintiff is entitled to institute action." *Raftery v. Construction Co.*, 291 N.C. 180, 183, 230 S.E.2d 405, 407 (1976). The State, as plaintiff, is entitled to institute an action to collect a penalty assessed under the SPCA only after the amount of the penalty has been determined by the Secretary, demand for payment has been made, and no payment is received or equitable settlement reached within thirty days of the demand. N.C.G.S. § 113A-64(a)(2). Only then can the Attorney General file an action to collect the penalty. *Id.*

We note in passing that an aspect of this issue has been addressed on similar facts by several federal courts. Although there is a split among the circuits,[3] we believe the better view was announced in *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987). In *Meyer* the First Circuit determined that the five-year statute of limitations in 28 U.S.C. § 2462 did not begin to run until a civil penalty was imposed under the Export Administration Act's

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2. N.C.G.S. § 113-64(a) was amended in 1991 to include a three-year statute of limitations on the State's ability to institute an action to recover unpaid civil penalties assessed pursuant to the Act. 1991 N.C. Sess. Laws ch. 725, § 5. Thus, while the general one-year statute of limitations might have been applicable to actions to recover unpaid civil penalties prior to the 1991 amendment, the internal three-year statute of limitations now controls. N.C.G.S. § 1-54(2).

3. The split among the Circuits is represented by the decisions of the Fifth Circuit in *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), and the First Circuit in *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987).

(EAA) antiboycott regulations.[4] Like the version of the SPCA at issue here, the EAA prescribed no time limits within which either the final administrative penalties under the Act had to be assessed or a suit to enforce the penalty had to be brought. However, similar to our general one-year statute of limitations, 28 U.S.C. § 2462 prescribed a general five-year statute of limitations for an "action, suit, or proceeding for the enforcement of any civil fine, penalty or forfeiture." In reaching its conclusion that the five-year statute of limitations began to run only after the penalty had been administratively assessed, the court observed that, otherwise, the statute of limitations would have expired before the government's right to sue even arose. The court opined that "[s]uch a self-abnegating result would be thoroughly unacceptable." *Id.* at 919. The *Meyer* court also observed that the distinguishing feature in the case before it and in *Crown Coat Front Co. v. United States*, 386 U.S. 503, 18 L. Ed. 2d 256 (1967), was "the necessity for allowing an administrative proceeding to run its course as a precondition to the commencement of suit." *Meyer*, 808 F.2d at 920. That feature is present in this case as well.

We note that the parties in *Meyer* conceded that the statute of limitations, as applied to the EAA, at least required that administrative action be initiated within five years of the alleged violation. *Meyer*, 808 F.2d at 914. Since administrative action was initiated within that five-year period, the court did not discuss whether the statute of limitations, as applied to the EAA, did in fact include such a requirement. Rather, the court merely observed that such a view was reasonable as a matter of policy. *Id.* No such concession was made by the parties in this case. In fact, that is the issue presently before us.

We conclude that the one-year statute of limitations contained in N.C.G.S. § 1-54(2) does not apply to the assessment of a civil penalty by the Secretary of DEHNR pursuant to N.C.G.S. § 113A-64(a) because the assessment of the penalty is not an "action or proceeding" as those terms are used in N.C.G.S. § 1-54. Therefore the Court of Appeals erred in applying N.C.G.S. § 1-54(2) to bar the administrative assessment of civil penalties pursuant to N.C.G.S. § 113-64(a). The decision of the Court of Appeals is therefore reversed.

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4. The regulations of the Export Administration Act (EAA) at issue in *Meyer* were codified at 50 U.S.C. app. §§ 2401-2420 (1982), as amended by the Export Administration Amendments Act, Pub.L. No. 99-64, 99 Stat. 120 (12 July 1985).

REVERSED.

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

Justice WEBB dissenting.

I dissent for the reasons stated by Judge Walker in the opinion of the Court of Appeals.

STATE OF NORTH CAROLINA v. ALLISON BAKER

No. 269PA92

(Filed 12 February 1993)

Evidence and Witnesses § 2330 (NCI4th)— indecent liberties— evidence of penetration—admissible

The trial court did not err in a prosecution for taking indecent liberties by admitting medical opinion evidence that the victim had been penetrated even though the child's testimony did not mention penetration. The offense of taking indecent liberties with a minor may involve but does not require sexual penetration. The fact that evidence of penetration would also support the uncharged offense of rape or sexual offense does not affect its relevance to the charge of taking indecent liberties with a minor. Language in *State v. Ollis*, 318 N.C. 370, upon which the Court of Appeals relied in erroneously reversing the trial court, is confined to the facts of the case.

Am Jur 2d, Evidence § 251.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision by the Court of Appeals, 106 N.C. App. 687, 418 S.E.2d 288 (1992), reversing a judgment entered by Brannon, J., at the 11 February 1991 session of Superior Court, Durham County. Heard in the Supreme Court 12 January 1993.

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

Currin & Boyce, by George B. Currin and Mary C. Boyce, for defendant-appellee.

WHICHARD, Justice.

Defendant was indicted and convicted for taking indecent liberties with a minor, given a five-year suspended sentence, and placed on special probation for five years. In addition, he was ordered to pay restitution of court costs and all past and future medical expenses of the victim arising from the case. The Court of Appeals reversed and remanded the case for a new trial. We reverse.

For approximately two years, from when the victim was in kindergarten until January 1990, the victim's mother, accompanied by the victim, regularly stopped for a cup of coffee at Four Points convenience store before running her morning school bus route. Defendant also habitually patronized the store at that hour and became friendly with the victim.

On 12 February 1990 the victim, then a first-grader, told her mother that defendant had been "mess[ing] with [her] private part" since she was in kindergarten. The child subsequently testified that defendant had touched her outside her clothes and had "rubbed [her] private part" with his hand outside her underpants. The child stated that the touching had occurred in the store over the course of two years and that her mother had always been in the store with her. The child testified that defendant touched her while he was sitting on a drink crate and she was sitting on his lap.

A pediatrician from the University of North Carolina Hospital examined the victim with a colposcope, a magnifying lens with a light source, which revealed that the child's vaginal opening was six millimeters. The child's hymen was notched and changed in shape. Two photographs taken through the colposcope were shown to the jury. The pediatrician stated that the normal vaginal opening for a pre-pubescent child over five years of age is four to six millimeters. The fact that this child's vaginal opening was "right on the edge of what we consider acceptable," together with the irregular shape of the hymen, led the physician to state that "the feeling was that there was evidence that she had been penetrated."

A social worker who interviewed the child prior to her medical examination testified, in part, that "the physical exam indicated that more happened in terms of the exact sexual contact than what she was telling [the interviewer]." On cross-examination, defendant's counsel asked whether, "[w]ith her pants on, she could not have suffered at the hands of [defendant] with these notches on the hymenal ring if she had her pants on, could she?" The social worker responded, "That's why [we thought] there was more involved in the sexual contact . . . ." The witness stated her belief that, based on "the discrepancy between the physical findings and what the child [told her in their single interview,] . . . there was more involved in the sexual contact than what this child was stating." The social worker opined "that when [the child] said that her pants were on, her panties were on and he was rubbing her on the outside of her panties . . . [but that] there were also probably some other things that occurred that she was not telling me."

Defendant testified he was friendly with the victim, that he had bought her candy and that she had sat on his lap, but he denied having molested her. Two store clerks and a customer who had seen defendant interact with the child testified that, like the child's mother, they had never seen defendant molest the child.

The Court of Appeals concluded that the trial court erred to defendant's prejudice by allowing evidence to be admitted that indicated the victim had been sexually penetrated. It found controlling this Court's decision in *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986).

In *Ollis* the defendant was charged with first-degree rape of and first-degree sexual offense (cunnilingus) upon a ten-year-old girl. The child testified as to these offenses, but did not mention in her testimony that anyone other than defendant had sexually abused her. A physician testified as to the results of his physical examination of the child, which supported his opinion that the child "did receive or has been the object of inappropriate physical and sexual abuse." *Id.* at 375, 348 S.E.2d at 781. The physician recounted the child's statement during the course of the examination that two men had had sexual relations with her. *Id.* at 375, 348 S.E.2d at 780. A social worker who interviewed the child also testified that the child told her two men had raped her. The trial court limited the jury's consideration of this testimony to corroboration of the victim's testimony.

Defendant argued that the trial court erred in disallowing cross-examination of the victim regarding instances of rape committed by the defendant's adult son. This Court agreed, holding that such testimony was admissible under Rule 412(b)(2), which provides: "the sexual behavior of the complainant [in a rape or sexual offense case] is irrelevant to any issue in the prosecution unless such behavior: . . . (2) [i]s evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." N.C.G.S. § 8C-1, Rule 412(b)(2) (1986). This Court concluded that the failure to admit for substantive purposes evidence relevant to a defense on the rape charge prejudiced defendant. It continued:

> Although the evidence of an alternative source of the physical condition possibly resulting from rape was irrelevant to the sexual offense charge, we also are not convinced that under the circumstances its exclusion was harmless. If the sexual offense charge had been tried separately, the physician's testimony would not have been relevant, and the evidence regarding rape of the victim by another man as an alternative explanation for the victim's physical condition also would have been irrelevant. Because the two offenses were tried together, however, the enhancing character of the doctor's evidence, appearing as it did to corroborate the victim's testimony that she was penetrated, in turn enhanced the credibility of the witness regarding a second sexual offense by the defendant. For that reason we also find that the error was prejudicial to the defendant's defense against the charge of first-degree sexual offense.

State v. Ollis, 318 N.C. 370, 377-78, 348 S.E.2d 777, 782.

Quoting this passage from *Ollis*, the Court of Appeals concluded that the photographs and the penetration testimony of the physician and social worker in this case were not relevant to the crime with which defendant had been charged and convicted, and that the admission of that testimony prejudiced defendant: "The introduction of irrelevant evidence of a second uncharged sexual offense made more plausible the victim's allegation that the defendant had taken an indecent liberty with her by touching her private parts." *State v. Baker*, 106 N.C. App. 687, 691, 418 S.E.2d 288, 291 (1992). Viewing the record as a whole, the Court of Appeals

was unable to hold that the jury would have found defendant guilty beyond a reasonable doubt had this evidence not been admitted.

The State argues that the Court of Appeals incorrectly characterized opinion testimony that the child had been sexually penetrated as "irrelevant evidence of a second uncharged sexual offense." *Id.* at 691, 418 S.E.2d at 291. We agree with the State that the absence of other evidence of sexual penetration does not render the physician's and social worker's opinion testimony irrelevant.

Although penetration is an element of first- and second-degree sexual offense and of first- and second-degree rape, *see* N.C.G.S. §§ 14-27.1, -27.2, -27.3, -27.4, -27.5 (1986), it is not an element of the offense of taking indecent liberties with children, N.C.G.S. § 14-202.1 (1986). This last statute provides, in pertinent part:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C.G.S. § 14-202.1(a) (1986).

Nevertheless, as the Court of Appeals correctly observed, the offense of taking indecent liberties with a minor "may involve sexual penetration, but does not require sexual penetration." *State v. Baker*, 106 N.C. App. at 690, 418 S.E.2d at 290. *See, e.g., State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987) (penetration of the victim one of several sequential events which could be found to have been performed for the defendant's gratification); *State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988) (separate elements of indecent liberties and rape proved from same, single offense), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989). A broad variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor. *State v. Etheridge*, 319 N.C.

at 49, 352 S.E.2d at 682. Genital, vaginal or anal penetration is obviously included in the statutory proscription against "tak[ing] . . . an[ ] immoral, improper, or indecent libert[y] with a[ ] child," N.C.G.S. § 14-202.1(a)(1), or "committing . . . a[ ] lewd or lascivious act upon . . . any part . . . of the body of any child," N.C.G.S. § 14-202.1(a)(2).

That evidence of penetration would also support the uncharged offense of rape or sexual offense does not affect its relevance to the charge of taking indecent liberties with a minor. Evidence of other criminal offenses is admissible if it tends to prove any relevant fact, other than the defendant's character or propensity for committing the types of offenses charged. Such evidence may not be excluded merely because it also shows the defendant to have been guilty of another crime. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 91 (3d ed. 1988); *e.g.*, *State v. Cotton*, 318 N.C. 663, 665, 351 S.E.2d 277, 278 (1987) (statement codified as N.C. R. Evid. 404(b)).

In this case, evidence of penetration, although unmentioned in the child's testimony, was relevant evidence supporting the charge of taking indecent liberties with a minor.

The Court of Appeals' reliance on *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777, is misplaced, for, properly viewed, the language upon which the appellate court relies is confined to the facts of that case. In *Ollis* this Court, hypothetically considering the sexual offense as if it had been prosecuted separately from the rape, evidently presumed that penetration resulting in hymen damage was not relevant to cunnilingus. This presumption is patently not applicable to all other sexual offenses: depending on the sexual act committed, evidence of such damage may well be relevant. Sex offense is defined as "engag[ing] in a sexual act." N.C.G.S. §§ 14-27.4, -27.5 (1986). The definition of a "sexual act" explicitly includes penetration which could result in damage to the victim's hymen:

> "Sexual act" means cunnilingus, fellatio, an[i]lingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body . . . .

N.C.G.S. § 14-27.1(4) (1986).

Plainly, this Court's language in *Ollis* was not intended to apply to any and all cases of sexual offense, nor does it apply in this case. " '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 (1986). We hold that medical opinion evidence that the vagina of the victim in this case had been penetrated was relevant to the charge of taking indecent liberties with a child, even though the child's testimony did not mention penetration. Accordingly, we reverse the decision of the Court of Appeals reversing the judgment of the trial court.

We allow defendant's motion for remand to the Court of Appeals for consideration of assignments of error not previously considered by that court.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DOUG HEMBY

No. 482PA91

(Filed 12 February 1993)

Criminal Law § 1688 (NCI4th)— resentencing—fewer charges—same sentence—erroneous

The trial court erred when resentencing defendant where obscenity convictions were obtained on eight indictments, each containing one count for possession and one count for dissemination; the trial court elected to consolidate for sentencing the possession and dissemination counts in each indictment; the court found in the first sentencing hearing no factors in aggravation or mitigation; the indictments upon which convictions were obtained were consolidated into three groups for sentencing; defendant's total sentence was eight years; the Court of Appeals upheld the sentence upon two indictments but remanded the others for resentencing; and the trial court arrested judgment on three indictments on remand, found aggravating factors, and imposed sentences totaling six years on the remaining three indictments, for a total of eight years

on five indictments. It is clear that the trial court originally intended to impose a sentence of one year on each indictment and to total these sentences when it consolidated the indictments for sentencing purposes; when indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing, the sentence for purposes of appellate review will be deemed to be equally attributable to each indictment or conviction. The trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing because, as to each indictment involved, the trial court resentenced defendant to a term greater than the term attributable to the indictment at the original sentence. N.C.G.S. § 15A-1335; N.C.G.S. § 15A-1340.4(a).

Am Jur 2d, Criminal Law § 580.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unpublished decision of the Court of Appeals, 104 N.C. App. 140, 408 S.E.2d 763 (1991), affirming an order entered by Lake, J., on 31 October 1988 in Superior Court, Onslow County. Heard in the Supreme Court on 14 April 1992.

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

Robert T. Hargett for defendant-appellant.

EXUM, Chief Justice.

The issue before us is whether the trial court violated the Fair Sentencing Act in a resentencing proceeding by imposing upon defendant more severe sentences than were imposed originally. Although defendant's total number of years of imprisonment remained the same, the number of convictions for which he was resentenced had been reduced. Considering each conviction separately for sentencing purposes, we conclude that the trial court violated the Fair Sentencing Act by resentencing defendant to a term of years for each conviction that exceeded the sentence given for each conviction at the original sentencing.

Defendant was charged in twelve indictments with twelve counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1(a),

and twelve counts of possession of obscene material with intent to disseminate in violation of N.C.G.S. § 14-190.1(e). He was convicted on eight indictments, each containing one count for possession and one count for dissemination. The indictments rested on an offense committed at various times with various pornographic items as follows: indictment number 88-CRS-9503 [hereinafter Indictment A], a 28 April 1988 rental of a pornographic video cassette; indictment number 88-CRS-9505 [hereinafter Indictment B], a 1 June 1988 sale of a pornographic magazine; indictment numbers 88-CRS-9506 [hereinafter Indictment C] and 88-CRS-9507 [hereinafter Indictment D], an 11 June 1988 sale of two separate pornographic magazines; indictment numbers 88-CRS-9509 [hereinafter Indictment E] and 88-CRS-9510 [hereinafter Indictment F], an 11 June 1988 rental of two pornographic video cassettes; indictment number 88-CRS-9511 [hereinafter Indictment G], a 21 April 1988 rental of another pornographic video cassette, and indictment number 88-CRS-9513 [hereinafter Indictment H], an 11 February 1988 sale of a pornographic magazine. Each indictment charged defendant with both disseminating and possession with intent to distribute each pornographic item described.

At defendant's original sentencing hearing on 3 November 1988, the trial court found no factors in aggravation or mitigation. For the purposes of sentencing, the trial court consolidated into three groups the eight indictments upon which convictions were obtained. In group one, consisting of indictments A, B and C, the trial court sentenced defendant to a term of three years' imprisonment. In group two, consisting of indictments D, E and F, the trial court sentenced defendant to a term of three years' imprisonment to run consecutively with the previous sentence. In group three, consisting of indictments G and H, the trial court sentenced defendant to a term of two years' imprisonment to run consecutively with the previous sentences. Thus, defendant's total sentence was eight years.

The Court of Appeals found no error in the guilt phase of defendant's trial but held that the trial court had improperly, and in violation of *State v. Smith*, 323 N.C. 439, 373 S.E.2d 435 (1988), imposed a sentence upon defendant for each pornographic item disseminated rather than for each transaction involving one or more such item. The Court of Appeals upheld the two-year sentence imposed for indictments G and H, but it vacated and remanded for resentencing indictments A, B, C, D, E and F. *State v. Hemby*,

97 N.C. App. 333, 388 S.E.2d 638, *disc. rev. denied*, 326 N.C. 485, 391 S.E.2d 818 (1990).

At the resentencing hearing on 30 April 1990, the trial court first arrested judgment on indictments C, E and F, which had offended the principle announced in *Smith*. The trial court then noted that of the remaining five indictments, indictments G and H were not subject to resentencing since the two-year sentence on these indictments had been upheld on appeal.

Upon resentencing defendant on the three remaining indictments A, B and D, the trial court, after finding aggravating circumstances based on evidence presented by the State, sentenced defendant on indictment D to three years' imprisonment to run at the expiration of the previously imposed two-year sentence on indictments G and H. The trial court consolidated for sentencing purposes indictments A and B and sentenced defendant to three years' imprisonment to run consecutively with the sentence imposed on indictment D. Defendant was thus resentenced to six years' imprisonment on the three indictments remaining (A, B and D) after the appeal and the trial court's order arresting judgment. Defendant's total sentence remained eight years. The new sentence was affirmed by the Court of Appeals.

Defendant contends the trial court's resentencing violated the Fair Sentencing Act by imposing upon him sentences which were more severe than those imposed originally. We agree.

Although a trial judge may find altogether new aggravating and mitigating circumstances at a resentencing hearing without regard to the findings at prior sentencing hearings, *State v. Jones*, 314 N.C. 644, 648-49, 336 S.E.2d 385, 388 (1985), such findings cannot justify a sentence which is more severe than the original sentence imposed on the same offenses. Section 15A-1335 of the North Carolina General Statutes provides:

> When a conviction or sentence imposed in Superior Court has been set aside on direct review or collateral attack, the Court may not impose a new sentence for the same offense or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C.G.S. § 15A-1335 (1988). This limitation on resentencing was explained in *State v. Mitchell*, 67 N.C. App. 549, 313 S.E. 2d 201 (1984):

> For all intents and purposes the resentencing hearing is de novo as to the appropriate sentence. *See State v. Watson*, 65 N.C. App. 411, 413, 309 S.E.2d 3, 4 (1983); *State v. Lewis*, 38 N.C. App. 108, 247 S.E.2d 282 (1978). On resentencing the judge makes a new and fresh determination of the presence in the evidence of aggravating and mitigating factors. The judge has discretion to accord to a given factor either more or less weight than a judge, or the same judge, may have given at the first hearing. However, in the process of weighing and balancing the factors found on rehearing the judge cannot impose a sentence greater than the original sentence. . . . In simple words, on resentencing, a trial judge cannot impose a term of years greater than the term of years imposed by the original sentence, regardless of whether the new aggravating factors occurred before or after the date of the original sentence.

Mitchell, 67 N.C. App. at 551, 313 S.E.2d at 202.

Defendant's original sentence was based on convictions for eight counts of possession of obscene material with an intent to disseminate, in violation of N.C.G.S. § 14-190.1(e), and eight counts of dissemination of obscene material in violation of N.C.G.S. § 14-190.1(a). Both N.C.G.S. § 14-190.1(a) and N.C.G.S. § 14-190.1(e) establish Class J felonies with presumptive sentences of one year. N.C.G.S. § 15A-1340.4(f)(8) (1988). At resentencing, however, the trial court stated:

> As the court recalls the evidence from trial, and the sentencing hearing previously, prior to the decision by the Court of Appeals that came down the day that the previous sentencing hearing took place, the court was of the opinion and believes that was not addressed by the decision of the Court of Appeals, and the maximum, under the offense with which the defendant was charged was sixteen years, rather than eight, and that's considering possession. But the court chose to consolidate, if the court recalls, all of the possession charges.

Nothing else appearing in the record, we conclude that the above statement denoted an election on the part of the trial court at both sentencing hearings to consolidate for purposes of sentencing the possession and dissemination counts in each indictment.

Pursuant to the Fair Sentencing Act, a trial judge must impose the presumptive prison term unless,

> after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term . . . or unless when two or more convictions are consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

N.C.G.S. § 15A-1340.4(a). At the original sentencing hearing, no findings in aggravation or mitigation were made, and the trial court consolidated the indictments for purposes of sentencing into three groups and imposed three sentences as follows: In group one, indictments A, B and C were consolidated; and defendant was given a sentence of three years. In group two, indictments D, E and F were consolidated; and defendant was given a sentence of three years. In group three, indictments G and H were consolidated; and defendant was given a sentence of two years. It seems clear that the trial court intended to impose a sentence of one year on each indictment and, pursuant to N.C.G.S. § 15A-1340.4(a)(i), to total these sentences when it consolidated the indictments for sentencing purposes. We conclude, further, that when indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing in the record, the sentence, for purposes of appellate review, because of the provisions of N.C.G.S. § 15A-1340.4(a), will be deemed to be equally attributable to each indictment or conviction.

Here, defendant's three-year sentences imposed, respectively, in groups one and two, each of which consisted of consolidated indictments having equal presumptive terms, must be apportioned equally among the indictments in each group. Thus, in each group, defendant was, in effect, sentenced to a one-year term on each indictment; and after consolidation the terms were totaled to arrive at the three-year term ultimately imposed.

At resentencing, after the trial court arrested judgment on three of defendant's indictments, only three indictments, A, B and D, remained for resentencing, A and B having initially been consolidated in group one, and D in group two. When the trial court again consolidated indictments A and B for sentencing in group

one, no more than two years' imprisonment could be imposed without exceeding the sentence originally imposed on these indictments. When the trial court imposed a new sentence of three years, the sentence was more severe than the original sentence on these indictments.

The trial court's error at resentencing is even more apparent for indictment D. At the original sentencing this indictment was consolidated with indictments E and F, and the trial court imposed a three-year sentence. At resentencing only one of the three originally consolidated indictments remained; yet defendant was given a new sentence of three years on this indictment. This new sentence on this indictment was more severe than the one-year sentence originally attributed to the same indictment.

Because, as to each indictment involved, the trial court resentenced defendant to a term of years greater than the term of years attributable to the indictment at the original sentence, the trial court violated the Fair Sentencing Act by imposing a more severe sentence at resentencing than was imposed originally.

Defendant must, therefore, be given a new sentencing hearing on indictments A (88-CRS-9503), B (88-CRS-9505) and D (88-CRS-9507). The decision of the Court of Appeals is reversed and this case is remanded to Superior Court, Onslow County, for a new sentencing hearing on these indictments.

REVERSED AND REMANDED.

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

JAMES WATSON v. AMERICAN NATIONAL FIRE INSURANCE COMPANY

No. 281PA92

(Filed 12 February 1993)

Insurance § 533 (NCI4th)— vehicle operated under I.C.C. permit— UIM coverage—no rejection by insured—amount equal to liability coverage not required

Where plaintiff had in effect at the time of a collision a liability policy with defendant providing liability coverage of $5,000,000 on each of two buses he operated under an Interstate Commerce Commission certificate of convenience and plaintiff was required to have this amount of liability coverage in order to receive the certificate, N.C.G.S. § 20-279.21(b)(4) did not require that the liability policy provide plaintiff with underinsured motorist (UIM) coverage in the amount of his liability coverage when he did not reject UIM coverage since N.C.G.S. § 20-279.32 provides that N.C.G.S. § 20-279.21(b)(4) does not apply to vehicles operated under an Interstate Commerce Commission permit if liability insurance for the protection of the public is required to be carried on the vehicle.

Am Jur 2d, Automobile Insurance § 294.

On discretionary review pursuant to N.C.G.S. § 7A-31, from a decision of the Court of Appeals, 106 N.C. App. 681, 417 S.E.2d 814 (1992), reversing and remanding a judgment entered by Grant, J., in the Superior Court, Bertie County, on 29 October 1990. Heard in the Supreme Court 12 January 1993.

The plaintiff was operating his mother's 1984 Cadillac automobile in Hertford County, North Carolina on 17 February 1989. The automobile being driven by the plaintiff was struck by a vehicle driven by Mr. Clyde Lee. The plaintiff filed a complaint against Mr. Lee and settled with Mr. Lee's insurance carrier for the limits of his policy of $100,000.00.

The plaintiff then filed this declaratory judgment action for a determination of his right to underinsured motorist coverage. It is undisputed that the plaintiff had in effect at the time of the collision a liability policy with the defendant which provided liability coverage in the amount of $5,000,000.00 on each of two buses he owned. The policy provided for underinsured motorist

coverage in the amount of $25,000.00. The parties stipulated that the plaintiff operated the two covered vehicles under a certificate of convenience as required by the Interstate Commerce Commission. The parties also agreed that the Interstate Commerce Commission required as a condition for issuing the certificate of convenience that the plaintiff have $5,000,000.00 in liability coverage for each vehicle.

The superior court held that N.C.G.S. § 20-279.21(b)(4) requires that the policy which provides for liability coverage must provide the plaintiff with underinsured motorist coverage in the amount of the liability coverage unless the plaintiff had rejected it, which he had not done. The superior court held the plaintiff had $10,000,000.00 of underinsured motorist coverage. The Court of Appeals held that the policy did not provide underinsured motorist coverage for the plaintiff and reversed the superior court. We allowed discretionary review.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr., Lars P. Simonsen and David J. Irvine, Jr., for plaintiff appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and Robert E. Levin, for defendant appellee.

WEBB, Justice.

This case brings to the Court a question as to whether the plaintiff has underinsured motorist coverage for injuries received in an automobile accident. The plaintiff contends that N.C.G.S. § 20-279.21(b)(4) provides that the policy he has with defendant gives him underinsured motorist coverage in the amount of his liability coverage because there is no showing that he rejected underinsured motorist coverage.

We hold that this case is governed by N.C.G.S. § 20-279.32 which provides in part:

> This Article . . . does not apply to any vehicle operated under a permit or certificate of convenience or necessity issued by the North Carolina Utilities Commission, or by the Interstate Commerce Commission, if public liability and property damage insurance for the protection of the public is required to be carried upon it.

It is undisputed that the vehicles insured by the defendant were operating under a certificate of convenience issued by the Interstate Commerce Commission and the plaintiff was required to have the liability coverage that he had in order to receive this certificate. N.C.G.S. § 20-279.21(b)(4), under which the plaintiff contends he is given underinsured motorist coverage, is part of the same article as N.C.G.S. § 20-279.32. By its plain words N.C.G.S. § 20-279.32 says that N.C.G.S. § 20-279.21(b)(4) does not apply in this case. The plaintiff has only such coverage as is provided in the policy.

The plaintiff, relying on *Bray v. Insurance Co. of the State of Pa.*, 917 F.2d 130 (4th Cir. 1990), argues that the ICC regulations do not preempt state regulation of underinsured coverage. We agree. It is not the ICC regulations that preempt the plaintiff from underinsured motorist coverage. It is the statutes of this state which do not provide for underinsured motorist coverage in this case.

For the reasons stated in this opinion, we affirm the Court of Appeals.

AFFIRMED.

DALE PRICE JONES v. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA

No. 113PA92

(Filed 12 February 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 105 N.C. App. 612, 414 S.E.2d 49 (1992), affirming an order of summary judgment for plaintiff entered by Greene, J., in Superior Court, Wayne County. Heard in the Supreme Court 12 January 1993.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff appellee.

Smith Helms Mullis & Moore, by Alan W. Duncan and J. Donald Hobart, Jr., for defendant appellant.

PER CURIAM.

The issue presented is controlled by our decision in *Nationwide Mutual Ins. Co. v. Silverman*, 332 N.C. 633, 423 S.E.2d 68 (1992), which was filed subsequent to the decisions of both the trial court and the Court of Appeals. Under the authority of *Silverman*, the decision of the Court of Appeals affirming the order of the Superior Court, Wayne County, is reversed. The cause is remanded to the Superior Court, Wayne County, with instructions to vacate the order of summary judgment for plaintiff and enter an order or judgment resolving the issue presented in accordance with the law as established in *Silverman*.

REVERSED AND REMANDED.

EGBERT L. HAYWOOD v. MARY R. HAYWOOD

No. 181A92

(Filed 12 February 1993)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 106 N.C. App. 91, 415 S.E.2d 565 (1992), affirming in part and reversing in part a judgment and order of equitable distribution, entered by LaBarre, J., on 7 September 1990 in District Court, Durham County. Heard in the Supreme Court 14 January 1993.

Hunter, Wharton & Lynch, by John V. Hunter III, and Egbert L. Haywood, Jr., for plaintiff-appellee.

Randall, Jervis & Hill, by John C. Randall, for defendant-appellant.

PER CURIAM.

Defendant's petition for discretionary review as to additional issues having been denied on 24 June 1992, our review is limited solely to the issues raised in the dissent. As to each such issue, the decision of the Court of Appeals is reversed for the reasons stated in the dissent by Judge Wynn, 106 N.C. App. at 101, 415 S.E.2d at 571. The case is remanded for further proceedings not inconsistent with this holding.

REVERSED IN PART AND REMANDED.

Justices WHICHARD and PARKER did not participate in the consideration or decision of this case.

ADVENTURE TRAVEL WORLD v. GENERAL MOTORS CORP.

No. 412P92

Case below: 107 N.C.App. 573

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

BOWSER v. WILLIAMS

No. 425PA92

Case below: 108 N.C.App. 8

Petition by Continental Insurance Company for discretionary review pursuant to G.S. 7A-31 allowed 11 February 1993.

BURTON v. SAUNDERS

No. 418P92

Case below: 108 N.C.App. 104

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

CROWELL CONSTRUCTORS, INC. v.
N.C. DEPT. OF E.H.N.R.

No. 427P92

Case below: 107 N.C.App. 716

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

DEALER SUPPLY CO. v. GREENE

No. 438P92

Case below: 108 N.C.App. 31

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

DROUILLARD v. KEISTER
WILLIAMS NEWSPAPER SERVICES

No. 7P93

Case below: 108 N.C.App. 169

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993. Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals dismissed 11 February 1993.

ENDERBY v. DAVIS

No. 430P92

Case below: 108 N.C.App. 104

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

FORSYTH MEMORIAL HOSPITAL v. CONTRERAS

No. 393P92

Case below: 107 N.C.App. 611

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

FOWLER v. VALENCOURT

No. 428PA92

Case below: 108 N.C.App. 106

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 11 February 1993.

IN RE WILL OF CANOY

No. 379P92

Case below: 107 N.C.App. 491

Petition by caveators for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

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

KRON MEDICAL CORP. v. COLLIER COBB & ASSOCIATES

No. 360P92

Case below: 107 N.C.App. 331
333 N.C. 168

Petition by defendant for reconsideration of petition for discretionary review dismissed 11 February 1993.

LEWIS v. WATKINS

No. 6P93

Case below: 108 N.C.App. 353

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

LONG DRIVE APARTMENTS v. PARKER

No. 429P92

Case below: 107 N.C.App. 724

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

MAINTENANCE EQUIPMENT CO. v. GODLEY BUILDERS

No. 426P92

Case below: 107 N.C.App. 343

Petition by defendants (Godley Builders and William C. Godley) for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

MCBRIDE v. MCBRIDE

No. 419PA92

Case below: 108 N.C.App. 51

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by defendant in this matter pursuant to G.S. 7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: Retained by order

of the Court in conference, this 11th day of February 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 11 February 1993.

PARKER v. VANCE

No. 335P92

Case below: 107 N.C.App. 302

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

PHILLIPS v. PHILLIPS

No. 362P92

Case below: 107 N.C.App. 489

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

PROCTOR v. N.C. FARM BUREAU MUTUAL INS. CO.

No. 317A92

Case below: 107 N.C.App. 26

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 11 February 1993. Appeal by defendant of constitutional question dismissed 11 February 1993.

SAFETY MUT. CASUALTY CORP. v. SPEARS, BARNES

No. 531PA91

Case below: 104 N.C.App. 467
331 N.C. 118

Motion by plaintiff to be allowed to withdraw petition for discretionary review allowed 4 February 1993.

SCHULTZ v. SCHULTZ

No. 386P92

Case below: 107 N.C.App. 366

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

STATE v. BRYANT

No. 400P92

Case below: 107 N.C.App. 762

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

STATE v. DAVIS

No. 304P92

Case below: 106 N.C.App. 596

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

STATE v. HUNTER

No. 381P92

Case below: 107 N.C.App. 402

Petition by defendant (Clarence J. Hunter) for writ of certiorari to the North Carolina Court of Appeals denied 11 February 1993.

STATE v. RICHARDSON

No. 424P92

Case below: 108 N.C.App. 105

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

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

STATE v. SCALES

No. 291PA92

Case below: 106 N.C.App. 707

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 11 February 1993 for the sole purpose of entering the following order: the case is remanded to the Court of Appeals for reconsideration in light of *State v. Hightower*, 331 NC 636 (1992).

STATE v. STALLINGS

No. 347PA92

Case below: 107 N.C.App. 241

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed, review limited to bill of particulars issues as follows: 1) whether Judge Seay properly ruled on the bill of particulars 2) whether Judge Walker erred in permitting a variance. By order of the Court in conference, this the 11th day of February 1993.

STATE v. TUFT

No. 358P92

Case below: 107 N.C.App. 490

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

TOMPKINS v. ALLEN

No. 392P92

Case below: 107 N.C.App. 620

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 February 1993.

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

PETITION TO REHEAR

NUCOR CORP. v. GENERAL BEARING CORP.

No. 378PA91

Case below: 333 N.C. 148

Petition by plaintiff to rehear pursuant to Rule 31 denied 11 February 1993.

STATE OF NORTH CAROLINA v. ELIAS HANNA SYRIANI

No. 300A91

(Filed 12 March 1993)

1. **Jury § 227 (NCI4th)— capital trial—death penalty views of prospective juror—equivocal responses—excusal for cause**

The trial court in a capital trial did not err in excusing a prospective juror for cause because of his views on the death penalty where he gave equivocal and conflicting responses to questions by the trial court and the prosecutor, but those responses nonetheless revealed that he did not believe in the death penalty, he thought his views on the death penalty would interfere with the performance of his duties at both the guilt and sentencing phases of the trial, and he could not affirmatively agree to follow the law in carrying out his duties as a juror.

Am Jur 2d, Jury § 290.

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

2. **Jury § 133 (NCI4th)— voir dire—expectation of conviction—objection sustained—similar questions allowed—absence of prejudice**

The trial court did not abuse its discretion in refusing to allow defendant to ask the first twelve prospective jurors passed by the State in a murder trial whether any of them had any expectation that defendant was going to be proven guilty where the court sustained an objection to the form of the question and immediately allowed defendant to ask two almost identical questions.

Am Jur 2d, Jury § 304.

3. **Jury § 133 (NCI4th)— voir dire—guilty because charged—objection sustained—absence of prejudice**

Defendant failed to show an abuse of discretion or prejudice when the trial court sustained the State's objection to a question as to whether any member of the second panel of jurors passed by the State felt that, because defendant was charged with a crime, he may be guilty of something where defendant then reminded the jurors about the presumption of innocence and asked whether they all still agreed with

that presumption; prior to questioning by either the prosecutor or defense counsel, the court had carefully instructed these jurors that the fact that defendant was charged was not evidence of guilt and had instructed on the presumption of innocence and the State's burden of proving guilt; and defendant individually questioned each juror on this informed panel and was able to pursue the relevant inquiry as to whether any prospective juror had formed an opinion on defendant's guilt or innocence based solely on the charge before the court.

Am Jur 2d, Jury § 304.

4. Jury § 127 (NCI4th)— voir dire—strength of juror's opinions—objection sustained—absence of prejudice

Defendant failed to show an abuse of discretion or prejudice when the trial court sustained the State's objection to a question as to whether a prospective juror has pretty strong opinions and sticks to them or is easily swayed where the court permitted defense counsel to ask the juror whether she could deliberate with others, which was the crux of the question; defendant asked the juror numerous personal questions designed to determine whether she had formed an opinion as to defendant's guilt and whether she could be fair and impartial; and defendant had not exhausted his peremptory challenges and was therefore not forced to accept a juror objectionable to him. If defendant wanted to determine how well the juror could stand up to other jurors in the event of a split decision, the question amounted to an impermissible stake-out.

Am Jur 2d, Jury § 304.

5. Evidence and Witnesses §§ 335, 339 (NCI4th)— misconduct toward victim—admissibility to show lack of accident, intent, premeditation and deliberation

In a prosecution of defendant for the first degree murder of his wife, testimony by defendant's children about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to his wife were admissible under Rule of Evidence 404(b) to prove lack of accident, intent, malice, premeditation and deliberation, notwithstanding that some of the incidents dated back to the beginning of the marriage.

Am Jur 2d, Evidence § 298; Federal Rules of Evidence §§ 117, 119, 120, 124.

Admissibility under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs or acts similar to the offense charged. 41 ALR Fed. 497.

6. **Appeal and Error § 504 (NCI4th); Evidence and Witnesses § 765 (NCI4th)— defendant's misconduct toward daughter—invited error—opening door to testimony**

In a prosecution of defendant for the first degree murder of his wife wherein defense counsel asked defendant's daughter on cross-examination why she so disliked her father and whether he had ever beaten her, the daughter's response about an occasion when defendant had beaten her was invited error, and defendant cannot complain of such error on appeal. Furthermore, this question opened the door to redirect testimony by the daughter about another specific act of misconduct toward her by defendant to explain her response as to why she so disliked her father, which went directly to her credibility, and to rebut the implication that her father had beaten her only the one time.

Am Jur 2d, Appeal and Error § 717.

7. **Criminal Law § 1315 (NCI4th)— capital trial—sentencing hearing—evidence of nonviolent character—rebuttal testimony—specific instances of misconduct**

Where a defendant on trial for first degree murder of his wife presented evidence during the sentencing phase of his character for nonviolence and requested submission of the statutory mitigating circumstance that he had no significant history of prior criminal activity, the State was entitled to impeach him with the rebuttal testimony of his daughter concerning four specific instances of misconduct by defendant toward her mother and herself.

Am Jur 2d, Criminal Law § 527.

8. **Evidence and Witnesses §§ 335, 339 (NCI4th)— cross-examination of defendant—specific and general misconduct—proper purpose**

In a prosecution of defendant for the first degree murder of his wife, the State's cross-examination of defendant with regard to defendant's specific and general misconduct toward

his wife was proper under Rule of Evidence 404(b) where the State proffered the evidence to establish lack of accident, intent, malice, premeditation and deliberation, not to prove that defendant acted in conformity with a violent character.

Am Jur 2d, Evidence § 298; Federal Rules of Evidence §§ 117, 119, 120, 124.

9. Evidence and Witnesses §§ 765, 3023 (NCI4th)— impeachment—specific instances of misconduct—opening door to cross-examination

While Rule of Evidence 608(b) prohibits use of specific instances of misconduct to impeach a defendant upon cross-examination, a defendant on trial for the first degree murder of his wife opened the door to cross-examination regarding specific instances of misconduct toward both his wife and children when he testified on direct examination that he was a loving and supportive husband and father, and that he did not intend to hurt his wife but unintentionally, or in self-defense, struck back at her with a screwdriver, trying only to get her to stop moving her car. Therefore, the State was properly permitted to cross-examine defendant about threats, arguments, and acts of violence toward both his wife and children to explain and rebut defendant's direct examination testimony. Furthermore, the trial court did not err by failing to exclude this evidence as more prejudicial than probative under Rule of Evidence 403.

Am Jur 2d, Witnesses § 968.

10. Evidence and Witnesses § 268 (NCI4th)— character in issue—cross-examination—specific instances of misconduct

Where defendant put his character in issue by having one witness testify about his reputation for peacefulness and another testify that defendant was not the kind of person he would expect to kill his wife and that there was nothing in defendant's lifestyle that caused him any concern, the prosecutor was properly permitted to cross-examine these witnesses about specific instances of misconduct by defendant toward his wife and children, in accordance with Rules of Evidence 404(a) and 405(a), to rebut their prior testimony.

Am Jur 2d, Witnesses § 968.

11. Evidence and Witnesses §§ 1694, 1700 (NCI4th)— photographs of victim's body—not excessive—no improper presentation to jury

The trial court did not abuse its discretion in the admission of sixteen color photographs of a murder victim's body where six photographs depicted the victim shortly after her arrival at the hospital, intubated, connected to a ventilator, and covered with white hospital sheets; the trial court limited the jury's consideration of these photographs to illustration of the testimony of a neighbor who came to the victim's aid; the photographs served properly to illustrate the neighbor's testimony about the nature of the wounds and the prolonged manner of the killing; ten photographs were submitted in conjunction with a pathologist's testimony about the autopsy; nine of these depicted isolated areas of injury to the victim's hands, arms, elbows, neck, mouth, and head, and one depicted a section of the membrane between the victim's brain and skull; although gruesome, these photographs were not excessive, unduly repetitious, or duplicative of the six hospital photographs because the victim survived almost one month and many of the wounds had healed; these photographs were also tendered with limiting instructions that they were only for the purpose of illustrating the pathologist's testimony; and they served to illustrate the pathologist's testimony regarding the likely weapon, which had never been found, the multiple stab wounds, and the cause of death. Furthermore, the manner of presentation of the photographs to the jury was not improper where the autopsy photographs were passed to the jury at the close of the pathologist's testimony and the others at the close of the neighbor's testimony, and the photographs were published again only at the conclusion of the evidence with all exhibits.

Am Jur 2d, Evidence §§ 256, 785.

12. Homicide § 250 (NCI4th)— first degree murder—sufficient evidence of premeditation and deliberation

There was sufficient evidence that defendant killed his wife with malice, premeditation and deliberation to support his conviction of first degree murder where the State's evidence tended to show that defendant had a history of physically abusing his wife and children; when he first learned that his wife wanted a divorce, he threatened to kill her and ruin

the lives of the children if she ever left him; approximately two weeks before he killed his wife, she had obtained a domestic violence order against him, requiring him to leave the home; on the night of the murder, defendant parked along the street where his wife and children lived; as his wife's car approached the street, defendant pulled his van in front of her car, forcing her to stop; defendant approached the car, opened the door, stabbed her with a screwdriver, and as she moved her car out of the road, continued to stab her; defendant stabbed his wife a total of twenty-eight times with a screwdriver, including one blow which penetrated the brain three inches and another that fractured her jaw; and following the incident, defendant walked calmly back to his van and drove to a nearby fire station for treatment of scratches he had received.

Am Jur 2d, Evidence § 363.

Homicide: presumption of deliberation from the fact of killing. 86 ALR2d 656.

13. Criminal Law § 1343 (NCI4th)— first degree murder—especially heinous, atrocious, or cruel aggravating circumstance—constitutional instructions

The trial court's Pattern Jury Instructions on the "especially heinous, atrocious, or cruel" aggravating circumstance provided constitutionally sufficient guidelines to the jury where the instructions permitted a finding of this circumstance when the brutality involved in the murder exceeded that which is normally present in any killing or the murder was a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

Am Jur 2d, Trial § 1120.

14. Criminal Law § 1345 (NCI4th)— first degree murder—especially heinous, atrocious, or cruel aggravating circumstance—evidence sufficient to support finding

The trial court did not err in submitting the aggravating circumstance that defendant's first degree murder of his wife was "especially heinous, atrocious, or cruel" because the evidence and inferences therefrom supported a finding that the level of brutality exceeded that normally found in first degree murder cases and that the killing was physically and psychologically agonizing, conscienceless, pitiless and unnecessarily torturous

to the victim. The jury could reasonably find that the victim sustained and endured agonizing physical pain before becoming unconscious or comatose and that the killing was excessively brutal and conscienceless, pitiless and unnecessarily torturous based upon evidence that defendant stabbed the victim twenty-eight times; while many of the wounds were to her face and neck, several were to her arms and hands, suggesting that she tried to defend herself or ward off the blows; one wound penetrated the brain three inches, causing hemorrhaging and swelling in the brain; another blow fractured her jaw and several of her teeth; these blows did not cause immediate death, and the victim was able to communicate with her daughter moments after the attack and with the attending emergency room assistant upon her arrival at the hospital; and she died twenty-eight days later as a result of the puncture wound to her brain after having suffered stroke, infarct or paralysis. Additionally, where there was evidence that defendant had abused his wife to the extent that she had left the home with the children and that two weeks prior to the killing she had a domestic violence order served on defendant, requiring him to leave their home, the jury could reasonably infer that the victim feared her husband and endured psychological torment during the attack, not only because of danger to her own life but also to the life of her son, who tried to stop his father's attack.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstances that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

15. Criminal Law § 1360 (NCI4th)— impaired capacity mitigating circumstance—testimony by defendant—judgment affected by emotional disturbance—insufficient evidence

The trial court was not required to submit *sua sponte* the impaired capacity mitigating circumstance to the jury in a prosecution of defendant for the first degree murder of his wife based upon defendant's testimony that he was very upset about the prospect of losing his wife and family through divorce proceedings, that he was "very emotional and highly upset" when he approached his wife on the night of the killing, that

he was having a lot of hurt inside, and that those feelings were affecting his judgment. N.C.G.S. § 15A-2000(f)(6).

Am Jur 2d, Criminal Law §§ 598, 599.

Mental or emotional condition as diminishing responsibility for crime. 22 ALR3d 1228.

16. Criminal Law § 1320 (NCI4th)— capital trial—penalty phase—consideration of bad acts evidence—instruction not required

The trial court did not err in failing to instruct the jury at the penalty phase of a capital trial that prior bad acts evidence received at the guilt phase, as well as on rebuttal in the penalty phase, could not be used by the jury to support an aggravating circumstance in the penalty phase where the evidence of bad acts toward the victim was relevant to the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance, the only aggravating circumstance submitted to the jury, because it tended to show that the victim feared defendant and endured psychological torment during the attack, not only on account of the danger to her own life but also to the life of her son, who tried to stop defendant's attack on her. N.C.G.S. § 15A-2000(a)(3).

Am Jur 2d, Evidence § 298.

17. Criminal Law § 455 (NCI4th)— death penalty—specific deterrence jury argument

The trial court did not commit plain error in failing to instruct the jury *ex mero motu* to disregard the prosecutor's argument to the jury that "[t]he only way to insure he won't kill again is the death penalty," since specific deterrence arguments are proper.

Am Jur 2d, Trial § 572.

Propriety, under federal Constitution, of evidence or argument concerning deterrent effect of death penalty. 78 ALR Fed. 553.

18. Criminal Law § 460 (NCI4th)— murder of wife—intent to kill daughter—jury arguments—reasonable inferences from evidence

The prosecutor's jury arguments in a prosecution for the murder of defendant's wife that the victim told her daughter

who came to her aid to "shut up" because she feared defendant would kill the daughter if he heard her, that defendant stopped his van and started back toward the victim in order to kill the daughter, and that he did not do so only because a citizen came to the victim's aid were reasonable inferences based on the evidence and were within the wide latitude given counsel in argument.

Am Jur 2d, Trial § 632.

19. Criminal Law § 1373 (NCI4th) — first degree murder of wife — death penalty not excessive or disproportionate

A sentence of death imposed on defendant for the first degree murder of his wife is not excessive or disproportionate, considering both the crime and the defendant, where the murder was preceded by many years of physical abuse of the wife and threats to her; the victim feared defendant; the murder resulted from a calculated plan of attack by the defendant; the killing was a senseless and brutal stabbing in front of other people; the victim suffered great physical and psychological pain before death; defendant failed to exhibit any remorse after the killing; the jury found the "especially heinous, atrocious, or cruel" aggravating circumstance; the jury found only one statutory mitigating circumstance, that the crime was committed while the defendant was under the influence of mental or emotional disturbance; and the jury found five nonstatutory mitigating circumstances.

Am Jur 2d, Criminal Law §§ 538, 609.

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

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Burroughs, J., at the 3 June 1991 Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict finding defendant guilty of first-degree murder. Execution stayed 9 July 1991 pending defendant's appeal. Heard in the Supreme Court 10 September 1992.

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

Richard B. Glazier for defendant appellant.

WHICHARD, Justice.

Defendant was tried on an indictment charging him with the first-degree murder of his wife, Teresa Yousef Syriani. The jury returned a verdict finding defendant guilty upon the theory of premeditation and deliberation. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. For the reasons discussed herein, we conclude that the jury selection, guilt, and sentencing phases of defendant's trial were free from prejudicial error, and that the sentence of death is not disproportionate.

The State's evidence tended to show the following: Defendant and his wife were living apart, defendant in a motel, and his wife with their children in their home. On 28 July 1990, around 11:20 p.m., defendant drove to their home, but his wife had not returned from work. As she drove her automobile onto a nearby street, defendant blocked her way with his van. Defendant got out of his van, gestured, and chased after her car as she put it in reverse. As his wife sat in her car, defendant began stabbing her with a screwdriver through the open door or window, while their ten-year-old son John sat in the seat beside her. John was unable to stop his father; he got out of the car and ran home to get his older sister. At least two neighbors watched from their homes as defendant stabbed his wife and then walked away. Teresa Syriani died twenty-eight days later due to a lethal wound to her brain.

Boyd Wilson testified that he lived in the Syrianis' neighborhood. He knew defendant's son but only knew defendant by sight. On 28 July 1990, around 11:20 p.m., Wilson was at home when he heard children hollering. He looked out his window and saw a van parked across the street with the interior lights on and the door open. He looked again and watched defendant come toward the van, get into the driver's seat, and fumble with something. Then he saw defendant go back down the street and cross the street to a car in the driveway of the house next to Wilson's. Defendant leaned over inside the car. Wilson saw the car shaking. Then Wilson went outside, whereupon he saw defendant back in the van. He also saw two young boys, John Syriani and John's friend. Wilson heard a young woman hollering "somebody help my mother" and went to the car. A woman in the car was covered in blood. A neighbor wiped her face. She looked to him "like somebody [who] had been shot in the face with a load of buckshot."

Thomas O'Connor testified that he lived near the Syrianis but did not know them. On 28 July 1990, around 11:20 p.m., he received a phone call from a neighbor prompting him to look out his window. O'Connor saw a man standing at a car halfway in a driveway holding what appeared to be a screwdriver and "stabbing into the car." O'Connor ran outside, yelling, and made eye contact with the man. The man kept stabbing into the car. O'Connor ran back inside to phone the police, then ran outside. He saw the van pulling away. The van stopped and the man, screwdriver in hand, got out and walked toward the car. The man saw O'Connor, turned back to the van, and drove away.

John Syriani, defendant's eleven-year-old son, testified that the family had lived in the house in Charlotte since 1986 except for a week in the summer of 1988 when the police took him, his sisters, and his mother to a Battered Women's Shelter. Then they stayed with his mother's sister in New Jersey for about a month. When defendant came to take them back, they returned to Charlotte. In July 1990 he, his three sisters, and his mother lived in a motel. They moved back to their home when defendant moved out.

On 28 July 1990, John went with his mother to the Crown gas station. His father came by and asked him to go out with him. John rode home with his mother and saw his father's van stopped ahead as they approached their home. As his mother approached the turn onto the main street before their house, defendant moved the van to block her way. Then defendant got out of the van, gestured, and chased the mother's car. She put the car in reverse. Defendant opened the door and started stabbing John's mother, who started screaming. John tried to push his father's hands off her, but he could not stop his father. John ran home to get his older sister and told her, "Dad is killing Mom." John then ran to his friend's house. John and his friend ran back to his mother's car, now in a neighbor's driveway. Defendant was kneeling at the open door, stabbing into the car. Defendant then walked back to the van and yelled, "Go home bastard," in Arabic, to John. Frightened, John ran back down the street. Neighbors took John into their home.

On cross-examination, John testified that his father worked long hours. His father always carried a screwdriver as part of his work tools. His mother had never worked, had dressed according to Arabic tradition, and had worn no makeup or lipstick before

they moved to Charlotte. His parents had argued, but mostly over the children. In 1988 or 1989, John's mother decided she did not like staying at home and wanted to get a job. At her second job at a gas station, she worked some nights. When his mother worked nights, his older sister babysat. Starting in 1990, his parents argued more frequently. Defendant did not like the fact that John's mother was working; he wanted her to stay home with the children. In July 1990, defendant moved into a motel.

When he first spotted the van the night of 28 July 1990, John thought the motor was turned off because the headlights were turned off. Defendant, however, turned on the headlights and turned his van to the right across the street. Defendant had stabbed John's mother once before the car came to a complete stop in a driveway.

On redirect examination, John recalled seeing his father slap his mother when he was five and hit his mother in "the ear" on Easter Sunday, 1989. John also recalled seeing his mother "screaming and running out of the house" while his father stood at the door in the summer of 1988. Finally, John testified that his mother was a good mother. She and his father argued about three times a week, and his father called her names, for example, "whore."

Rose Syriani, defendant's eldest daughter, testified about the events leading up to the stay at the Battered Women's Shelter in the summer of 1988. Rose and her mother were at home when defendant came in and threw the groceries at them. Defendant started to scream at his wife, jumping up and down and breaking a table with his foot. Then defendant went into the garage and returned with a large wooden bat. He ran upstairs after her mother, who had left the house. The police showed up shortly thereafter and took the mother and children to the shelter. Contrary to John's testimony, Rose testified that her parents fought constantly in Illinois. In the summer of 1990, her mother was sleeping in the younger daughter's bedroom. In July, they moved to a motel.

On 28 July 1990, John came to the front door banging and screaming, "Dad is trying to kill Mom." Rose called the police, saw her brother coming back, and ran to her mother. She saw her father enter his van, look at her, and drive away. When she reached her mother, her mother said, "Ma Ma, shut up." "Ma Ma" is Arabic for "honey."

On cross-examination, Rose maintained that her parents were always arguing and defendant would jump and yell at her mother, although there were times when her parents did not argue. Sometimes her father "would go downstairs around three o'clock in the morning . . . and just start breaking things downstairs." During arguments between January and July 1990, her mother would say she would quit her job if defendant would buy food the children liked to eat. Rose also testified about the time defendant started yelling at her in Arabic and grabbed her around her throat, saying he was going to kill her. Rose remained angry with her father in 1988, 1989, and 1990 because he constantly disciplined the children—for example, they were not allowed to play outside after 5:00 p.m.—and he argued with her mother.

On redirect, Rose testified that her mother told her to "shut up" because she was screaming, holding her mother's hand, trying to sit her mother up, and shaking her to see if she were still alive. Once her mother spoke, she stopped shaking her and went for help.

Rose then testified about a number of specific instances of verbal and physical abuse by her father. When defendant thought she had scratched his new van, he grabbed her and started to kick her. Crying, she ran out of the house. She testified: "[H]e got me on the floor and kicked me . . . into the ground. People were walking by and my mom pulled his leg off me." Defendant told her mother he would kill her if she ever left him, that she would not live without him, and that he would "f--- up our world."

On recross-examination, Rose testified that the children were always scared of their father even though he provided well for them.

Jeane Allen, a registered nurse at the Carolinas Medical Center, testified that she saw Mrs. Syriani at 12:24 a.m. on 29 July 1990. The victim was covered in blood and suffered from lacerations to her arm, right side, and face. As she was being moved, she grasped her jaw and complained, "It hurts." Monitors showed she had difficulty breathing, so someone inserted a tube through her nose into her lungs to facilitate breathing. On cross-examination, Allen testified that the cuts below the victim's temple area were superficial but the ones above were not.

Kenneth C. Martin, an attorney, testified that the victim had asked Martin to represent her in a domestic action against defend-

ant in November, 1989. He prepared a complaint against her husband, but she only decided to file it on 27 June 1990. An *ex parte* domestic violence order was issued on 5 July 1990.

Alice Safar, the victim's older sister, testified that she visited her sister at the hospital on 29 July 1990. Mrs. Syriani squeezed her hand when Safar spoke to her. On cross-examination, Safar testified that the marriage between her sister and defendant had been arranged.

Dr. James Sullivan, a forensic pathologist and medical examiner, testified that he performed an autopsy on the victim's body on 24 August 1990. Seven healed wounds were located on her left cheek, five wounds on the left side of her neck, five wounds on her right cheek and around her mouth, and five wounds to the back of her right hand and arm. There were visible healed wounds in the mouth where the victim's jaw had been fractured, and several of her teeth had been fractured or lost. Several of the wounds had been sutured. All of the wounds had a linear or rectangular configuration.

However, in Sullivan's opinion, the chronic penetrating brain wound caused the victim's death. A three-inch deep puncture wound to the right temple, to the right of her right eye, penetrated the victim's brain, going through the right temporal lobe and into the deep central area of her brain known as the basal ganglia area. Such a wound would cause brain dysfunction, unconsciousness or coma, infarct or stroke, and paralysis on the left side of her body. There was a small rectangular defect in the approximately one-eighth-inch-thick bone. The wound was caused by a narrow instrument like a squared-off pick, screwdriver, or knife. Sullivan opined that it would take a substantial amount of force to penetrate an adult's skull.

On cross-examination, Sullivan testified that none of the arm or hand wounds were life threatening.

Charlotte Police Department Investigator Hilda M. Griffin testified she arrived at the scene around 11:37 p.m. She found the victim alive, sitting in the car with her head laid back. Blood was everywhere. Mrs. Syriani tried to speak, but Griffin could not tell what she was saying. When Griffin arrived at the fire station where defendant had stopped for first aid, defendant had already been arrested, and his van had been searched. He appeared

sober. There was blood all over him, but only some light scratches on his arm and shoulder. Griffin testified that a team searched for, but never found, the murder weapon.

Dr. Richard C. Stuntz, Jr., the first witness for the defendant, testified that on the morning of 29 July 1990, he treated defendant in the emergency room of Carolinas Medical Center. Defendant's hand was bruised. There was an abrasion on his lower left leg, and there were scratches on his nose and shoulder which could have been caused by a fingernail. His hand was X-rayed, and he was treated with a tetanus shot and pain medicines. On cross-examination by the prosecutor, Stuntz testified that defendant told him he had been assaulted by his wife.

Charles M. Stanford, a fireman, testified that around 1:00 a.m. on 29 July 1990 defendant walked into his station. Stanford tended to scratches on defendant's face, arms, and chest. Defendant told him he had been in a fight. On cross-examination, Stanford testified that defendant said his wife had assaulted him.

Walid Bouhussein testified that he lived two or three blocks from the Syrianis and had known them almost three-and-one-half years. Their families exchanged visits and ate together a number of times. He had never seen any arguments between defendant and his wife. His children felt "a warmth" toward the defendant. Both defendant and his wife were very nice people, neither appearing violent nor showing temper. Defendant was very hospitable, a "mild-mannered man." On cross-examination, Bouhussein admitted that Mrs. Syriani had told his wife that defendant mistreated her.

On redirect, Bouhussein testified that defendant was known in the community as a very hard-working, mild-mannered man. He did not have a reputation for violence, but he did have a reputation for truth and veracity. Upon recross-examination, the prosecutor questioned Bouhussein about specific instances of defendant's misconduct toward his wife and children.

Michael Carr, a domestic law attorney, testified that he had talked with defendant about the *ex parte* domestic violence order. At the 12 July 1990 hearing defendant and his wife agreed to joint counseling, but a few days later Mrs. Syriani changed her mind and no longer wanted it. Carr testified that defendant had wanted very much to be reconciled with his wife.

David D. Stevens testified that he first met defendant in 1983 when they worked at Kerr Glass in Chicago. Defendant was a good worker. When Kerr Glass closed, Stevens moved to Charlotte, became a supervisor at Midland Machine Corporation, and hired defendant. During the time he knew them, he never noticed a problem between the Syrianis. The children did not appear to be afraid of their father. Further, defendant never argued with, abused, or fought with any fellow employees. On cross-examination, however, Stevens conceded that he had told defendant's current boss not to hire defendant because he had a "terrible temper and the men were afraid of him."

Harold Linn testified that he had been a plant superintendent with Protective Door Manufacturing Company and had met defendant in 1977. Defendant was looking for work, and Linn hired him. Linn considered defendant a terrific employee, one of the hardest workers at the plant, capable of "great, beautiful production." Even after Linn retired and moved to North Carolina, he maintained contact with the Syriani family. He was very close to defendant. He respected him very much as a man who had earned everything for himself, having come to this country with only a few dollars in his pocket.

Linn also testified that there seemed to be a great deal of love in the Syriani household, and the Syriani children always seemed to enjoy having the Linns visit. They were "bright kids, very well trained. You couldn't ask for a better family."

The prosecutor cross-examined Linn with regard to specific acts of misconduct by defendant toward his wife and children. Linn replied that he could not believe any of those things occurred, that it was not in defendant's nature, and that all he ever saw was that defendant had "good and deep family devotion, the kind that most of us would envy."

Florence Linn, Harold Linn's wife, testified that when the Linns visited the Syriani home they never observed discord or arguments. She never noticed abusive conduct by defendant toward his wife or children, only "loving conduct." She thought a better family atmosphere could not have been asked for, and that the children were bright, healthy, and well-loved.

Odett Syriani, defendant's older sister, testified that the Syriani children now live with her in Illinois. Her brother's marriage had

been arranged. Teresa Syriani, the victim, had been living in New Jersey. Teresa and Odett's brother were married in Jordan, and he followed his wife back to the United States. Odett visited the family for six months in 1987, and later the family visited Odett in Chicago. She did not notice any problems between defendant and his wife. They seemed to get along very well together.

Defendant testified on his own behalf. Born in Jerusalem in 1938, he had to leave school at age twelve when his father, a laborer, became sick. He worked to help his mother support his three sisters and two brothers. He learned the machinist trade. He entered the Jordanian Army at age nineteen as a civilian machinist. His sisters did not work because "their job was to finish school, then they engage and then they get married." After leaving the army, he worked in a garage and then as a singer on a radio station. At the age of thirty-six he married Teresa in Amman, Jordan. She was twenty-four. Friends had arranged the marriage. She returned to the United States, and he followed. They lived in Washington, D.C., where he worked as a busboy and learned English at night. They then moved to Chicago, where defendant found work as a machinist with Protective Door.

When Protective Door closed some six years later, defendant went to work for Kerr Glass Manufacturing, where he stayed almost six years. Although Mrs. Syriani had worked at Woolworth's, she had stayed at home after the birth of Rose, their first child. Defendant purchased a home for his family in Calumet City, Illinois, near Chicago. When Kerr Glass closed in 1986, defendant moved to North Carolina, found a job and a place to live, and brought his family to Charlotte.

While in Chicago, he and his wife rarely argued. When they did, it was nothing of a serious nature. They spoke Arabic in their home. Whenever he was away, he called the family every night, and they missed him very much. In Charlotte, Mrs. Syriani asked if she could take a part-time job. He bought another car for her use. Her first job was in a restaurant, but she quit and found work at a local service station. After she began working, she changed "fast[,] very fast." Although he loved his wife, he was not happy with the change. Despite the problems caused by his wife's deviation from Arabic tradition, defendant did not strike his wife. Rather, he tried to make her "more happy."

Defendant recalled receiving papers from a lawyer about his wife's request for a divorce. In July 1990, she came home with

police officers and told defendant he had to leave his keys and move out of the home. Defendant packed his clothes and moved into a hotel room.

Defendant visited the neighborhood several times. He saw John skateboarding outside and asked John to tell his mother he wanted to talk with her. John did not respond. Another time, defendant asked John to ask his mother for the small television because he did not have one in his hotel room. Mrs. Syriani refused his request.

On 27 July 1990, defendant worked his normal half day. Late that evening, he saw his son outside the gas station. He asked John whether he could go to lunch with him the next day. Mrs. Syriani said John could not go with his father.

On 28 July 1990, defendant went to the gas station and asked whether John could go out to lunch, but Mrs. Syriani refused to let the child go. Defendant returned to his motel room. Around 8:00 p.m., he went to the supermarket near the gas station. He did not see his wife's car pass by and believed that his wife was still working at 11:00 p.m. Concerned about the family's safety, he left the supermarket and went to their home, but his wife was not there. On his way to the gas station to ascertain why his wife was late in coming home, he saw her car. She stopped her car, and he went up to ask about his children and who was supervising them. She scratched his face, and he pushed her away. She opened the driver's side door, hitting him in the leg. He grabbed the door, and she placed the car in reverse. He struck at her through the open window with a screwdriver he had in his pocket, trying to get her to stop moving the car. He never had any desire to hurt or kill his wife and remembered hitting her only three or four times. He loved his wife very much.

On cross-examination, defendant recalled the time in 1985 when he thought his daughter Rose had scratched his new van. He did not drag her by the hair and kick her. He spanked her on the "butt." It was the first spanking he had ever given her. Defendant denied pulling hair out of his wife's head over an argument about a washing machine. He denied knocking Sara down and kicking her in the summer of 1989. She had lost her tennis shoe, and he only spanked her on the bottom. He denied ever putting his hands around Rose's throat. Defendant admitted he had hit his wife when they had lived in Illinois and had hit her on the hand

while driving in the van on Easter Sunday, 1989. They had been arguing about lamps, and she had put her hand on the door as if to open it.

Defendant testified that during the last three months of their marriage his wife beat him, sometimes in front of the children. On the night she told him she would leave him, she hit him and then called the police to escort her and the children away from their home. Fifty minutes later, defendant called the police and told them his wife had assaulted him but he did not want her arrested. Defendant stated that he loved his wife and children, and up until the end he hoped he and Teresa would reconcile.

Cindy Smith testified for the State on rebuttal. She lived next door to the Syrianis in Charlotte. Smith thought Mrs. Syriani was a gentle person, but her husband had a violent temper. Upon cross-examination, Smith admitted that she had never heard an argument, that the Syrianis were a discreet family and conducted their business within their home, but she could see that defendant had an incredible temper "from the fear and the terror in the children's faces and Teresa['s]."

Defendant moved to dismiss at the close of the State's evidence. The trial court denied the motion. The jury found defendant guilty of first-degree murder based on premeditation and deliberation.

At the capital sentencing hearing, defendant testified that he had been out on bond for a short time, during which he had arranged for the care of his children. He testified that he felt "real, very terrible" about what had happened, that he loved his wife and missed her very much, and that he was very sorry for what he had done. He reiterated that at the time of the confrontation with his wife, he was very emotional and upset, feeling he was going to lose his wife and family. Finally, he testified that in his eleven months in jail he had never been cited for any misconduct or caused trouble for anyone.

Michael Thomas McCarn, a deputy with the Mecklenburg County Sheriff's Department, testified that during defendant's eleven months of incarceration he never gave anyone trouble, was "very cooperative," and was a model prisoner.

In rebuttal, Sara Syriani, defendant's second oldest daughter, testified for the State that on one occasion her father threatened her mother with a pair of scissors. On Easter Sunday, 1988, he

hit her mother. Further, her father had yelled at her, pushed her down, and kicked her. Finally, on her graduation from sixth grade, he had yelled at the victim, followed her upstairs, grabbed her by her hair, thrown her down the stairs, and dragged her into the kitchen, ripping her shirt.

Following the capital sentencing hearing, the jury found one aggravating circumstance—that the murder was especially heinous, atrocious, or cruel—and eight mitigating circumstances. Among these was one statutory mitigating circumstance, that the murder was committed while defendant was under the influence of mental or emotional disturbance. The remaining nonstatutory mitigating circumstances pertain to defendant's understanding of the severity of his conduct, defendant's demonstrated ability since his incarceration to abide by lawful authority, defendant's history of good work habits, defendant's history of being a good family provider, defendant's good character or reputation in the community in which he lived, defendant's upbringing in a different culture, and defendant's aggravation by events following the issuance of the *ex parte* domestic violence order.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstance, and that the aggravating circumstance was sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

JURY SELECTION ISSUES

[1] Defendant first contends that the trial court erred in excusing a prospective juror for cause because of his views on the death penalty, thereby denying defendant his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Defendant contends that jurors may be excused for cause only if they are unequivocally opposed to capital punishment or if they would "automatically" vote against imposition of the death penalty.

The standard for determining whether a prospective juror may be properly excused for cause for his views on capital punishment is whether those 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); *accord, State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905,

110 L. Ed. 2d 268 (1990). This Court has recognized that a prospective juror's bias may not always be "provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Davis*, 325 N.C. at 624, 386 S.E.2d at 426.

> Many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

Wainwright, 469 U.S. at 425-26, 83 L. Ed. 2d at 852.

The transcript reveals that Ramon Masterson responded firmly and unequivocally to the court's initial queries about Masterson's understanding that the defendant has the presumption of innocence and the State the burden of proof. But, in response to the court's query about whether he had any "personal convictions about the death penalty which would prevent or substantially impair the performance of [his] duty in accordance with the [c]ourt's instructions and [his] oath at the guilt . . . phase of the trial," Masterson responded equivocally, "I don't know on the death penalty. I'm not certain." The court asked whether he would be "able to vote for the death penalty if the proper circumstances were presented to [him]?" Masterson responded, "I'm not certain." He agreed with the court's suggestion that he would not "unequivocally vote against the death penalty." But in response to the question, "would you be able to convict the defendant knowing that the conviction meant the possible imposition of the death penalty," he responded, "I'm not certain of that." The court again asked him whether "it was fair to say that [he] would not recommend the death penalty under any circumstances." Masterson responded, "I feel reserved on that. I don't know." The court queried whether "it [is] fair to say that you would vote against the imposition of the death penalty without regard to the evidence." Masterson responded, "Well, no, I don't think so."

Following the court's voir dire, the prosecutor asked, "If the State meets its burden of proof and proves to this jury that the death penalty is the appropriate punishment, would you be able to walk back to this courtroom, stand up by yourself, look at the defendant and say, 'I sentence you to be executed?' " Masterson replied, "I don't think I could do that." In response to the question, "And is that due to your reservations . . . about the death penalty," he replied, "I just don't believe in that." In response to the question, "You just don't believe in the death penalty," he replied, "I don't believe in an eye for an eye." The prosecutor asked again whether his beliefs would prevent or substantially impair the performance of his duties in accordance with the court's instructions and his oath, and he responded, "I could possibly say yes." Finally, the prosecutor asked,

> [I]f you don't feel like you could impose the death penalty and if the law is that if you are convinced the death penalty is the appropriate punishment you must vote for the death penalty, then it would be fair to say . . . that would interfere with your ability to perform your duties under your oath?

Masterson replied, "I guess so."

Masterson's equivocal yet conflicting responses exemplify the situation anticipated by the United States Supreme Court in *Wainwright*. "[D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 852. His responses nonetheless reveal that he did not believe in the death penalty, and he thought his views on the death penalty would interfere with the performance of his duties at both the guilt and sentencing phases. Masterson could not affirmatively agree to follow the law in carrying out his duties as a juror; therefore, the trial court did not err in excusing him for cause. N.C.G.S. § 15A-1212(8) (1988); *see Davis*, 325 N.C. at 624, 386 S.E.2d at 426. This assignment of error is overruled.

Defendant next contends the trial court erred in sustaining the State's objection to four questions defendant posed to prospective jurors, thus preventing him from obtaining information necessary to exercise his "for cause" and peremptory challenges intelligently so as to secure an impartial jury. We conclude this contention is without merit.

"The prosecutor and the defense counsel . . . may personally question prospective jurors . . . concerning their fitness and competency to serve as jurors in the case . . . ." N.C.G.S. § 15A-1214(c) (1988). Moreover, neither is "foreclosed from asking a question merely because the court has previously asked the same or [a] similar question." *Id.* This statutory right to voir dire examination serves a double purpose, first, to determine whether a basis for challenge for cause exists, and second, to enable counsel to intelligently exercise peremptory challenges. *State v. Soyars*, 332 N.C. 47, 56, 418 S.E.2d 480, 486 (1992). The extent and manner of that inquiry, however, rest within the sound discretion of the trial court. *Id.* Therefore, defendant must show prejudice, as well as a clear abuse of discretion, to establish reversible error. *Id.*

[2] During examination of the first twelve prospective jurors passed by the State, defendant asked the following questions:

> [DEFENSE COUNSEL]: Is there any member of the jury that has any expectation at this point that this defendant is going to be proven guilty?
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.
>
> [DEFENSE COUNSEL]: Does any member of the jury feel that merely because the defendant has been charged with a crime that that is any evidence of guilt?
>
> Anybody feel that way, that the mere fact that [he] has been charged with this crime is any evidence of guilt?
>
> Does any member of the jury feel merely because the defendant is sitting here charged with a crime that he must have done something wrong or he wouldn't be here?
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.

Defendant contends that the court's refusal to allow him to ask the first two of these questions denied him the right to determine whether there were any prospective jurors who had formed an opinion as to the guilt or innocence of the defendant based solely on the charge before the court. The court apparently sustained an objection to the form of the question, because it immediately allowed defendant to ask two almost identical questions.

(Defendant mistakenly asserts that the prosecution objected to the second question.) The trial court therefore did not abuse its discretion in refusing to allow defendant to ask this question.

[3] During examination of the second panel of jurors passed by the State, defendant asked the following:

> [DEFENSE COUNSEL]: This question is to all of you. Do you feel that because the defendant is charged with a crime and is seated here, that he may be guilty of something?
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.
>
> [DEFENSE COUNSEL]: You did tell the Judge that you knew he was presumed to be innocent when he asked you that question. Do you all still agree with that?

Defendant again contends that he was denied the right to determine whether there were any prospective jurors who had formed an opinion as to his guilt or innocence based solely on the charge before the court. However, following the court's sustaining of the objection to the question, defendant reminded the jurors about the presumption of innocence and asked whether they all still agreed with that presumption. Further, and subsequently, defendant individually questioned each juror on this second panel passed by the State. Prospective juror Woods was asked whether the newspaper account she admitted reading would tend to influence her in her final judgment, whether she was willing to hear all the evidence and hear defendant's side of it, whether she had formed any opinion and whether she presumed defendant to be innocent. Juror Roper was asked whether he had formed an opinion and whether he could be fair and impartial. Roper had three small children of his own, and defendant questioned whether Roper could remain impartial because the State's witnesses included small children. Juror Price was asked whether his mind was clear and whether defendant would be starting "even with the board." Juror Sebring was asked whether he had yet formed any opinion and whether his mind was clear. Defendant found all four jurors satisfactory. Moreover, their answers were informed answers. Prior to questioning by either the prosecutor or defense counsel, the court had carefully instructed these jurors that the fact that defendant was charged was not evidence of guilt, that defendant was not required to prove his innocence, that defendant was presumed inno-

cent, and that the burden was on the State to prove guilt beyond a reasonable doubt. Because defendant was able to pursue the relevant inquiry, with an informed panel, he has shown neither abuse of discretion nor prejudice.

[4] Finally, during examination of Tonya Pettit the following occurred:

> [DEFENSE COUNSEL]: Are you a person who has pretty strong opinions and pretty well stick[s] to your opinions when you make them, or are you easily swayed?
>
> [PROSECUTOR]: Objection.
>
> COURT: Sustained.
>
> [DEFENSE COUNSEL]: Can you sit down and deliberate with other people pretty regularly?
>
> JUROR PETTIT: I think so, yes, sir.

In the context of defendant's extensive voir dire examination of Pettit, it is clear that defendant was interested in determining whether Pettit had formed an opinion with regard to defendant's guilt or innocence and whether she could be fair and impartial. Defendant asked Pettit numerous personal questions designed to elicit these relevant qualifications, including whether the facts that her brother-in-law was a law enforcement officer, or that she had formerly worked for the district attorney, or that her daughter had been a victim of crime, would predispose her to favor the State's case. After sustaining the State's objection to the one question above, the court permitted defendant to ask Pettit whether she could deliberate with others, which was the crux of the excluded question. *See Black's Law Dictionary* 426 (6th ed. 1990) ("deliberate" means "[t]o examine and consult in order to form an opinion. To weigh in the mind; to consider reasons for and against"); *Webster's Third New International Dictionary* 596 (1976) ("deliberate" means "to ponder or think about with measured careful consideration and often with formal discussion [and consultation] before reaching a decision"). If defendant wanted to determine how well Pettit could stand up to other jurors in the event of a split decision, the question amounted to an impermissible stakeout. *State v. Bracey*, 303 N.C. 112, 119, 277 S.E.2d 390, 395 (1981) (hypothetical question, if you held an opinion that the defendant was not guilty, would you change your opinion simply because

eleven other jurors held a different opinion, could not reasonably be expected to result in an answer bearing upon the qualification of the juror; constituted impermissible stake-out). Defendant finally concluded that he was satisfied with Pettit. He had not exhausted his peremptory challenges and was therefore not forced to accept any juror objectionable to him. *See, e.g., State v. Lloyd*, 321 N.C. 301, 307-08, 364 S.E.2d 316, 321, *sentence vacated*, 488 U.S. 807, 102 L. Ed. 2d 18, *on remand*, 323 N.C. 622, 374 S.E.2d 277 (1988), *sentence vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), *on remand*, 329 N.C. 662, 407 S.E.2d 218 (1991). For these reasons, defendant has not shown either abuse of discretion or prejudice. Accordingly, this assignment of error is overruled.

GUILT PHASE ISSUES

Defendant contends that the trial court erred in overruling his objections and allowing testimony by his children—John, Rose and Sara Syriani—about defendant's specific instances of prior misconduct toward them, contrary to Rules 404(b) and 403 of the North Carolina Rules of Evidence.

John Syriani, age eleven, testified for the State. During cross-examination, John responded to many questions about how well his parents got along. John testified that his father was a giving person and his parents got along, but sometimes they argued. Beginning in 1990, they argued more and more. In July 1990, defendant moved out of the house. During redirect examination, John testified, over objection, that when he was five, he saw his father slap his mother. Further, he frequently heard his parents arguing and heard defendant call the victim "whore." John further testified, without objection, that his parents argued a lot, his father backhanded the victim during an argument on Easter Sunday, 1989, and that in 1988, prior to the stay at the Battered Women's Shelter, John saw her screaming and running from the house while his father stood in the doorway.

Rose Syriani, age fourteen, testified on direct examination, without objection, that in Illinois her parents were constantly fighting. Sometime during the summer of 1988, she left the house with her mother and siblings and went to the Battered Women's Shelter. Rose recalled, without objection, that on the day before, defendant had entered the house, thrown down the groceries he was carrying, and started screaming at her mother. Jumping up and down, defendant broke a table with his foot and called her

and her mother "nasty" names. Defendant left the house but returned with a big wooden bat, with which he threatened them, trying to scare them. Rose got in front of her mother, trying to keep her father away from her mother. "[A]nd he was over me with a bat trying, you know, trying to scare us." Rose recalled that defendant later chased her mother out of the house with the bat.

During cross-examination, Rose testified that her parents would always get into bad arguments, that defendant would jump at her mother, start screaming for no reason, slam doors and break tables. In the six months before her mother's death, her parents argued about her mother's working. Then defense counsel asked Rose, "Has he ever beat you?" She replied affirmatively. While living in Charlotte, he started yelling at her, grabbed her by the throat, and said he was going to kill her.

During redirect examination, Rose testified, over objection, that defendant had also grabbed her by the hair and kicked her sometime two or so years before. Also over objection, Rose testified that defendant told her mother he would kill her if she ever left him. "He told her that she would not live without him. She wouldn't live at all." Finally, Rose recalled, over objection, that shortly before killing her mother, defendant had said that if her mother ever left him he would mess up the children's world.

Defendant contends that the evidence of specific instances of misconduct toward his wife and children was elicited from his children only to prove defendant's character, to show that he acted in conformity therewith, or alternatively, that the incidents were too remote in time, some more than two years prior to the killing, or insufficiently similar in nature to defendant's assault on their mother, to be admissible. *See State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989) (use of evidence under Rule 404(b) is guided by two constraints, similarity and temporal proximity), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). Defendant failed to object to the testimony about several incidents, and our review of that testimony is limited to consideration of whether its admission constituted plain error.

[5] We conclude that the testimony about defendant's misconduct toward his wife was proper under Rule 404(b) to prove motive, opportunity, intent, preparation, absence of mistake or accident with regard to the subsequent fatal attack upon her. Rule 404(b)

provides that while "[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," such evidence "may . . . 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) (1992).

> "Rule 404(b) state[s] a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged."

State v. Hill, 331 N.C. 387, 405, 417 S.E.2d 765, 773 (1992) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)), *cert. denied*, --- U.S. ---, --- L. Ed. 2d ---, 1992 WL 347109 (1993).

" 'When a husband is charged with murdering his wife, the State may introduce evidence covering the entire period of his married life to show malice, intent and ill will towards the victim.' " *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)). Specifically, evidence of frequent quarrels, separations, reconciliations and ill-treatment is admissible as bearing on intent, malice, motive, premeditation and deliberation. *State v. Moore*, 275 N.C. 198, 206-07, 166 S.E.2d 652, 658 (1969), *disapproved on other grounds by State v. Young*, 324 N.C. 489, 492, 380 S.E.2d 94, 96 (1989). Further, threats against a victim have "always been freely admitted to identify [the defendant] as the killer, disprove accident or justification, and to show premeditation and deliberation." *Braswell*, 312 N.C. at 561, 324 S.E.2d at 247.

Further still, remoteness "generally affects only the weight to be given . . . evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991); *cf. State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (remoteness relevant to admissibility of prior bad acts to show common scheme or plan). " 'In the domestic relation, the malice of one of the parties is rarely to be proved but from a series of acts; and the longer they have existed and the greater the number of them, the more powerful are they to show the state of his feelings.' " *Moore*, 275 N.C. at 207, 166 S.E.2d at 658 (quoting *State v. Rash*, 34 N.C. 382, 384 (1851)).

For these reasons, we hold that the testimony about defendant's frequent arguments with, violent acts toward, separations from, reconciliations with, and threats to his wife were admissible under Rule 404(b) to prove issues he disputed—that is, lack of accident, intent, malice, premeditation and deliberation—notwithstanding that some of the incidents dated back to the beginning of the marriage. We include herein the baseball bat incident, in which it appears that defendant threatened his wife with the bat and threatened his daughter Rose only incidentally when Rose tried to protect her mother.

[6] Defendant also complains about testimony of prior bad acts directed toward the children. Defendant, however, elicited the first instance of misconduct toward daughter Rose from her during cross-examination when he asked her whether he had ever beaten her. Defendant cannot now complain about this evidence. N.C.G.S. § 15A-1443(c) (1988) ("A defendant is not prejudiced . . . by error resulting from his own conduct."). *See, e.g., State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989) (defendant cannot invalidate trial by inviting error, eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991).

Further, we agree with the State that with this question, in the context of a series of questions, defendant opened the door to the State's subsequent question about another specific act of misconduct toward his daughter.

> "[T]he law wisely permits evidence not otherwise admissible to be offered to explain or rebut evidence elicited by the defendant himself. Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially."

State v. Hudson, 331 N.C. 122, 154, 415 S.E.2d 732, 749 (1992) (quoting *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981)), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 136, *reh'g denied*, --- U.S. ---, --- L. Ed. 2d ---, 1993 WL 49522 (1993). Here, defendant elicited from Rose that her father supported the family with a nice house, furniture, a van, food and clothes; that her father was very strict; and that Rose had disliked him for a long

time. Then defendant asked Rose why she so disliked her father and whether he had ever beaten her. Defendant, however, permitted Rose to describe only one time when he had beaten her. The State was entitled to elicit further testimony from Rose to explain her responses—especially why she so disliked her father, which went directly to her credibility—and to rebut the implication that her father had beaten her only the one time.

Defendant contends, in the alternative, that the trial court erred by allowing the inquiry on cross-examination because the probative value of the evidence was outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury. N.C.G.S. § 8C-1, Rule 403. In general, the exclusion of evidence under the Rule 403 balancing test is within the sound discretion of the trial court. *See, e.g., Hill*, 331 N.C. at 406, 417 S.E.2d at 773. Abuse of discretion occurs where the court's ruling is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision. *See, e.g., State v. Phipps*, 331 N.C. 427, 453, 418 S.E.2d 178, 191-92 (1992). We conclude that the trial court did not abuse its discretion in allowing the testimony about the specific instances of misconduct toward defendant's wife and children, otherwise admissible under Rule 404(b).

[7] Within this same assignment of error, defendant contends the trial court erred during the sentencing phase in allowing Sara to testify in rebuttal about four specific instances of misconduct toward her mother and herself, contravening both Rules 404(b) and 403. Sara Syriani, age thirteen, testified for the State during sentencing that on one occasion her father threatened her mother with a pair of scissors. On Easter Sunday, 1988, he hit her mother. Further, her father had yelled at her, pushed her down, and kicked her. Finally, on her graduation from sixth grade he had yelled at the victim, followed her upstairs, grabbed her by her hair, thrown her down the stairs, and dragged her into the kitchen, ripping her shirt.

We have already determined that the testimony about defendant's specific misconduct toward his wife was properly admitted in the guilt phase. Defendant subsequently presented character evidence through other witnesses, including evidence of his character for non-violence. Further, defendant requested submission of the statutory mitigating circumstance that he had no significant history of prior criminal activity. Because defendant proffered evidence

of his character, including his character for non-violence, the State was entitled to impeach him, in proper order, by rebuttal evidence. *See, e.g., Hudson*, 331 N.C. at 153-54, 415 S.E.2d at 749. This assignment of error is overruled.

Defendant next contends that the trial court erred in allowing the prosecution, during its cross-examination of defendant, to repeatedly attempt to impeach him with allegations of prior misconduct toward his wife and children, contravening Rules 404(b), 403 and 608(b) (evidence of specific instances of conduct for the purpose of proving credibility of a witness or lack thereof). Defendant did not object to all such questions, but contends that it was plain error to allow the questions. Defendant testified upon direct examination that he was a loving, supportive husband and father. He bought the family a house in Calumet City, Illinois. When they moved to Charlotte, he invested all his savings in another house with new furniture and a van for family travel. His wife and children missed him when he was away in Charlotte and called him every night. They were very happy together. While he and his wife lived in Chicago they had arguments, but nothing serious. When the family moved to North Carolina, he and his wife did not have any marital problems of which he was aware. After his wife learned to drive and got a job, however, she changed a lot. During the two-and-one-half years that she worked at a gas station prior to her death, they had several serious arguments. During the last two years he discovered his wife was going to get a divorce. He never hit his wife during those two years, but rather tried to make her more comfortable and happy. About four weeks before her death, his wife and children left their home for two weeks, and when they returned he was served with papers by a police officer and told he would have to leave.

Defendant also testified on direct examination, regarding the night of the killing, that he never desired to hurt or kill his wife. He had only wanted to ask about the children, and she scratched his face, opened the car door, hit him hard in the leg, and put the car in reverse. He had grabbed onto the door and hit her through the open window with a screwdriver from his pocket, trying to get her to stop moving the car.

During cross-examination the prosecutor asked defendant, over objection, whether he tore his wife's hair out of her head over an argument about the family washing machine in 1980; whether

he threatened his wife with a pair of scissors in 1982; whether his wife's brother ever talked with him about beating his wife; whether he used a baseball bat to drive her out of the house and to the Battered Women's Shelter on the night of 21 June 1990; and whether he remembered getting so angry that night when he learned that his wife was going to leave him and take the children that he told her, "If you don't live with me, you won't live at all," and he would "f--- up her daughters, too." The prosecutor also asked defendant, without objection, whether he remembered that he had thought daughter Rose scratched his new van, and he got so angry with her that he knocked her down, dragged her by her hair and kicked her; whether he backhanded his wife on Easter Sunday, 1989; whether he would get angry and hit his wife because she would argue with him about furniture needed for the house and clothes and toys for the children; whether he knocked down his daughter Sara and kicked her twice in the summer of 1989 because she lost her tennis shoe; and whether he had put his hands around his daughter Rose's throat and threatened to kill her because she was fighting with her brother John.

Rule 611 provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611. In North Carolina, the substantive cross-examination is not confined to the subject matter of direct testimony and impeachment. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 35 at 181-84 (3d ed. 1988). The scope of cross-examination is within the sound discretion of the trial court. *Coffey*, 326 N.C. at 290, 389 S.E.2d at 61.

[8] We hold the cross-examination with regard to both defendant's specific and general misconduct toward his wife proper under Rule 404(b) because the State proffered the evidence to establish lack of accident, intent, malice, premeditation and deliberation, not to prove that defendant acted in conformity with a violent character. *Cf. State v. Morgan*, 315 N.C. 626, 639, 340 S.E.2d 84, 93 (1986) (cross-examination of defendant about series of assaults in which he allegedly hurt people other than victim improper under Rule 404(b) because irrelevant to disprove defendant's self-defense defense).

[9] Defendant correctly states that Rule 608(b) prohibits use of specific instances of misconduct to impeach a defendant upon cross-examination. We have recognized that Rule 608(b) represents a

"drastic departure from the former traditional North Carolina practice which allowed a defendant to be cross-examined for impeachment purposes regarding *any* prior act of misconduct not resulting in conviction so long as the prosecutor had a good-faith basis for the questions." *Morgan*, 315 N.C. at 634, 340 S.E.2d at 89. That rule provides:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence [for example, evidence of specific prior or subsequent act, not charged in the indictment, which may be criminal, but as applied herein, does not result in a conviction]. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

N.C.G.S. § 8C-1, Rule 608(b). Those types of conduct falling into this category include " 'use of false identity, making false statements on affidavits, applications or government forms (including tax returns), giving false testimony, attempting to corrupt or cheat others, and attempting to deceive or defraud others.' " *Morgan*, 315 N.C. at 635, 340 S.E.2d at 90 (quoting 3 D. Louisell & C. Mueller, *Federal Evidence* § 305 (1979)). Evidence generally disapproved as irrelevant to the question of a witness' truthfulness includes specific instances of conduct relating to violence against other persons. *Id.*

However, we agree with the State that defendant opened the door to the cross-examination regarding specific instances of misconduct toward both his wife and children. *See, e.g., Hudson*, 331 N.C. at 153-54, 415 S.E.2d at 749. Here, defendant testified on direct examination that he was a loving and supportive husband and father, that he did not intend to hurt his wife but rather unintentionally, or in self-defense, struck back at her with the screwdriver, trying only to get her to stop moving the car. We hold that the State was entitled to cross-examine defendant concerning the specific acts of prior misconduct—including threats, arguments, and acts of violence toward both his wife and children—to explain and rebut defendant's direct examination testimony.

Defendant further contends that, even if the evidence was admissible under Rule 608(b) or 404(b), the trial court erred by failing to exclude it as more prejudicial than probative under Rule 403. We conclude that the trial court did not abuse its discretion in allowing the inquiry into specific instances of misconduct toward both defendant's wife and his children. This assignment of error is overruled.

[10] Defendant next contends that the trial court erred in allowing the prosecution to cross-examine character witnesses Bouhussein and Linn concerning specific acts of misconduct by the defendant, contrary to Rules 404, 403 and 608. Bouhussein testified on redirect examination that defendant was known in the community as a very hard-working, mild-mannered man. Defendant did not have a reputation for violence, indeed, he had a reputation for truthfulness. Linn testified that defendant was not the kind of person he would expect to kill his wife, that defendant and his wife had treated each other with affection, and that there was nothing in defendant's lifestyle that caused him concern. After these witnesses so testified, the prosecutor asked whether they had heard of, or knew about, certain instances of misconduct by defendant toward his wife and children, for example, that defendant had slapped his wife on Easter Sunday, 1989, had chased his wife out of their house in June 1988, and had knocked down and kicked his daughter Rose.

It is well established that a criminal defendant is entitled to introduce evidence of his own good character, but if he "thus 'puts his character in issue,' the State in rebuttal may introduce evidence of his bad character . . . ." *State v. Gappins*, 320 N.C. 64, 69, 357 S.E.2d 654, 658 (1987) (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 104 (1982 & Cum. Supp. 1986)). Rule 404 requires that such evidence be of "a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same . . . ." N.C.G.S. § 8C-1, Rule 404(a)(1). Rule 405(a) requires that proof of character or a trait of character be made only by testimony as to reputation or in the form of an opinion, except that upon cross-examination "inquiry is allowable into relevant specific instances of conduct." "[A] witness who has given character evidence for the defendant [may] be cross examined by the State about relevant specific instances of the defendant's conduct." *Gappins*, 320 N.C. at 70, 357 S.E.2d at 658 (expressly noting that prior case law that prohibited use of specific instances of misconduct to test a character witness's knowledge of a defend-

ant's character and reputation is no longer binding); *see* N.C.G.S. § 8C-1, Rule 405(a).

Defendant put his character in issue by having Bouhussein testify about his reputation for peacefulness, "a pertinent trait of his character." Further, Linn testified that defendant was not the kind of person he would expect to kill his wife and that there was nothing in defendant's lifestyle that caused him any concern. Thereupon, the prosecutor cross-examined each of these witnesses about specific instances of conduct by defendant toward his wife and children, in accordance with Rules 404(a)(1) and 405(a), to rebut their prior testimony. Further, the trial court limited cross-examination to prior acts occurring after Christmas, 1987. Under the aforestated authorities, the trial court did not err in admitting the answers to the prosecutor's questions. This assignment of error is overruled.

[11] Defendant next contends that the trial court erred in denying his motion to exclude or limit the number of photographs of the victim's body introduced into evidence and in allowing the State to repeatedly pass the photographs to the jury and the jury to view all the photographs again prior to its deliberations at the close of all the evidence. Defendant argues that the photographs were redundant and irrelevant because he disputed neither the victim's identity nor the cause of death and because the facts concerning the number, nature and extent of the wounds to the victim's body were or could have been fully established by competent testimonial or diagrammatical evidence. Defendant further argues that their number, the fact that they were in color, their "physically disgusting" detail, and their repeated publication require a conclusion that the photographs possessed little probative value relative to the great prejudice to defendant their admission caused. We disagree.

"Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as . . . their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *State v. Hennis*, 323 N.C. 279, 284, 372 S.E.2d 523, 526 (1988). In order to determine the illustrative value of the photographic evidence and weigh its probative value against its tendency to prejudice the jury, the court must examine both the content and the manner in which the evidence is used and scrutinize the totality of the circumstances composing that presen-

tation. *Id.* at 285, 372 S.E.2d at 527. For example, factors to be considered include what a photograph depicts, the level of detail and scale, whether it is in color or black and white, whether it is a slide or print, the manner of projection or presentation, and the testimony it illustrates. *Id.* Exclusion of photographic evidence under the balancing test of Rule 403 is within the trial court's discretion. *Id.*

Here, the State introduced sixteen color eight-by-ten-inch photographs of the victim's body and one color portrait of the victim taken at an unspecified time before the night of the attack. Of these photographs, six depicted the victim shortly after her arrival at the hospital, intubated, connected to a ventilator, and covered by white hospital sheets. Gory and gruesome, these photographs illustrated the testimony of Boyd Wilson, the neighbor who went to the victim's aid. Wilson also testified that while he did not see the victim at the hospital, intubated and unclothed, he could see the wounds. These six photographs were received with a limiting instruction that they were for the purpose of illustrating Wilson's testimony, if the jury found them so illustrative, and were not substantive evidence. *See, e.g., State v. Thompson*, 328 N.C. 477, 492, 402 S.E.2d 386, 394 (1991) (trial court's cautionary instructions on the use of photographs for illustrative purposes limited the likelihood of unfair prejudice). They served properly to illustrate Wilson's testimony about the nature of the wounds and the prolonged manner of the killing.

Ten photographs were submitted in conjunction with the testimony about the autopsy. Nine of these depicted isolated areas of injury to the hands, arms, elbows, neck, mouth, and head. One depicted a section of the victim's dura, the tough membrane surrounding the brain between the brain and the skull, here with a rectangular hole. Although gruesome, these photographs were not excessive, unduly repetitious, or duplicative of the six hospital photographs because the victim survived almost one month and many of the wounds had healed. Further, these photographs were also tendered with limiting instructions that they were only for the purpose of illustrating Sullivan's testimony. They served to illustrate his testimony regarding the likely weapon, which had never been found, the multiple stab wounds, and the cause of death. *See, e.g., State v. Bearthes*, 329 N.C. 149, 161-62, 405 S.E.2d 170, 176-77 (1991) (twelve autopsy photographs, properly admitted, served to illustrate testimony about manner of the killing, so as to prove

circumstantially elements of first-degree murder, and were tendered with limiting instruction that they were admitted for illustrative purposes, notwithstanding a stipulation as to the cause of death).

Contrary to defendant's assertions that these photographs were repeatedly passed to the jury, the autopsy photographs were passed at the close of Sullivan's testimony and the others at the close of Wilson's testimony. These photographs were published again only at the conclusion of the evidence, with all exhibits. The photographs and the circumstances of their presentation to the jury are not such that we can say their admission for illustrative purposes was not the result of a reasoned decision. We therefore find no abuse of discretion in their admission.

The final photograph to which defendant assigns error is a color portrait of the victim, taken at some unspecified time before the killing, introduced by the State to illustrate the testimony of John Syriani that his mother appeared as depicted. Defendant failed to object to admission of this photograph at trial, as required by N.C. R. App. P. 10(b)(1). This failure constitutes waiver of the right to assert the error on appeal. Reviewed for plain error, or as assumed error, however, there is no possibility that improper admission of this one photograph could have prejudiced defendant. *See* N.C.G.S. § 15A-1443(a) (1988). This assignment of error is overruled.

[12] Defendant next assigns as error the trial court's denial of his motion to dismiss the charge of first-degree murder for insufficiency of the evidence. Defendant concedes that he has reviewed the record and finds sufficient evidence upon which a jury could convict him. Defendant requests that this Court independently review the evidence and decide the issue, citing *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, *reh'g denied*, 388 U.S. 924, 18 L. Ed. 2d 1377 (1967) (constitutional right to counsel requires that, on an indigent's first appeal from his conviction, court-appointed counsel support the appeal to the best of his or her ability, and if counsel finds the case wholly frivolous, submit a brief referring to anything in the record that might support the appeal).

In *State v. Quick*, we described the appropriate standard of review for determining the sufficiency of the evidence 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. 175, 180-81, 400 S.E.2d 413, 415-16 (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." *State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (emphasis in original).

329 N.C. 1, 19, 405 S.E.2d 179, 190 (1991).

Under this standard, there was sufficient evidence that defendant killed his wife with malice, premeditation and deliberation, the only issues defendant disputed at trial. The State's evidence tended to show that defendant had a history of physically abusing his wife and children and that when he first learned that his wife wanted a divorce, he had threatened to kill her and to ruin the lives of the children if she ever left him. Approximately two weeks before he killed his wife, she had obtained a domestic violence order against him, requiring him to leave the house. On the night of 28 July 1990, defendant parked along the street near where his wife and children lived. As his wife's car approached the street, defendant pulled his van in front of her car, forcing her to stop.

Defendant approached the car, opened the door, stabbed her with a screwdriver, and as she moved her car out of the road, continued to stab her. Defendant stabbed her a total of twenty-eight times with a screwdriver, including one blow which penetrated the brain three inches and another that fractured her jaw. Following the assault, defendant walked calmly back to his van and drove to a nearby fire station to have his scratches treated.

This evidence was more than sufficient to allow a reasonable inference that defendant was guilty of murder in the first degree, that is, with malice and premeditation and deliberation. *See, e.g., Quick*, 329 N.C. at 20, 405 S.E.2d at 191 (court may consider, in determining whether sufficient evidence of premeditation and deliberation, want of provocation on part of victim, conduct and statements of defendant before and after the killing, dealing of lethal blows after the victim has been rendered helpless, evidence killing done in brutal manner, and nature and number of the victim's wounds).

In the guilt-innocence phase, we conclude that defendant received a fair trial, free from prejudicial error.

SENTENCING PHASE ISSUES

The trial court submitted one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1988), and two statutory mitigating circumstances, that the defendant had no significant history of prior criminal activity, N.C.G.S. § 15A-2000(f)(1) (1988), and that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988). Further, the trial court submitted the eight requested non-statutory mitigating circumstances, as follows: the defendant understands the severity of his conduct; the defendant has demonstrated remorse; the defendant, since his incarceration, has demonstrated an ability to abide by lawful authority; the defendant has a history of good work habits; the defendant has a history of being a good family provider; the defendant has been a person of good character or reputation in the community in which he lived; and any circumstance or circumstances arising from the evidence which the jury finds to have mitigating value.

[13] Defendant contends that the trial court committed reversible error in submitting the aggravating circumstance that the murder

of Teresa Syriani was especially heinous, atrocious, or cruel, in that the language of the instructions was too vague to provide any guidance to the jury, contravening both the Eighth and Fourteenth Amendments of the United States Constitution. Defendant relies on *Godfrey v. Georgia* and its progeny. *Godfrey v. Georgia*, 446 U.S. 420, 64 L. Ed. 2d 398 (1980) (Georgia's "outrageously or wantonly vile, horrible or inhuman" circumstance unconstitutionally vague on its face and as applied by the state appellate courts to the facts presented); *see, e.g., Maynard v. Cartwright*, 486 U.S. 356, 100 L. Ed. 2d 372 (1988) (Oklahoma's "especially heinous, atrocious, or cruel" circumstance unconstitutionally vague on its face and as applied).

In the twelve years since *Godfrey*, the United States Supreme Court has approved certain limiting instructions (or subsequent constructions by state appellate courts) as constitutionally sufficient, "provid[ing] *some* guidance to the sentencer." *Walton v. Arizona*, 497 U.S. 639, 654, 111 L. Ed. 2d 511, 529, *reh'g denied*, 497 U.S. 1050, 111 L. Ed. 2d 828 (1990). Approved language includes the phrase "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Proffitt v. Florida*, 428 U.S. 242, 255, 49 L. Ed. 2d 913, 924 (1976); *see also Walton v. Arizona*, 497 U.S. at 654-55, 111 L. Ed. 2d at 529 (approving instruction equating "cruel" with infliction of "mental anguish or physical abuse," or applying "depraved" manner when the perpetrator "relishes the murder, evidencing debasement or perversion" or "shows an indifference to the suffering of the victim and evidences a sense of pleasure"); *Maynard v. Cartwright*, 486 U.S. at 365, 100 L. Ed. 2d at 382 (approving definition limiting "especially heinous, atrocious, or cruel" circumstance to murders involving "some kind of torture or physical abuse"); *cf. Shell v. Mississippi*, 498 U.S. 1, ---, 112 L. Ed. 2d 1, 5 (1990) (Marshall, J., concurring) ("like 'heinous' and 'atrocious' themselves, the phrases 'extremely wicked or shockingly evil' and 'outrageously wicked and vile' could be used by '[a] person of ordinary sensibility [to] fairly characterize almost *every* murder.' ") (quoting *Maynard v. Cartwright*, 486 U.S. at 363, 100 L. Ed. 2d at 381). The Court reasoned that a capital sentencing scheme must "provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.' " *Godfrey*, 446 U.S. at 427, 64 L. Ed. 2d at 406 (quoting *Gregg v. Georgia*, 428 U.S. 153, 188, 49 L. Ed. 2d 859, 883 (1976)).

> This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates "standardless [sentencing] discretion." It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," . . . . [Otherwise] "a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."

Godfrey, 446 U.S. at 428, 64 L. Ed. 2d at 406 (referring to *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, *reh'g denied*, 409 U.S. 902, 34 L. Ed. 2d 163 (1972) (citations omitted)). If the jury instructions on the "especially heinous, atrocious, or cruel" aggravating circumstance are not constitutionally sufficient, *Godfrey* requires that state appellate courts, at the least, "apply the . . . aggravating circumstance within narrow, consistent, and discernible bounds to avoid constitutional infirmity." Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. Rev. 941, 965 (1986).

In *State v. Goodman*, this Court interpreted our "heinous, atrocious, or cruel" aggravating circumstance as directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979). We have also held that the aggravating circumstance may be found where "the level of brutality involved exceeds that normally present in first-degree murder." *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986) (refers to the phrases disjunctively; finding permissible when brutality exceeds that which is normally present in any killing, or when murder was conscienceless, pitiless, or unnecessarily torturous to the victim), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 574, 364 S.E.2d 373, 375-76 (1988); *cf., e.g., State v. Rook*, 304 N.C. 201, 225, 283 S.E.2d 732, 747 (1981) (approving instructions incorporating both phrases conjunctively, "any brutality which was involved in it must have exceeded that which is normally present in any killing" and "this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim"), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982); *State v. Fullwood*, 323 N.C. 371,

400, 373 S.E.2d 517, 535 (1988) (same), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). We have also interpreted this aggravating circumstance as appropriate "when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder." *Brown*, 315 N.C. at 65, 337 S.E.2d at 827. Killings which are physically agonizing for the victim or which are in some other way dehumanizing, or killings which are less violent but involve the infliction of psychological torture, including placing the victim in agony in his last moments, aware of, but helpless to prevent, impending death, are two more types of murders warranting submission of the circumstance. *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 330. We have also held that the circumstance is properly submitted when there is evidence that the killing involved a prolonged death or was committed in a fashion beyond that necessary to effect the victim's death. *State v. Reese*, 319 N.C. 110, 146, 353 S.E.2d 352, 373 (1987).

Here, the trial court read the North Carolina Pattern Jury Instructions, verbatim, to the jury, as follows:

> Under the evidence in this case, one possible aggravating circumstance may be considered: Was this murder especially heinous, atrocious or cruel?
>
> In this context, heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.
>
> However, it is not enough that this murder be heinous, atrocious or cruel as those terms have just been defined. This murder must have been especially heinous, atrocious or cruel, and not every murder is especially so.
>
> For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing, or this murder must have been a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

N.C.P.I.—Crim. 150.10, at 18-19 (1992). Because these jury instructions incorporate narrowing definitions adopted by this Court and expressly approved by the United States Supreme Court, or are

of the tenor of the definitions approved, we reaffirm that these instructions provide constitutionally sufficient guidance to the jury.

[14] Defendant contends, further, that the evidence did not support the existence of this aggravating circumstance, as we have properly and consistently defined it, and that he is, therefore, entitled to have his death sentence vacated and a life sentence imposed or, at a minimum, to a new sentencing hearing. We disagree.

In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State. *State v. Moose*, 310 N.C. 482, 494, 313 S.E.2d 507, 515-16 (1984). Applying the above limiting constructions, we conclude that the evidence supports a finding that the level of brutality exceeded that normally found in first-degree murder cases and that the killing was physically and psychologically agonizing, conscienceless, pitiless and unnecessarily torturous to Teresa Syriani.

The evidence tends to show that defendant stabbed his victim twenty-eight times. While many of the wounds were to her face and neck, several were to her arms and hands, suggesting that she tried to defend herself or ward off the blows. Further, one wound penetrated her brain three inches, causing hemorrhaging and swelling in the brain. Another blow fractured her jaw and several of her teeth. These blows did not cause immediate death. The victim was able to communicate with her daughter Rose moments after the attack, and, as well, with the attending emergency room assistant upon her arrival at the hospital. Further, a tube was placed through her nose to her lungs to assist her breathing. She died twenty-eight days later as a result of the three-inch puncture wound to her brain, after having suffered stroke, infarct or paralysis. Defendant correctly assesses the record as devoid of expert testimony that his victim suffered "inordinate" pain, but notwithstanding, the jury could reasonably infer from this evidence that the victim sustained and endured agonizing physical pain before becoming unconscious or comatose. Further, this evidence supports a finding that the killing was excessively brutal and conscienceless, pitiless and unnecessarily torturous. *See, e.g., State v. Bonney*, 329 N.C. 61, 80-81, 405 S.E.2d 145, 156 (1991) (evidence of twenty-seven gunshot wounds supported finding of excessive brutality and that the

killing was pitiless and unnecessarily torturous); *Lloyd*, 321 N.C. at 319-20, 364 S.E.2d at 328 (evidence of seventeen stab wounds, several defensive, and that victim survived five to ten minutes, sufficient to support "especially heinous, atrocious, or cruel"); *State v. Huffstetler*, 312 N.C. 92, 115-16, 322 S.E.2d 110, 124-25 (1984) (severity and brutality of numerous blows with cast iron skillet justified submission of aggravating circumstance, notwithstanding that there was no evidence as to whether the victim was alive or conscious during assault), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985).

Additionally, the evidence that defendant had abused his wife to the extent that she had left the house with her children; that he had threatened to kill her should she ever leave him; that only two weeks prior to the killing she had an *ex parte* domestic violence order served on defendant, requiring him to leave their home; and that defendant had tried to talk to her or the children, which overtures she had rebuffed, suggests that she feared her husband. The jury could reasonably infer that the victim, upon seeing defendant's van that night, being blocked by the van, observing his getting out and shaking his fist at her, and then attacking her as she tried to reverse the car, suffered and endured psychological torture or anxiety not only for herself but for her young son who was sitting beside her trying to stop his father. *See, e.g., Artis*, 325 N.C. at 319-20, 384 S.E.2d at 493 (finding evidence of psychological suffering where victim killed by manual strangulation rendering her helpless in murderous hands, aware of impending death); *Lloyd*, 321 N.C. at 319, 364 S.E.2d at 328 (killings which are less violent, but involve placing the victim in agony in his or her last moments, aware of, but helpless to prevent, impending death, warrant submission of "especially heinous, atrocious, or cruel" circumstance).

For these reasons, applying constitutionally narrowing definitions heretofore adopted by this Court, we conclude that the evidence and reasonable inferences therefrom support a finding that the murder was "especially heinous, atrocious, or cruel." This assignment of error is overruled.

[15] Defendant next contends that the trial court erred in failing to submit *sua sponte* the mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. N.C.G.S. § 15A-2000(f)(6) (1988). Defendant argues that the jury could

reasonably have inferred this circumstance from the evidence that defendant was "very emotional and highly upset" when he approached his wife before killing her. We disagree.

Defendant testified during the guilt phase of the trial that he was extremely worried about his family and very upset about the prospect of losing his wife and family through the divorce proceedings. During the sentencing proceeding, defendant testified that he was "very emotional and highly upset" when he approached his wife that night. He further testified that he loved his wife completely and was concerned that he was going to lose his children; that he was worried about his wife and son and that he did not have control in the family; that he was having a lot of hurt inside; and that those feelings were "affecting [his] judgment." He argues that, if the State is to be believed, he was obviously subject to uncontrollable rages, during which he physically assaulted his wife and children, and from which the jury could reasonably infer that he was out of control and unable to conform his conduct to the law on the night of the killing.

It is well settled that "[w]hen evidence is presented in a capital case which may support a statutory mitigating circumstance, the trial court is mandated by the language in 15A-2000(b) to submit that circumstance to the jury for its consideration." *State v. Price*, 331 N.C. 620, 632, 418 S.E.2d 169, 176 (1992) (quoting *Lloyd*, 321 N.C. at 311-12, 364 S.E.2d at 323), *sentence vacated and remanded on other grounds*, --- U.S. ---, 122 L. Ed. 2d 113 (1993). "The test for sufficiency of evidence to support submission of a statutory mitigating circumstance is whether a jury could reasonably find that the circumstance exists based on the evidence." *Id.* The mitigating circumstance in question

> may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished).

State v. Johnson, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979).

Defendant notes, correctly, that this Court has never held expert testimony necessary to establish the existence of this mitigating circumstance. However, this circumstance has only been found to be supported in cases where there was evidence, expert or lay, of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or narcotic drugs, to the degree that it affected the defendant's ability to understand and control his actions. *See, e.g., Price*, 331 N.C. at 632-33, 418 S.E.2d at 176 (psychologist's testimony that defendant suffered from a mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with other evidence of defendant's past psychiatric problems resulting in hospitalization, would support reasonable inference that defendant's capacity to appreciate the criminality of his conduct was impaired); *State v. Thomas*, 329 N.C. 423, 444-45, 407 S.E.2d 141, 155 (1991) (testimony by defendant and father about defendant's habitual abuse of drugs—including LSD, cocaine, and heroin, that he lived in a "drug house" where people bought and used drugs, that by age twenty he had fathered two children and robbed a fast food restaurant to pay a cocaine debt, and physical evidence corroborating testimony that he had injected heroin the night of the murder, could support a reasonable inference that defendant was under the influence of heroin at the time of the crime and that as a result his ability to appreciate the criminality of his conduct was impaired); *State v. Payne*, 328 N.C. 377, 408, 402 S.E.2d 582, 600 (1991) (evidence of defendant's substance abuse, including drinking alcohol the night before the murder and smelling like beer shortly after the murder, held sufficient to support submission of mitigating circumstance of impaired capacity to appreciate criminality of conduct); *Johnson*, 298 N.C. at 68-69, 257 S.E.2d at 613-14 (jury could find existence of circumstance from testimony that defendant suffered from latent schizophrenia and that his capacity to appreciate the criminality of his conduct was impaired).

Defendant's testimony that his judgment was affected by his emotional disturbance, standing alone, would not support a reasonable inference that defendant's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law, was impaired, lessened or diminished. We thus find no error in the failure to submit this mitigating circumstance; this assignment of error is therefore overruled.

[16] Defendant next contends that the trial court committed plain error in failing to provide the jury with a limiting instruction at the penalty phase that the prior bad acts evidence received at the guilt phase, as well as on rebuttal in the penalty phase, could not be used by the jury to support an aggravating circumstance in the penalty phase. Defendant concedes that the evidence may have been relevant to rebut the defendant's statutory mitigating circumstance of lack of criminal history, but argues it was wholly irrelevant for the jury to believe it could consider such evidence in support of the aggravating circumstance submitted to it, *viz*, that the killing was "especially heinous, atrocious, or cruel."

The trial court stated only that the jury could consider all of the evidence admitted during both guilt and sentencing phases, which instruction was authorized by statute. *See* N.C.G.S. § 15A-2000(a)(3) ("In the [sentencing] proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is empaneled, but all such evidence is competent for the jury's consideration in passing on punishment."). The court carefully instructed the jury that under the evidence in the case only one possible aggravating circumstance could be considered—whether the murder was especially heinous, atrocious, or cruel—and then proceeded to properly instruct the jury on that circumstance in accord with the North Carolina Pattern Jury Instructions. The court specifically referred to the prior bad acts evidence with regard to the jury's consideration of whether defendant had no significant history of prior criminal activity: "You would find this mitigating circumstance if you find that there were incidences of assault against the family, and that this is not a significant history of prior criminal activity." The evidence was also relevant to the submitted mitigating circumstance that defendant has a good character because defendant proffered evidence of his non-violent character. Further, the evidence of bad acts toward the victim is relevant to the existence of the "heinous, atrocious, or cruel" aggravating circumstance because it tended to show the victim feared her husband and endured psychological torment during the attack, not only on account of the danger to her own life but also that to the life of her son, who tried to stop his father's attack.

We conclude that the evidence was relevant and that the court's instructions were proper under statutory authority. We thus hold that the court did not err in failing to submit the special instruc-

tions that even defense counsel at trial did not consider necessary. This assignment of error is overruled.

[17] Defendant next takes exception to the prosecutor's argument: "He's killed now. The only way to insure he won't kill again is the death penalty." Defendant contends that the prosecutor appealed to the jury to recommend the death penalty as a deterrent to his killing again. Defendant concedes that he failed to object at trial but contends that the trial court committed plain error in failing to act *ex mero motu* to instruct the jury to disregard the argument. We disagree.

In *State v. Zuniga*, we distinguished arguments invoking general deterrence and held specific deterrence arguments proper. 320 N.C. 233, 268-69, 357 S.E.2d 898, 920-21 (1987) (specific deterrence argument, "Justice is making sure that [defendant] is not ever going to do this again," not improper), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987); *cf. State v. Kirkley*, 308 N.C. 196, 215, 302 S.E.2d 144, 155 (1983) (general deterrence argument, "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct," improper but not so grossly so as to require trial court to intervene *ex mero motu*), *overruled on other grounds by State v. Shank*, 322 N.C. 243, 251, 367 S.E.2d 639, 644 (1988). This argument is without merit.

[18] Within this same assignment of error, defendant further contends that the trial court committed plain error in failing to act *ex mero motu* in instructing the jury to disregard the following statement by the prosecution:

> Rose Syriani, as he started out, started to run up the street screaming and ran to her mother. Screaming. And what did her mother say? This kind, sweet, loving mother, what did she say? "Mama, shut up." Why in the world would a woman like that, knowing what kind of woman she was, say to Rose "shut up"? I'll tell you why. She had heard the defendant say he was going to kill her, going to kill all her daughters. She didn't want the defendant to hear Rose out there because she knew if he did he would kill her too.
>
> Why did he stop at the corner? Why did he start back? I submit to you he looked in his rear view mirror and he saw probably the person he hated second only to Teresa running up the street behind him screaming. "I'll fix her too." Stopped

the van, got out, weapon in hand, and started back. But for a good citizen who was willing to put himself in harm's way between Rose and the Defendant, we would be trying a triple murder here today.

Prosecutors are given wide latitude in the scope of their argument. *Zuniga*, 320 N.C. at 253, 357 S.E.2d at 920. "A prosecutor's argument is not improper where it is consistent with the record and does not travel into the fields of conjecture or personal opinion." *Id.* Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts of their own knowledge or other facts not included in the evidence. *State v. McNeill*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991). In capital cases, when no objection is made at trial to the prosecutor's argument, that argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Pinch*, 306 N.C. 1, 17, 292 S.E.2d 203, 218 (1982), *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622, *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983), *overruled on other grounds by State v. Benson*, 323 N.C. 318, 326, 372 S.E.2d 517, 521 (1988).

The evidence tends to show that defendant abused his wife and children, including his daughter Rose. Only a few weeks prior to killing his wife, defendant threatened to kill her and to ruin the lives of the children. Approximately two weeks before her murder, the victim obtained a civil domestic violence order against defendant requiring him to leave the house. Further, as she lay on the front seat of her car following the attack, her daughter Rose came up to the car, screaming. Her mother told her to shut up.

The evidence also shows that at about the time Rose went to her mother, defendant started to walk back toward the car. As a neighbor went up to the car to see what was happening, defendant turned around and walked back to his van.

We conclude that the prosecutor did not travel outside the record. His arguments, although touching upon facts not testified to, were reasonable inferences based on the evidence and were

within the wide latitude properly given counsel in argument. Assuming error, *arguendo*, any impropriety in the argument was not so gross as to require the trial court to intervene *ex mero motu*. This assignment of error is overruled.

We conclude that defendant received a fair sentencing hearing, free from prejudicial error.

PRESERVATION ISSUES

Defendant raises eight additional issues which he concedes have been recently decided against him by this Court: (1) the trial court erred in denying defendant's motion to permit voir dire examination of potential jurors regarding their conceptions of parole eligibility; (2) the trial court erred in failing to require the prosecution to disclose, pre-trial, the aggravating circumstances on which the State intended to rely and any evidence tending to negate or establish such factors; (3) death qualification of the jury and denial of defendant's motion for separate juries and individual voir dire violated defendant's constitutional rights to an impartial jury, due process of law, and reliability in the imposition of the death penalty; (4) the trial court erred by permitting the prosecutor to use peremptory challenges to excuse qualified jurors on account of their opposition or lack of enthusiasm concerning the death penalty; (5) the North Carolina death penalty statute, and consequently the death sentence in this case, is unconstitutional, was applied in a discriminatory manner, is vague and overbroad, and involves subjective discretion; (6) the trial court erred by instructing the jury that defendant bore the burden of proving mitigating circumstances to the satisfaction of the jury; (7) the trial court's instructions placing defendant in jeopardy of his life if the jury determined that the mitigation was insufficient to outweigh the aggravation violate defendant's constitutional right to due process of law and to be free from cruel and unusual punishment; and (8) the trial court's instructions that the jury had a duty to return a recommendation of death if it found the aggravating circumstance, in light of the mitigating circumstances, sufficiently substantial to call for the death penalty violated defendant's constitutional right to due process of law and to be free from cruel and unusual punishment.

We have considered defendant's arguments on these issues, and we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

Having found no error in the guilt and sentencing phases, we are required by statute to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstance upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315 (1987), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

We have held that the record supports the jury's finding of the single aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). We further conclude that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review.

[19] In conducting proportionality review, we "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *Brown*, 315 N.C. at 70, 337 S.E.2d at 829. We compare similar cases in a pool consisting of

> *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

State v. Williams, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). This pool includes only those cases found to be free of error in both phases of the trial. *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983). We do not, however, "necessarily feel bound . . . to give a citation to every case in the pool of 'similar cases' used for comparison." *Williams*, 308 N.C. at 81, 301 S.E.2d at 356. Rather, we limit our consideration to

those cases "which are roughly similar with regard to the crime and the defendant . . . ." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Id.

Characteristics distinguishing the present case include (1) a murder of a wife preceded by many years of physical abuse and threats to her; (2) fear on the part of the victim; (3) a calculated plan of attack by the defendant; (4) a senseless and brutal stabbing in front of other people, found to be "especially heinous, atrocious, or cruel" by the jury; (5) a period of time in which the victim suffered great physical and psychological pain before death; and (6) a distinct failure by the defendant to exhibit remorse after the killing. The jury found only one statutory mitigating circumstance, that the crime was committed while the defendant was under the influence of mental or emotional disturbance. It found five non-statutory mitigating circumstances: that defendant understands the severity of his conduct; that he has, since his incarceration, demonstrated an ability to abide by lawful authority; that he has a history of good work habits; that he has a history of being a good family provider; and that he has been a person of good character or reputation in the community in which he lived. It found two circumstances under the catchall: that the defendant was raised in a different culture and that he was aggravated by events following the issuance of the *ex parte* domestic violence order.

Of the cases in which this Court has found the death penalty disproportionate, only two involved the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). Neither is similar to this case.

In *Stokes*, the defendant and several others planned to rob the victim's place of business. During the robbery one of the assailants severely beat the victim about the head, killing him. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. We find the dissimilarities between *Stokes* and this case significant. First, the defendant in *Stokes* was seventeen-years-old; defendant in this case is fifty-two-years-old. Second, the defendant in *Stokes* was convicted on a felony murder theory. There was virtually no evidence of premeditation and deliberation. In the present case, defendant was convicted on a theory of premeditation and deliberation, and there was substantial evidence of both premeditation and deliberation. There was also no evidence in *Stokes* showing who was the ringleader in the robbery, or that the defendant deserved a death sentence any more than did an older confederate who received a life sentence.

In *Bondurant*, the defendant shot the victim while they were riding together in a car. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. The Court "deem[ed] it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. He then went inside to secure medical treatment for the victim. The defendant also spoke with the police at the hospital, confessing that he shot the victim. In the present case, by contrast, the defendant offered neither comfort nor help to his wife, nor did he attempt to secure help from others. As his son returned to his mother, after running off to seek help, defendant yelled at him in Arabic, "Bastard." Then defendant left the scene and drove to a nearby fire station, where he told a fireman that he needed medical attention because he had been in a fight. His later expressions of remorse at the trial are not comparable to the actions taken by the defendant in *Bondurant*.

There are three similar cases in the pool in which the jury recommended a sentence of death after finding as an aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *State v. Spruill*, 320 N.C. 688, 360 S.E.2d 667 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988); *Huffstetler*, 312 N.C. 92, 322 S.E.2d 110; *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, 454 U.S. 933, 70 L. Ed. 2d 240, *reh'g denied*, 454 U.S. 1117, 70 L. Ed. 2d 655 (1981). Further, we believe that another case—*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)—is similar, and comparison to the present case is warranted.

In *Huffstetler*, defendant beat his mother-in-law to death with a cast iron skillet after an argument. The victim had multiple wounds on her head, neck and shoulders. Her jaw, neck, spine and collarbone were fractured. After beating the victim, the defendant went home to change his bloody clothes, returned to the scene to remove the skillet, and went to visit a woman friend. *Huffstetler*, 312 N.C. at 98-100, 322 S.E.2d at 115-16. The jury in *Huffstetler* found as the single aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *Id.* at 100, 322 S.E.2d at 116. The jury also found three mitigating circumstances: that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; that the killing occurred contemporaneously with an argument and by means of an instrument acquired at the scene and not taken there; and that the defendant did not have a history of violent conduct. *Id.* Notwithstanding the fact that defendant suffered from an emotional or mental disorder, this Court concluded that the sentence of death was not disproportionate, based on evidence similar to that in the present case, including the brutal nature of the killing, the lack of remorse shown by the defendant, and the defendant's cool actions after the murder.

In *Martin*, the defendant followed his wife to a neighbor's apartment and fired two shots at her. She slumped to the floor, unable to escape. The defendant proceeded to pistol whip her and taunt her for almost twenty-five more minutes, fired a round at her in the presence of their young child, and then fired several more rounds, killing her. *Martin*, 303 N.C. at 248, 278 S.E.2d at 216. The jury found as the single aggravating circumstance that the murder was especially heinous, atrocious, or cruel. *Id.* As in the present case, the murder was preceded by threats against the victim, the crime involved great physical and psychological pain and suffering, the murder was not done in a quick and efficient manner, and the victim was murdered in a public place in view of her child and neighbor. There, too, the defendant suffered from a mental or emotional disturbance. This Court found the sentence of death not disproportionate, emphasizing the prior threats and the brutal manner in which death was inflicted. *Id.* at 256, 278 S.E.2d at 220-21.

In *Spruill*, the defendant was convicted of killing a former girlfriend. He followed her around a nightclub and then out into the parking lot as she left. She apparently was frightened. He jumped into her car and stabbed her. Friends pulled him out of the car, but he eluded their grasp and returned to his victim, cutting her throat. She strangled on her own blood. *Spruill*, 320 N.C. at 690-92, 360 S.E.2d at 668-69. The jury found as the single aggravating circumstance that the murder was especially heinous, atrocious, or cruel, but found none of the five submitted mitigating circumstances. *Id.* at 701, 360 S.E.2d at 674. This Court upheld the sentence of death.

In *Boyd*, the defendant was convicted of killing his estranged girlfriend. Defendant threatened the victim several times after following her to a shopping center. As she tried to leave, he pulled out a knife and stabbed her repeatedly in front of her mother and her daughter. The victim suffered considerably before her death. *Boyd*, 311 N.C. at 412-13, 319 S.E.2d at 194. The jury found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that the defendant previously had been convicted of a felony involving the use or threat of violence to the person. *Id.* at 415-16, 319 S.E.2d at 195-96. The jury found one or more unspecified mitigating circumstances of the sixteen circumstances submitted. *Id.* at 416-17, 319 S.E.2d at 195-96. In upholding the sentence of death, this Court emphasized the overwhelming evidence of guilt, the prior threats, and the premeditated brutality of the murder, including the suffering of the victim.

Defendant relies on four cases in which the jury recommended life sentences as being similar to this case. *State v. Madric*, 328 N.C. 223, 400 S.E.2d 31 (1991); *State v. Harold*, 312 N.C. 787, 325 S.E.2d 219 (1985); *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984); *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980).

In *Harold*, *King* and *Myers*, the killings were by gunshot, and there was not the evidence of excessive brutality or suffering that there is in the present case. In *Harold*, the defendant entered the house through an unlocked window and chased the victim, his former girlfriend, through the house and out into a neighboring yard. The defendant caught the victim and threw her to the ground, then stood over her and shot her at point blank range as she begged for her life. *Harold*, 312 N.C. at 789, 325 S.E.2d at 220-21. There was evidence, however, that defendant suffered from paranoid

schizophrenia. *Id.* at 790, 325 S.E.2d at 221. In *King*, the defendant shot his former girlfriend with a pistol and again with a rifle. There was evidence of an argument about a truck purchased by the defendant but registered in the victim's name, and apparently no evidence that the victim feared the defendant. *King*, 311 N.C. at 605-07, 320 S.E.2d at 3-4. In *Myers*, there was evidence that the defendant had physically and verbally abused his wife, speaking to her sometimes as if she were a child and pulling her hair or ordering her to bed without her clothes. Further, there was evidence that the defendant had threatened the victim and that she feared him. *Myers*, 299 N.C. at 674-76, 263 S.E.2d at 770-72. On the day of the killing, the defendant accosted his wife and forced her to drive while he held a gun to her head. The victim pushed the gun away, but the defendant regained control of the gun and fired, killing her with that shot. *Id.* at 678, 263 S.E.2d at 773.

In *Madric*, the defendant was convicted of stabbing a pregnant mother to death and dragging her body out of her car and into the woods beside defendant's driveway. *Madric*, 328 N.C. at 225, 400 S.E.2d at 33. However, the murder was not planned but was committed while the defendant was committing robbery and kidnapping. Further, the victim was a stranger to the defendant. The murder was not in public or in front of family or friends, and there was no evidence of prior threats to the victim or history of violence by the defendant toward the victim. These circumstances distinguish these cases from the present case.

There is another case that is facially similar to the present case, *State v. Bearthes*, 329 N.C. 149, 405 S.E.2d 170, in which the jury recommended a life sentence. In *Bearthes*, the defendant stabbed his estranged wife through the open window of her car in front of at least four witnesses and two of their children. The victim suffered thirty-four wounds, twenty-three of which were life threatening, and died soon after the attack. *Bearthes*, 329 N.C. at 152-53, 162, 405 S.E.2d at 171-72, 177. The record shows that the jury found the single aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." It found two statutory mitigating circumstances: that the defendant had no significant history of prior criminal activity, and that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance. It also found five non-statutory mitigating circumstances: that the defendant was seeking marriage and religious counseling at the time of the offense; that his conduct in jail be-

tween the offense date and the sentencing date had been exemplary; that he voluntarily surrendered himself at the sheriff's department and thereafter voluntarily confessed both orally and in writing to his involvement in the offense; that he had exhibited religious beliefs before his incarceration; and that he had been a good neighbor. We find the dissimilarities between *Bearthes* and this case significant, however. In *Bearthes*, the defendant had not physically or verbally abused his wife or threatened her directly. There was no evidence that the attack was anything but unexpected by the victim. She had just rolled down her window to give the defendant directions to an outing. Finally, there was evidence that the victim died within five minutes of the attack, that the defendant was in shock and could not remember the attack and, seeing blood on his hands, asked his son to drive him to the sheriff's department. The defendant "asked [the deputies] about his wife because he was concerned she might be hurt." *Id.* at 154, 405 S.E.2d at 173. These facts distinguish *Bearthes* from the present case.

We find that *Huffstetler*, *Martin*, *Spruill* and *Boyd* are the cases in the pool most comparable to this case. In light of these cases, we cannot say that the death sentence in this case was excessive or disproportionate, considering both the crime and the defendant.

We hold that the defendant received a fair trial and sentencing hearing, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. *Robbins*, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

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

STATE OF NORTH CAROLINA v. JOHNNY MACK SWEATT

No. 556A91

(Filed 12 March 1993)

1. **Homicide § 244 (NCI4th)— first degree murder—sufficiency of evidence—premeditation and deliberation**

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss where there was testimony that defendant planned to seek revenge against the victim for calling him a cripple two weeks before the murder; multiple lethal and lesser blows were struck against the victim, who was elderly and intoxicated at the time; a substantial number of the blows were struck after the victim was disabled; and, assuming that the victim called defendant a cripple, this was insufficient to negate premeditation and deliberation. Since defendant was properly found guilty of first degree murder based on malice, premeditation and deliberation, any error relating to defendant's conviction of the same crime on the additional theory of a homicide committed during the commission of a felony or attempt to commit a felony is nonprejudicial.

Am Jur 2d, Homicide § 439.

Insulting words as provocation of homicide or as reducing the degree thereof. 2 ALR3d 1292.

2. **Homicide § 493 (NCI4th)— first degree murder—instructions—premeditation and deliberation—provocation**

The trial court did not err in its instruction on premeditation and deliberation in a first degree murder prosecution. Although defendant argues that the instruction amounted to placing the burden on a defendant to produce evidence of provocation, those contentions were rejected in *State v. Handy*, 331 N.C. 515.

Am Jur 2d, Homicide §§ 501, 508.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

3. Homicide § 498 (NCI4th)— first degree murder—instructions—use of term "felony murder"

The trial court did not err in a first degree murder prosecution by using the term "felony murder" in its instructions to the jury. Although the use of the term was disapproved in *State v. Foster*, 293 N.C. 674, the jury in that case returned a verdict of guilty of felony murder rather than guilty of murder in the first degree. The jury in this case returned a verdict of guilty of first degree murder under the first degree felony murder rule with robbery with a dangerous weapon and arson being the underlying felonies.

Am Jur 2d, Homicide §§ 498, 499.

Modern status of law regarding cure of error, in instruction as to one offense, by conviction of higher or lesser offense. 15 ALR4th 118.

4. Evidence and Witnesses § 1235 (NCI4th)— first degree murder—defendant's statements—not custodial interrogation

The trial court did not err in a first degree murder prosecution by denying defendant's motion to suppress his statement to an officer while being treated for injuries sustained in an automobile accident. *Miranda* warnings are required prior to questioning only if one is in custody or has been deprived of one's freedom of action in a significant way. Although defendant had been injured in a high speed automobile crash and was in a hospital treatment room when questioned, defendant's own statement to an inmate was that the crash was intentional and for the purpose of supplying defendant with an alibi, so that the presence of police was by defendant's own intentional actions. Defendant points to no overt actions by the officers which show actual custody: defendant's clothing was taken for the purpose of rendering treatment, no police guard was placed at defendant's door to confine him to his room, an officer had to "walk over" about 5 feet to where defendant was being treated when a doctor indicated that officers should talk with defendant, and the officer's inspection of defendant's wallets, given to the officer with defendant's permission, was found to be administrative rather than investigatory.

Am Jur 2d, Criminal Law § 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.

5. **Evidence and Witnesses § 1064 (NCI4th)— first degree murder—instruction on flight—no error**

The trial court did not err in a first degree murder prosecution in its instruction on flight where the State presented evidence that, shortly after the victim was murdered, defendant passed an officer on the highway at a very high rate of speed; flight was a contention of the State, contrary to defendant's assertion; the instruction makes it clear that flight is only a contention of the State and does not amount to an expression of opinion; the trial court expressly instructed the jury to draw no conclusion concerning judicial opinion; and it is not fatal that a contention of the State was not precisely balanced by a contradictory contention of defendant.

Am Jur 2d, Homicide §§ 486, 492.

6. **Criminal Law § 750 (NCI4th)— instruction—ascertainment of truth highest function of trial—burden of persuasion not improperly shifted—jurors not confused concerning reasonable doubt**

The trial court did not err in a first degree murder prosecution by instructing the jury that the highest aim of a criminal trial is the ascertainment of the truth where the instruction was taken verbatim from the pattern jury instructions and the court defined reasonable doubt and repeated the reasonable doubt standard throughout his jury charge.

Am Jur 2d, Homicide §§ 482, 484, 510.

7. **Homicide § 43 (NCI4th)— felony murder—State not relieved of proving mens rea—not unconstitutional**

The North Carolina felony murder rule is not unconstitutional on the ground that it relieves the State of proving *mens rea* at the time of the killing.

Am Jur 2d, Homicide §§ 10, 72, 79.

Appeal by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing life imprisonment entered by Webb, J., at

the 1 July 1991 Criminal Session of Superior Court, Guilford County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 13 January 1993.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

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

FRYE, Justice.

On 3 December 1990, a Guilford County grand jury indicted defendant for the murder of Robert James Taylor. A superseding indictment for this crime was returned on 10 June 1991. Defendant pled not guilty to the first-degree murder charge and was tried capitally before a jury. The jury returned a verdict of guilty. After a sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment, and defendant was sentenced accordingly. Defendant filed written notice of appeal to this Court on 7 July 1991.

Defendant brings forward seven assignments of error. After considering each of them, we conclude that defendant received a fair trial free of prejudicial error.

The State presented evidence tending to show the following facts and circumstances. Robert James Taylor [hereinafter referred to as Taylor or the victim] was murdered in his home during the early morning hours of 3 November 1990. Taylor had become a resident of Sheraton Towers, a residential high-rise for the elderly in High Point, North Carolina, just two weeks before his death.

Danny Noe testified that on the evening of 2 November 1990, he and defendant were at the Uptown Tavern where they talked and drank together. They eventually went across the street to Colors, a bar, for a final beer before defendant's wife came to pick them up at approximately 11:45 p.m.

William Rolph testified that he saw Taylor and defendant talking and drinking together at the Uptown Tavern on 2 November and later, after the Uptown Tavern closed, he saw Taylor and defendant at Colors. Rolph observed the victim and defendant leave Colors together near closing time. Gary Dalton, the owner of Colors,

also saw Taylor and defendant leave his premises together at approximately 1:30 a.m.

Colors was generally known as a place for individual bartering, and Taylor was known to trade and sell watches. Taylor was always in possession of more than one watch and he habitually carried more than one wallet in both rear pants pockets.

Each of the witnesses who observed Taylor and defendant at the bar had known both of them for varying but considerable periods of time, and each stated that Taylor was a peaceable person. Two of the State's witnesses also commented on defendant's noticeable limp. However, none of the witnesses regarded defendant as being in any manner impaired by alcohol when he and Taylor left the bar on the morning of 3 November 1990.

At approximately 3:00 a.m. on 3 November 1990, Onota Slate, a Sheraton Towers resident, heard a smoke alarm on her floor. When she went down the hallway to investigate, she observed a white male of medium build who appeared to be in his thirties sitting on the couch near the elevator. Ms. Slate continued down the hall and observed that the individual light and sound alarms outside apartment 703 had been activated. She knocked on the door and, receiving no response, pushed the door open. Upon opening the door, Ms. Slate observed thick smoke inside the room. As Ms. Slate returned to her room, she noticed that the person she had seen earlier was gone.

Mildred Styles, also a resident of Sheraton Towers, was in the laundry room when she heard the door from the mezzanine close and the fire alarm sounding. She left the laundry room to see what had happened. Ms. Styles saw an unfamiliar young white male come down the steps, go out the front door of the building and turn toward the center of town. Ms. Styles' description of the stranger was essentially the same as Ms. Slate's description, except Ms. Styles also noticed that the stranger had a severe limp on his left side. During a photographic line-up, Ms. Styles identified defendant as the person she saw leaving Sheraton Towers on the morning of Taylor's death. She also identified defendant in open court.

The High Point Fire Department received the fire call at 2:58 a.m. Fireman Phillip Shields entered apartment 703 and observed

dense, billowing smoke and an open flame. Shields discovered a body on the floor with a large knife protruding from the victim's back.

When Officer Wade Foley of the High Point Police Department was attempting to respond to the fire alarm at Sheraton Towers, he observed a yellow Chevrolet Monte Carlo pass him at a high rate of speed. Officer Foley continued on to the fire call, but prior to reaching Sheraton Towers he received a call at 3:31 a.m. directing him to the scene of a nearby automobile accident. He arrived at the site at 3:44 a.m. and saw what appeared to be a single car accident involving the same Chevrolet Monte Carlo he had seen speeding a few minutes earlier. The accident had occurred roughly two or three miles from Sheraton Towers. When Officer Foley arrived at the scene of the accident, emergency medical personnel were in the process of removing the driver who identified himself as Johnny Sweatt.

Officer Foley proceeded to the hospital where the driver of the vehicle, later identified as defendant, had been taken. During the standard admittance inventory procedure, two hospital workers found four wallets containing identification of two different persons in defendant's pants pockets. Two of the wallets contained identification belonging to Robert Taylor, one of the wallets was empty, and one contained identification of Johnny Mack Sweatt. Defendant initially stated that his name was Johnson and someone had been beating him. Defendant also stated that Robert Taylor had given him the wallets to hold. After obtaining defendant's permission, the hospital personnel gave the wallets to Officer Foley.

Officer Foley looked inside the wallets and discovered that they contained multiple identifications. At the time of Officer Foley's review of the wallets, he was not aware of the incident at Sheraton Towers involving Robert Taylor. Officer Foley called Officer Jeff Insley, a breathalyzer operator, for the purpose of administering a chemical test for intoxication. When Officer Insley arrived at the hospital, he was shown the wallets and he recalled having heard a broadcast requesting information concerning a Robert Taylor. Officer Insley called his lieutenant and was informed of the apparent homicide. At that point, the doctor emerged from the treatment room and stated that defendant was "running off at the mouth" about "things the police should hear."

Officer Insley proceeded to defendant's treatment room and asked him about the wreck and the multiple identifications found

inside the wallets. Defendant told Officer Insley that a David Lee Johnson had given him the wallets to hold, had forced defendant to drive him somewhere, and had held a knife to his throat while bragging about "cutting someone." Defendant admitted that he and the victim had been drinking together earlier and that they had walked back to the victim's residence. Defendant then stopped and indicated that he had nothing else to say.

After defendant was released from the hospital and transported to the police department, he was read his *Miranda* rights and was interviewed for approximately thirty minutes by Detective Beck. Defendant told Beck that he had taken Danny Noe home and, after going to his own home, he had returned to Colors at approximately 12:30 a.m. He also stated that the victim gave him two wallets to hold and they left Colors together. However, when they left together, they went to the vehicle of a person named Johnson and someone hit him in the head. Defendant stated that he remembered nothing else until he saw the fire trucks. He denied going to the victim's residence.

David Lee Johnson, who once lived briefly with defendant and his wife and was the only known associate of defendant by that name, testified that he was in prison on 3 November 1990.

John William Miller, who had been incarcerated with defendant for several months preceding trial, testified that defendant told him that he and the victim had been drinking partners for some time. They had an argument two weeks before the murder during which the victim called defendant a "cripple m----- f-----," for which comment defendant decided to exact revenge. Defendant told Miller that he had gone to the Uptown Tavern in the late afternoon of 2 November and that he and the victim had been drinking together most of the night. During the evening, the victim gave defendant "some valuables" to hold before going home because of an unnamed third party the victim did not trust. Defendant stated that he took some of the victim's money thinking that he was too intoxicated to realize the money was missing. However, the victim realized his money was missing and an argument ensued. The victim called defendant a cripple again and said he was going to have him arrested. A scuffle began and defendant grabbed a butcher knife from the kitchen. Defendant told Miller that he "lost it," and began stabbing the victim over and over until the victim's body stopped moving. Defendant then took the wallets and set

the bed on fire to cover the murder. He also wrecked his vehicle in an attempt to acquire an alibi.

The autopsy of the victim disclosed that he was a sixty-one-year-old male, six feet tall and weighed one hundred fifty-five pounds. The medical examiner determined that the victim had suffered numerous blunt impact wounds to his head, face, chest and extremities, which were consistent with a fight. There were thirteen to fourteen stab wounds to the victim's head, chest and back, of which three were potentially fatal. The potentially fatal wounds included a neck wound six inches deep and two six-inch deep stab wounds to the chest which entered the victim's right lung. All three fatal wounds preceded death, and in the opinion of the medical examiner, the victim, who was severely intoxicated, would have survived up to ten minutes after their infliction.

Defendant did not testify. However, the evidence presented by defendant during the guilt phase confirmed that he suffered from a pronounced limp on his left side as the result of a prior stroke, that he left his home again during the early morning hours of 3 November sometime after 12:30 a.m., and that his home was roughly five miles from the victim's residence.

The jury found defendant guilty of murder in the first degree "[o]n the basis of malice, premeditation and deliberation" and on the basis of felony murder with the underlying felonies being robbery with a dangerous weapon and first-degree arson.

[1] In defendant's first argument, he contends that the trial court erred in denying his motion to dismiss. Defendant contends that the evidence was insufficient to support his conviction of first-degree murder on the theory of premeditation and deliberation or that he killed during the course of an armed robbery or arson, therefore his conviction must be set aside.

In ruling on a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989). "The test that the trial court must apply is whether there is substantial evidence—either direct, circumstantial, or both—to support a finding that the crime charged has been committed and that defendant was the perpetrator." *Id.*

Murder in the first degree is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 494 (1992). Premeditation means the perpetrator thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary. *Id.* at 590, 417 S.E.2d at 494. Deliberation means an intent to kill executed by the defendant in a cool state of blood in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. *Id.*

The evidence taken in the light most favorable to the State in the instant case tended to show that defendant acted with malice, premeditation and deliberation. Premeditation and deliberation are mental processes which are not ordinarily susceptible of proof by direct evidence. *State v. Olson*, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992). Some of the circumstantial factors from which premeditation and deliberation may be inferred 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.

In the instant case, the State's evidence and the reasonable inferences therefrom demonstrated that defendant had formed a retaliatory intention before the offense occurred. Miller testified that defendant planned to seek revenge on the victim for calling him a cripple two weeks before the murder. The State's evidence also established that multiple lethal and lesser blows were struck against the victim, who was elderly and intoxicated at the time. In addition, a substantial number of the blows were struck after the victim was disabled.

"An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill, notwithstanding the fact that

the defendant was angry or emotional at the time, unless such anger or emotion was strong enough to disturb the defendant's ability to reason." *State v. Hunt*, 330 N.C. 425, 427, 410 S.E.2d 478, 480 (1991). The requirement of a "cool state of blood" does not mean that the defendant must be calm or tranquil. *Id.* Thus, even assuming *arguendo* that the victim did call defendant a cripple, we find this insufficient to negate premeditation and deliberation. Clearly, the evidence of premeditation and deliberation was sufficient to submit first-degree murder to the jury and to support the jury's finding of guilty on that theory.

Since defendant was properly found guilty of first-degree murder based on malice, premeditation and deliberation, any error relating to defendant's conviction of the same crime on the additional theory of a homicide committed during the commission of a felony or attempt to commit a felony is non-prejudicial because defendant can only be sentenced once for the same conviction. Thus, there is no need for us to address the sufficiency of the evidence to establish that the murder was committed during the commission of a felony so as to support the jury finding of guilty of first-degree murder based on the felony murder rule, and we decline to do so.

[2] In defendant's second assignment of error, he contends that the trial court committed reversible error in its instruction to the jury on premeditation and deliberation. The trial court instructed the jury as follows:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by—they may be proved by circumstances from which they may be inferred, such as the lack of provocation by the victim; the conduct of the defendant before, during and after the killing; use of grossly excessive force; infliction of lethal wounds after the victim is felled; brutal or vicious circumstances of the killing; or the manner in which or means by which the killing was done.

Defendant contends that although the language is intended to distinguish between first- and second-degree murders, it does not. Defendant argues that the instruction fails to distinguish between legal provocation and ordinary provocation, and that the instruction could reasonably be understood by a juror to mean that the State had proven "the lack of provocation," thus the only decision left for the jury was whether this showed premeditation

and deliberation. According to defendant, this amounts to placing the burden on a defendant to produce evidence of provocation in order to avoid conviction.

This Court recently addressed and rejected these same contentions in *State v. Handy*, 331 N.C. 515, 525-26, 419 S.E.2d 545, 551 (1992). Defendant does not raise any additional arguments which were not addressed in *Handy*. We therefore reject this assignment of error.

[3] Next, defendant contends that the trial court erred in using the term "felony murder" in its instructions to the jury. Defendant relies on *State v. Foster*, 293 N.C. 674, 239 S.E.2d 449 (1977), in which this Court disapproved the use of the term "felony-murder" in an issue submitted to a jury. In response to the issue submitted by the trial judge, the jury returned a written verdict of "guilty of felony murder" rather than a verdict of "guilty of murder in the first degree." Since "felony murder" is not a statutory term, the Court said, "its use in an issue submitted to the jury is ill-advised and we expressly disapprove its usage." *Id.* at 687, 239 S.E.2d at 458. In the instant case, in response to written issues submitted by the trial court, the jury returned its verdict finding defendant "guilty of first degree murder . . . B. [u]nder the first-degree felony murder rule with robbery with a dangerous weapon being the underlying felony . . . C. [u]nder the first-degree felony murder rule, the underlying felony being first-degree arson." Thus, the evil condemned by this Court in *Foster* is not present in the instant case. This assignment of error is rejected.

[4] In defendant's fourth assignment of error, he contends that the trial court erred in denying his motion to suppress his statement made to Officer Insley while defendant was at the hospital being treated for injuries sustained in an automobile accident. Defendant observes that the trial court found as a fact that Officer Insley had questioned him. He contends that he was therefore subjected to an unwarned custodial interrogation and that the evidence derived from the interrogation was not constitutionally available to the State.

Miranda warnings are required prior to questioning only if one is in custody or has been deprived of one's freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966); *State v. Perry*, 298 N.C. 502, 506, 259 S.E.2d 496, 499 (1979). Whether an individual is in custody for

these purposes is a question of law, to be resolved under the totality of the circumstances. *State v. Corley*, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984); *State v. Davis*, 305 N.C. 400, 414-15, 290 S.E.2d 574, 580-81 (1982).

Defendant contends that his statements to Officer Insley were custodial, essentially because he was in a hospital treatment room at the time. He points to no overt actions of the officers themselves which show actual custody. Among the various factors cited by defendant supporting custody is that he had been injured in a high speed automobile crash. According to statements made to a fellow inmate, this crash was intentional and for the purpose of supplying defendant with an alibi; thus the presence of police was assured by his own intentional actions. Defendant was placed in a treatment room, again either necessitated by his own action or at least not because of police-initiated action. The taking of defendant's clothing was for the purpose of rendering proper treatment. When the doctor emerged and talked to the officers, Officer Insley was at the counter and had to "walk over" to where defendant was being treated—approximately five feet away. No police guard was placed at defendant's door to confine him to the hospital room. The officer's inspection of defendant's wallets, originally given to Officer Foley with defendant's express permission, was found by the trial court to be administrative rather than investigatory.

Viewing the totality of the circumstances, we conclude that defendant was not in custody at the time of the limited questioning of defendant by Officer Insley. Thus, *Miranda* warnings were not required and there was no error in denying defendant's motion to suppress.

[5] Next, defendant argues that the trial court erred in its instruction to the jury on flight. The trial court instructed the jury as follows:

> The State contends that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the defendant's guilt. Further, this circumstance has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation and deliberation.

Defendant contends that the instruction was flawed in three respects. First, the instruction assumed that the evidence presented by the State was evidence of flight which is a question for the jury to decide. Second, contrary to the trial court's instruction, the State did not contend to the jury that defendant fled. Third, even if the State had made a contention that defendant fled, the instruction was flawed since the trial court did not give defendant's contentions.

We find no error in the trial court's instruction on flight. The State presented evidence that shortly after the victim was murdered, defendant passed Officer Foley on the highway traveling at a very high rate of speed. This was evidence from which the jury could draw a reasonable inference that defendant fled the scene. Contrary to defendant's assertion, flight was a contention of the State, both as to defendant's immediate actions and his subsequent high-speed removal from the scene of the crime. Since the instruction makes it clear that flight is only a contention of the State, it does not amount to an expression of judicial opinion. *State v. Tucker*, 329 N.C. 709, 723, 407 S.E.2d 805, 813 (1991). The trial court expressly instructed the jury to draw no such conclusion. Also, it is not fatal that a contention of the State was not precisely balanced by a contradictory contention of defendant. *Id.* Defendant's fifth assignment of error is rejected.

[6] Next, defendant contends that the trial court committed plain error in instructing the jury that the highest aim of a criminal trial is the ascertainment of the truth. Defendant argues that the instruction is erroneous as a matter of law because it runs the grave risk of improperly shifting the burden of persuasion to the defendant. We disagree.

The instruction given by the trial judge was taken verbatim from the criminal Pattern Jury Instructions. *See* N.C.P.I.—Crim. 101.36. In addition, prior to the instruction, the trial judge instructed, "[t]he State must prove to you that the defendant is guilty beyond a reasonable doubt." The trial judge also defined reasonable doubt and repeated the reasonable doubt standard throughout his jury charge. As this Court decided in *State v. Garner*, 330 N.C. 273, 296, 410 S.E.2d 861, 874 (1991), defendant does not establish any possibility that the trial judge confused the jurors concerning the reasonable doubt standard, and we reject his assignment of error.

[7] In defendant's final assignment of error, he contends that the North Carolina felony-murder rule offends both the state and federal constitutions because it relieves the State of proving *mens rea* at the time of the killing. This argument was recently rejected by this Court in *State v. Thomas*, 332 N.C. 544, 564, 423 S.E.2d 75, 86 (1992). We also reject it here.

For the above-stated reasons, we conclude that defendant's trial was free of prejudicial error, and a new trial is not warranted.

NO ERROR.

LOUISE PRICE PARSONS v. JEFFERSON-PILOT CORPORATION

No. 240PA92

(Filed 12 March 1993)

1. **Corporations § 151 (NCI4th)— corporate shareholder—right to inspect accounting records**

A shareholder's common law rights of inspection, including the right to make reasonable inspections of the accounting records of a public corporation for proper purposes, are preserved by N.C.G.S. § 55-16-02(e)(2). Further, a shareholder who seeks to exercise her common law right, as opposed to a statutory right, to examine corporate records for a proper purpose also has a common law right to utilize the mandamus power of the courts to compel a reluctant corporation to disclose its corporate records pertinent to that purpose.

Am Jur 2d, Corporations §§ 348, 406.

2. **Corporations § 133 (NCI4th)— list of beneficial owners—not possessed by corporation—corporation not required to provide**

A corporation was not required to provide a shareholder with a list of non-objecting beneficial shareholders (NOBO list) where the corporation did not have such a list in its possession. The legislative intent embodied in N.C.G.S. § 55-16-02(b)(3) is that shareholders are entitled to the information concerning the identity of shareholders which is possessed by the corporation in order that they may have the same opportunity as the corporation to communicate with the other shareholders.

However, a shareholder is not granted a right under the statute to require a corporation to obtain NOBO lists or the information necessary to compile NOBO lists when the corporation does not possess or use such information.

Am Jur 2d, Corporations §§ 334, 395.

What corporate documents are subject to shareholder's right to inspection. 88 ALR3d 663.

3. Corporations § 151 (NCI4th)— shareholder inspection of corporate records—description of records sought—particularity

A shareholder seeking inspection of corporate records described both her purpose and the desired records with the reasonable particularity required by N.C.G.S. § 55-16-02(c), assuming that statute controls situations in which a shareholder exercises a common law right of inspection, as well as situations in which the statutory right is being exercised. Whether shareholders describe their purpose or the desired records with reasonable particularity depends upon the facts and circumstances of each case. In light of this plaintiff's actual knowledge at the time of the demand, it would not have been feasible to state her purpose with any greater particularity and, although her demand was broad, there is nothing in the record to show that she could have described the desired records with any greater particularity and the defendant company should not have had any trouble understanding what plaintiff desired.

Am Jur 2d, Corporations § 409.

On discretionary review of a decision of the Court of Appeals, 106 N.C. App. 307, 416 S.E.2d 914 (1992), affirming in part and reversing in part an order entered by Allen (W. Steven, Sr.), J., on 16 July 1991 in Superior Court, Guilford County. Heard in the Supreme Court on 13 January 1993.

Stern, Graham & Klepfer, by James W. Miles, Jr.; Jones, Day, Revais & Pogue, by Richard M. Kirby and Michael J. McConnell, for the plaintiff.

Robinson, Bradshaw & Hinson, P.A., by Russell M. Robinson, II, for the defendant.

MITCHELL, Justice.

Louise Price Parsons, a shareholder in Jefferson-Pilot Corporation, initiated this action by filing a complaint and motion for preliminary injunction seeking to compel the defendant corporation to allow her to inspect, *inter alia*, its accounting records and records of shareholder and director action. The defendant answered and filed a motion for summary judgment and for sanctions under Rule 11 of the North Carolina Rules of Civil Procedure.

The evidence introduced at a hearing on the defendant's motion tended to show the following. The plaintiff, Louise Price Parsons, is a shareholder of Jefferson-Pilot Corporation and owns 300,000 shares of its stock, which are worth several million dollars. On 14 February 1991, the plaintiff sent a letter to the defendant corporation requesting that it allow her to inspect and copy designated corporate records that would enable her to communicate with its other shareholders. The defendant allowed the plaintiff to inspect and copy certain records. However, the defendant refused to provide the plaintiff with a list of beneficial owners of its stock, stating that it did not possess such information or maintain such a list. In her letter of 14 February 1991, the plaintiff also requested that the defendant allow her to inspect and copy certain "accounting records" so that she could determine "any possible mismanagement of the company or any possible misappropriation of the company's assets." In refusing the plaintiff's request, the defendant stated that such records "are not within the scope of N.C.G.S. § 55-16-02(b)." On 4 March 1991, the plaintiff sent another letter to the defendant narrowing her request for accounting records to those dealing with "compensation paid to, perquisites made available to and relationships with only the executive officers and directors of the company, their family members and companions." The defendant still refused to allow the plaintiff to inspect and copy any "accounting records." As a result, on 6 May 1991, the plaintiff filed a motion for preliminary injunction seeking, among other things, an order directing the defendant to give her access to its accounting records and to give her a list of beneficial owners of its stock.

At the conclusion of the hearing, Judge Allen entered an order denying the defendant's motion for summary judgment and Rule 11 sanctions, concluding that the defendant must permit the plaintiff to inspect its accounting records and records of shareholder and director action. Judge Allen also found that the defendant,

Jefferson-Pilot Corporation, did not have the names of the non-objecting beneficial owners of its stock in its possession and, therefore, that the plaintiff was not entitled to an order requiring that the defendant provide her with a list of such individuals. Both parties appealed to the Court of Appeals.

The Court of Appeals affirmed the trial court's order to the extent that the order indicated that the plaintiff was not entitled to require the defendant corporation to obtain the names of non-objecting beneficial owners of the defendant's shares or to provide the plaintiff with a list of such non-objecting beneficial owners (NOBO list), where the defendant had neither the names nor a list of such individuals in its possession. The Court of Appeals also affirmed that part of the trial court's order which had concluded that the plaintiff's written demands to inspect other corporate records described her purpose and the records she sought with "reasonable particularity." However, the Court of Appeals reversed that part of the trial court's order which had concluded that the plaintiff had the right to inspect the defendant's accounting records. The Court of Appeals remanded the case to the trial court for its determination of whether the records the plaintiff sought were "directly connected" to her described purpose in seeking them and for a determination as to whether certain records sought by the plaintiff were in fact "accounting records." This Court allowed both the plaintiff's and the defendant's petitions for discretionary review on 3 September 1992.

I.

[1] By her first assignment of error, the plaintiff contends that the Court of Appeals erroneously concluded that N.C.G.S. § 55-16-02(b) abrogated a shareholder's common law right to inspect the accounting records of a public corporation. The statute provides, in pertinent part, that a qualified shareholder of any corporation is entitled to inspect and copy accounting records of the corporation if she gives the corporation written notice of her demand at least five days before the date on which she wishes to inspect and copy such records. N.C.G.S. § 55-16-02(b) (Supp. 1992). This right as guaranteed by the statute is limited, however, by its proviso that a shareholder of a public corporation[1] shall not be entitled to in-

1. The term "public corporation" as used in the North Carolina Business Corporation Act "means any corporation that has a class of shares registered under Section 12 of the Securities Exchange Act of 1934, as amended (15 U.S.C. § 781)." N.C.G.S. § 55-1-40(18a) (Supp. 1992).

spect or copy any accounting records of the corporation. *Id.* The Court of Appeals concluded that this proviso restricts a shareholder's statutory right *and abrogates any common law right* to inspect a public corporation's accounting records. We disagree.

Under common law, a shareholder of a corporation has a right to make reasonable inspection of its books and records. *White v. Smith*, 256 N.C. 218, 123 S.E.2d 628 (1962); *Carter v. Wilson Construction Co.*, 83 N.C. App. 61, 348 S.E.2d 830 (1986). This Court has expressly recognized that the shareholders of a corporation have a common law right to make a reasonable inspection of its books to assure themselves of efficient management. *White*, 256 N.C. at 219, 123 S.E.2d at 629. We have also noted that the rationale behind the common law right of inspection is that those in charge of the corporation are merely agents of the shareholders, and a shareholder's right to inspect a corporation's books and records is only the right to inspect and examine that which is his own. *Cooke v. Outland*, 265 N.C. 601, 610, 144 S.E.2d 835, 841 (1965).

In light of the controlling case law, it is clear that a common law right to inspect the accounting records of a corporation existed in 1990 when the North Carolina Business Corporation Act, 1989 N.C. Sess. Laws ch. 265, took effect. Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 10.1, at 173 (4th ed. 1990) [hereinafter *Robinson*]. The issue to be resolved here, then, is whether that common law right to inspect accounting records has been abrogated by N.C.G.S. § 55-16-02(b) or, to the contrary, has been preserved by N.C.G.S. § 55-16-02(e)(2), which provides that section 16-02 does not affect "the power of a court, independently of this Chapter, to compel the production of corporate records for examination."

The North Carolina Business Corporation Act, *inter alia*, provides shareholders certain rights of inspection of corporate records which did not exist under the common law. For example, the Act provides shareholders of corporations other than "public corporations" a new right to an *expedited inspection* of a corporation's accounting records *within five business days* after making a proper demand. N.C.G.S. § 55-16-02(b) (Supp. 1992). There seems to be general agreement, however, that the General Assembly did not intend the granting of such new or expanded rights of inspection under the Act to abrogate shareholders' rights of inspection already existing at common law; instead, it intended that N.C.G.S.

§ 55-16-02(e)(2) preserve all existing common law rights of inspection of corporate records. In this regard, one leading commentator has correctly noted:

> The North Carolina Business Corporation Act . . . prescribes statutory inspection rights in detail. Those statutory rights are nonexclusive because the present Act expressly provides that they do not affect the power of a court, independent of the Act, to compel the production of corporate records for examination; they also do not affect discovery rights in litigation.

Robinson § 10.1, at 174 (footnotes omitted) (citing N.C.G.S. § 55-16-02 (e)(1) and (2)). Both the Official Comment and the North Carolina Commentary to N.C.G.S. § 55-16-02 concur in this view.

This Court has noted that the commentary to a statutory provision can be helpful in some cases in discerning legislative intent. *State v. Bogle*, 324 N.C. 190, 376 S.E.2d 745 (1989); *State v. Hosey*, 318 N.C. 330, 348 S.E.2d 805 (1986). In *Bogle* this Court noted that since the commentary printed with the North Carolina Rules of Evidence was not enacted into law, it was not binding but, where proper, could be given substantial weight in our efforts to discern legislative intent. *Bogle*, 324 N.C. at 202-03 n.5, 376 S.E.2d at 752 n.5. In the present case, neither the Official Comment nor the North Carolina Commentary to N.C.G.S. § 55-16-02 were enacted into law and, therefore, they are not controlling. 1989 N.C. Sess. Laws ch. 265 § 2. However, we accord them some weight in our efforts to determine the intent of our legislature.

N.C.G.S. § 55-16-02(e)(2) expressly provides that "this section" (section 16-02) does not affect "the power of a court, independently of this Chapter, to compel the production of corporate records for examination." N.C.G.S. § 55-16-02(e)(2) (Supp. 1992). The Official Comment states that "Section 16.02(e) provides that the right of inspection granted by section 16.02 is an independent right of inspection that is not a substitute for or in derogation of rights of inspection that may exist . . . as a 'common law' right of inspection, if any is found to exist by a court, to examine corporate records. Section 16.02(e) simply preserves whatever independent right of inspection exists. . . ." N.C.G.S. § 55-16-02 official cmt. 4 (1990). *Accord* N.C.G.S. § 55-16-02 North Carolina Commentary (ii) (1990) ("Subsection (e) of this section merely preserves any common law inspection right that may exist. . . ."). We find the conclusion expressed in the Official Comment inescapable and are

compelled to conclude that the North Carolina Business Corporation Act "was intended to leave in effect any common law rights of inspection existing in North Carolina, and the North Carolina cases have confirmed the existence of such rights in reasonably broad scope." *Robinson* § 10.4, at 181.

We conclude that N.C.G.S. § 55-16-02(e)(2) preserves a shareholder's common law rights of inspection, including the right to make reasonable inspections of the accounting records of a public corporation for proper purposes. *Cooke*, 265 N.C. at 610, 144 S.E.2d at 841. Further, a shareholder who seeks to exercise her common law right—as opposed to a statutory right—to examine corporate records for a proper purpose also has a common law right[2] to utilize the mandamus power of the courts to compel a reluctant corporation to disclose its corporate records pertinent to that purpose. *State ex rel. Lillie v. Cosgriff Co.*, 240 Neb. 387, 482 N.W.2d 555 (1992). Therefore, we reverse that part of the Court of Appeals' opinion which concluded that the plaintiff in the present case did not retain these common law rights after the adoption of the North Carolina Business Corporation Act.

II.

[2] By her next assignment of error, the plaintiff shareholder contends that the Court of Appeals erred in failing to compel the defendant corporation to provide her with a NOBO list for inspection. A NOBO list is a list of beneficial owners of a corporation's stock who do not object to the disclosure of their names and addresses by the registered owner of the stock (typically, a stock broker or a bank) to the corporation itself for the limited purpose of allowing direct communication on corporate matters. Only recently have NOBO lists been recognized under federal law.[3] When creating the rules requiring banks, stock brokers and dealers to create such lists upon requests by issuing corporations, the Securities Exchange Commission reviewed the question of whether a corporation's shareholders should themselves be granted the right to compel the production of a NOBO list on the same terms as the issuer of the shares. *See* Exchange Act Release No. 34-22533, 50 Fed.

2. Shareholders have a statutory right to court-ordered inspection when a corporation fails or refuses to permit them to exercise the rights of inspection granted them by N.C.G.S. § 55-16-02. N.C.G.S. § 55-16-04 (1990).

3. The Rules adopting the NOBO system are found in SEC Rules 14b-1, 14c-7 and 14a-13, Part 240, Code of Federal Regulations.

Reg. 42, 672 (Oct. 22, 1985). However, the Commission has not promulgated any rule providing shareholders with such a right.

A qualified shareholder has a statutory right to inspect a "record of shareholders." N.C.G.S. § 55-16-02(b)(3) (1990). The plaintiff contends that the record of shareholders made available by this statute includes a NOBO list. Our Court of Appeals concluded in the present case that the defendant corporation does not have to provide the plaintiff shareholder with a NOBO list, because the defendant corporation does not have the information needed to create such a list and does not use such a list in communicating with shareholders. We agree.

Other courts have held that where a corporation has obtained a NOBO list and is or will be using it to solicit shareholders, a shareholder should be allowed the same channel of communication. *E.g., Shamrock Associates v. Texas American Energy*, 517 A.2d 658 (Del. Ch. 1986); *Bohrer v. International Banknote Co.*, 150 A.D.2d 196, 540 N.Y.S.2d 445 (1989). However, there is a paucity of cases addressing the issue before us in the present case—whether a corporation must provide a shareholder a NOBO list even though the corporation does not have in its possession the names of its non-objecting beneficial owners and does not use such information to solicit shareholders.

In *Sadler v. NCR Corp.*, 928 F.2d 48 (2d Cir. 1991), the court concluded that, in light of a peculiar voting requirement of the defendant corporation, the production of a NOBO list could be required even though the corporation did not have such a list in its possession. In reaching its conclusion, the court stated that New York law may not require compilation of a NOBO list routinely. *Id.* at 53. However, in light of the defendant corporation's peculiar rule that directors could be replaced at a special meeting only upon the affirmative vote of eighty-percent of the stockholders, the court concluded that an order requiring the corporation to create and provide a NOBO list was proper. *Id.* We are faced with no such situation in the present case.

On the other hand, in *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 662 F. Supp. 114 (D. Nev. 1987), the court refused to require the corporate defendant to obtain the names and addresses of beneficial owners of its stock in order to create a NOBO list for a shareholder, because the defendant corporation did not already have such information in its possession. This ruling was based

in part upon the view that requiring a corporation to divulge all of the shareholder information *in its possession* would completely effectuate the goal of fairness and equality between a corporation and its shareholders in proxy solicitation. *Id.* at 1147. Therefore, the court refused to order the corporation to "acquire specially any shareholder information which it does not already possess in order to then distribute it to [the shareholder] Bryson." *Id.* at 1148. We find the decision in *Cenergy Corp.* persuasive.

We believe that the legislative intent embodied in N.C.G.S. § 55-16-02(b)(3) is that shareholders be entitled to the information concerning the identity of shareholders which is *possessed by the corporation* in order that they may have the same opportunity as the corporation to communicate with the other shareholders. In order to effectuate that legislative goal, it is necessary that shareholders have access to NOBO lists or other information which the corporation itself has in its possession; however, a shareholder is not granted a right under the statute to require a corporation to obtain NOBO lists or the information necessary to compile NOBO lists when the corporation does not possess or use such information. Since the defendant corporation does not have in its possession a NOBO list or the information needed to compile a NOBO list, it is not required to obtain that information simply because the plaintiff shareholder has requested that it do so for an otherwise proper purpose. Therefore, we affirm that part of the opinion of the Court of Appeals which affirmed the trial court's holding that the defendant corporation was not required to provide the plaintiff with a NOBO list.

III.

[3] In its sole assignment of error, the defendant contends that the Court of Appeals erred in concluding that the plaintiff had satisfied the "reasonable particularity" requirement of N.C.G.S. § 55-16-02(c)(2). This statute provides that a "qualified shareholder may inspect and copy the records described in subsection (b) only if" she describes with reasonable particularity her purpose and the records she desires to inspect. N.C.G.S. § 55-16-02(c)(2) (1990). In her demand, the plaintiff requested

> for the purpose of determining any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company, all records of any final action taken, with or without a meeting,

> by the Board of Directors of the Company, or by a committee of the Board of Directors of the Company while acting in place of the Board of Directors of the Company on behalf of the Company, minutes of any meeting of the shareholders of the Company and records of action taken by the shareholders of the Company without a meeting.

Since no court has yet construed the "reasonable particularity" requirement of N.C.G.S. § 55-16-02(c)(2), we find it helpful to consider the interpretation placed upon the "reasonable particularity" requirement contained in Rule 34(b) of the Federal Rules of Civil Procedure. In determining whether the "reasonable particularity" requirement of this federal rule governing document production has been satisfied, it has been recognized that

> the test must be a relative one, turning on the degree of knowledge that a movant in a particular case has about the documents he requests. In some cases he has such exact and definite knowledge that he can designate, identify, and enumerate with precision the documents to be produced. This is the ideal designation, since it permits the party responding to go at once to his files and without difficulty produce the document for inspection. But the ideal is not always attainable and Rule 34 does not require the impossible. Even a generalized designation should be sufficient when the party seeking discovery cannot give a more particular description and the party from whom discovery is sought will have no difficulty in understanding what is wanted. The goal is that the designation be sufficient to apprise a man of ordinary intelligence what documents are required.

8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2211, at 628-31 (1970). This test is in line with the Official Comment to N.C.G.S. § 55-16-02(c)(2), which provides that under the "reasonable particularity" requirement, a shareholder should make more meaningful statements of purpose and the desired records when "feasible." Whether a shareholder has described his purpose or the desired records with reasonable particularity necessarily depends upon the facts and circumstances of each case.

In the present case, the record does not show that the plaintiff had any specific knowledge of corporate mismanagement or of any improper use of corporate assets at the time that she made the demand. The record shows only that the plaintiff was dissatisfied

with the return on her investment in the defendant corporation. In light of the plaintiff's actual knowledge at the time of the demand, it would not have been feasible to state her purpose with any greater particularity. In addition, the plaintiff specifically described the desired records in her demand. The plaintiff sought "all records of any final action taken by the Board or by a committee of the Board, the minutes of any meeting of the shareholders, and records of action taken by the shareholders of the Company without a meeting." Although the plaintiff's demand was broad, we agree with the Court of Appeals' determination that there is nothing in this record to show that the plaintiff could have described the desired records with any greater particularity than she did, and the defendant company should not have had any trouble understanding what the plaintiff desired. Assuming *arguendo* that N.C.G.S. § 55-16-02(c) controls situations in which a shareholder exercises a common law right of inspection, as well as situations in which the statutory right is being exercised, we conclude that the plaintiff described both her purpose and the desired records with the "reasonable particularity" required by that statute. This assignment of error is overruled.

In conclusion, we agree with the holding of the Court of Appeals that the plaintiff was not entitled to require the defendant to obtain the information needed to prepare a NOBO list or to provide such a list to the plaintiff. We also agree with the holding of the Court of Appeals that the plaintiff described her purpose and the desired records with "reasonable particularity." Accordingly, we affirm the results reached in those parts of the opinion of the Court of Appeals. The Court of Appeals erred, however, in holding that the plaintiff does not have a common law right to inspect the accounting records of the defendant, and we reverse that part of the opinion of the Court of Appeals. This case is remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part; and remanded.

STATE OF NORTH CAROLINA v. TERRY LYNN JORDAN

No. 555A91

(Filed 12 March 1993)

1. **Evidence and Witnesses § 3025 (NCI4th)— impeachment—limited to prior convictions**

The trial court did not err in a murder prosecution where a State's witness testified concerning conversations with defendant in jail by limiting defendant's cross-examination of that witness about prior bad acts to questions under N.C.G.S. § 8C-1, Rule 609 concerning prior convictions. Although defendant contends that he was not able to cross-examine the witness about his recent conversion to the pursuit of justice and his facility with deception, the testimony clearly indicates that defense counsel communicated to the jury the issue of the witness's credibility as effectively as if he had proceeded under N.C.G.S. § 8C-1, Rule 608.

Am Jur 2d, Witnesses §§ 910, 911.

Construction and application of Rule 609(a) of the Federal Rules of Evidence permitting impeachment of witness by evidence of prior conviction of crime. 39 ALR Fed 570.

2. **Homicide § 211 (NCI4th)— first degree murder—sufficiency of evidence—cause of death**

The trial court did not err by denying defendant's motion to dismiss a first degree murder prosecution for insufficient evidence that the shooting of the victim was the proximate cause of death. Although defendant contended that the victim's family and doctor determined that they would not pursue medical options available to them to keep the victim alive, the evidence presented was clearly sufficient to establish that the gunshot wounds inflicted by defendant were the proximate cause of the victim's death. Contradictions in the evidence are for the jury to resolve.

Am Jur 2d, Homicide § 432.

3. **Appeal and Error § 149 (NCI4th)— first degree murder—instructions—error favorable to defendant—no objection —no prejudice**

There was no plain error in a first degree murder prosecution where the court instructed the jury that the State must

prove that defendant did not act in self-defense. Defendant failed to object at trial and derived the benefit of an instruction to which he was not entitled.

Am Jur 2d, Appeal and Error § 545.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by Martin (Lester P., Jr.), J., at the 21 August 1991 Criminal Session of Superior Court, Guilford County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 14 January 1993.

Michael F. Easley, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

MEYER, Justice.

Defendant was indicted by a Guilford County grand jury on 14 January 1991 for the murder of Kimella Denise Hewett. Defendant was tried capitally in Superior Court, Guilford County, in August 1991, and the jury returned a verdict finding defendant guilty of first-degree murder. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment. In accordance with the jury's recommendation, Judge Martin sentenced defendant to life imprisonment. Defendant appeals to this Court as of right.

Evidence presented by the State at defendant's trial tended to show the following facts and circumstances. In the early morning hours of 10 January 1991, Patrick Little spotted Kimella Denise Hewett lying on the sidewalk near the corner of Windley and Hoover Streets in front of a house owned by Robert Fair. Fair testified that he heard three gunshots coming from the Hoover Street side of his house sometime before 2:00 a.m. Little called the police, and Officer Bob Morris with the High Point Police Department arrived at the scene at 2:10 a.m. Morris found Hewett lying face down on the sidewalk. Officer Morris saw on the ground two spent .25-caliber cartridges and one .25-caliber cartridge that had not yet been fired.

Hewett, who was still alive, was taken to the High Point Memorial Hospital. The victim died at 9:45 a.m. on 10 January 1991, almost eight hours after she was found. An autopsy of the

victim's body revealed that the victim had five gunshot entrance wounds, all to the back of the body. Three gunshot wounds were to the victim's back, and two were to the back of the victim's head. The pathologist who performed the autopsy testified that, in her opinion, the cause of death was multiple gunshot wounds.

At the time the victim died, Willie Brooks was the victim's boyfriend and had been dating her for about three months. Prior to that, the victim had been dating the defendant. In November of 1990, Brooks accompanied the victim to court in High Point regarding assault charges filed by the victim against defendant. The case was continued to 14 January 1991. After the November 1990 court appearance, defendant called the victim. Brooks answered the phone, and when defendant asked to speak to the victim, Brooks asked defendant why he would not leave the victim alone. Defendant responded to Brooks, saying, "Let me tell you something. If I can't have Kim, you can't have her. Before I let you have her I'll kill her." Brooks then hung up the phone.

About two or three months prior to the killing, defendant called a co-worker, John Flowers, and asked to borrow his gun. Flowers told defendant he could not use it. Approximately a month before the killing, defendant told Flowers that he and the victim were "having a little difficulty, problems and stuff." Defendant told Flowers that the victim had a new boyfriend and that he was "kind of upset." Defendant told Flowers that if he (defendant) could not have the victim, "nobody else [would]." Defendant said that "he would kill her or something like that."

A few weeks before the killing, defendant showed Michael Lorenzo Brown a pistol and asked Brown where he could get some bullets. Brown told defendant that he could get bullets at Rose's or K Mart. Two weeks prior to the killing, defendant showed Christopher Keith Archie, a co-worker and a relative by marriage, a gun that defendant said he found at a nightclub. Defendant asked Archie how to kill someone, and Archie responded that he did not know. Defendant told Archie that he was going to go to court and did not want to go to jail. Defendant told Archie that he was going to kill someone, but Archie did not think defendant was talking about the victim.

On 27 December 1990, defendant purchased CCI .25-caliber handgun ammunition from the K Mart on North Main Street in High Point. Tina Mixon, the clerk in the sporting and automotives

department who sold defendant the ammunition, took special notice of defendant because she did not often sell handgun ammunition.

On the evening of 9 January 1991, Brooks and the victim had dinner together and went to the home of Brooks' stepmother, who lived approximately three blocks from the victim. At approximately 1:15 a.m. on the morning of 10 January 1991, the victim left to return home, arriving a short time later. Defendant was waiting outside of her house. He pulled out his gun, and the victim said, "Oh, God, what are you going to do?" Defendant responded that he wanted to talk to her. She said "Okay," and they began talking. Defendant asked her where she had been and asked her if she had been with another man. The victim responded in the affirmative, and they began arguing. Defendant attempted to get the victim to go to his car, but the victim said, "If you're going to kill me, you're going to have to do it here." The victim turned around and walked away. Defendant fired the gun, hitting the victim in the back. The victim fell to the ground, and defendant aimed the gun at her head and shot the victim four more times.

Defendant arrived at work later that morning at approximately 3:00 a.m. Defendant was four hours late and appeared nervous. Defendant asked Alvin Jessie Thompson, Jr., a co-worker, numerous questions. Defendant asked Thompson, "How do you get rid of powder burns?" Defendant inquired of Thompson, "If you shot somebody from about five to ten feet, could they—if they didn't die, could they testify against you?" Defendant asked Thompson, "If you shot somebody twice in the head and twice in the back, would they live?" Defendant continued questioning Thompson, saying, "If I was standing here, and somebody was standing there, and you take and shoot somebody like [making a motion as if pointing a gun] . . . . If you shoot somebody and you're standing— . . . pow, pow, pow, would they live or could they testify against you?"

Defendant presented no evidence at the guilt phase of the trial.

Additional facts will be discussed as necessary for the proper disposition of the issues raised by defendant.

[1] By his first assignment of error, defendant contends that the trial court erred by limiting defendant's cross-examination of State's witness Hairston about prior bad acts to questions about prior

convictions under N.C.G.S. § 8C-1, Rule 609. Brian William Hairston, III, testified for the State regarding conversations he had with defendant while he and defendant were in jail. Hairston testified that defendant told him that he and his girlfriend (the victim) were "having a lot of problems before he had did the incident." Defendant told Hairston that the victim had filed some assault charges against him, that he (defendant) had been following her around the city, and that she "was messing around with another guy or something." Hairston testified that defendant was "getting upset about it, and he tried to talk to her about it and she had refused to listen to him so he knocked her off. . . . He knocked her off, killed her. . . . Shot her in the head."

On cross-examination, defense counsel sought to discredit Hairston's testimony by questioning him about prior specific instances of conduct, which defendant argues was probative of truthfulness.

> Q. Let's go back to December. In December you forged a check from the account of Robbie Ingram, didn't you?
>
> A. Yes, I did.
>
> . . . .
>
> Q. And when you were doing that you knew what you were doing, didn't you?
>
> A. Yes, I did.
>
> Q. You knew it was wrong, didn't you?
>
> A. Yes.
>
> Q. You didn't care about Mr. Ingram, did you?
>
> A. I didn't know Mr. Ingram.

At this point, the prosecutor objected, and the trial court sustained the objection. A bench conference was held, and defense counsel argued that the questioning was permissible pursuant to Rule 608(b) of the North Carolina Rules of Evidence. The prosecutor argued that the cross-examination should be limited to prior criminal convictions pursuant to Rule 609 of the North Carolina Rules of Evidence. The trial court agreed and ruled that defense counsel would be limited to questioning Hairston about prior convictions under Rule 609.

A voir dire examination of Hairston was conducted by the prosecution, wherein Hairston stated that he had been convicted of felony larceny, credit card theft, thirteen counts of forgery and uttering, and driving without a license. Following this voir dire examination, defense counsel made an offer of proof. When questioned, Hairston stated that his purpose for coming forward about what defendant had told him was "justice." Hairston admitted that when he committed forgery, credit card theft, and larceny, justice was not his goal.

The jury returned, and defense counsel resumed its cross-examination of Hairston.

Defendant contends that the trial court erred by limiting the cross-examination of Hairston about his prior acts to cross-examination concerning prior convictions under Rule 609 and thereby prevented defense counsel from questioning Hairston about his "recent pursuit of justice and his facility with deception" under Rule 608(b). We disagree. Rule 608(b) reads, in pertinent part:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.G.S. § 8C-1, Rule 608(b) (1992). As the rule provides, it is within the trial court's discretion to allow or disallow cross-examination of a witness about his specific acts if the acts are relevant to his character for truthfulness or untruthfulness. *See also State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986). In *Morgan*, we held that prior to admitting evidence under Rule 608(b), "the trial judge must determine, *in his discretion*, . . . that the probative value of the evidence is not outweighed by the risk of unfair prejudice, confusion of issues, or misleading the jury, and that the questioning will not harass or unduly embarrass the witness." *Id.* at 634, 340 S.E.2d at 90 (emphasis added). 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, 343 S.E.2d 828 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

The record indicates that the trial judge articulated two primary bases for disallowing questioning of Hairston pursuant to Rule 608. First, the court indicated its concern about the amount of time such an inquiry would require:

> THE COURT: . . . . Let's restrict it. I don't want you to go off on a tangent here and be here all day asking this witness all about his past history and that sort of thing. We could be here forever. Let's hold it down to the usual procedure of past convictions.

Second, the trial court stated that defendant's objective could be accomplished under the trial court's ruling:

> MR. HAMMER [Defense Counsel]: I don't plan to question him on every little thing he's ever done because we would be here more than an afternoon, I guarantee you that.
>
> THE COURT: I understand. That's why I would like to, in my discretion, bar you from going into all of that. I think you can accomplish the same purpose by following the usual rule under 609.

We believe that the record clearly indicates that the trial court did not abuse its discretion.

On cross-examination, pursuant to Rule 609, which allows a party to impeach a witness by evidence of prior convictions, Hairston testified that he had been convicted of larceny and credit card theft and that he had been in jail on charges of forgery and uttering. Hairston maintained that his purpose for coming forward and testifying against defendant was "justice." Hairston testified, however, that after informing the district attorney about his conversations with defendant, he was released from jail on a promise to appear. Hairston admitted that despite the fact that he had made a promise to appear and a promise not to break the law, upon his release, new charges were filed against him for first-degree sexual offense, kidnapping, and armed robbery. Hairston further admitted to being charged with selling counterfeit controlled substances, and when Hairston testified that he did not remember whether he was convicted of those charges, defense counsel refreshed his memory as to his voir dire testimony to the contrary. Defense counsel elicited

testimony from Hairston which implied to the jury that he had misrepresented his mental condition while in jail in order to be sent to Dorothea Dix Hospital. Hairston testified that he "wanted to be able to walk around, breathe some air." Hairston further admitted to knowing that he was HIV positive since 1988 and that he was currently being held for a sexual offense on a young man.

Although defendant contends that he was not able to cross-examine Hairston about his recent conversion to the pursuit of justice and his facility with deception, this testimony clearly indicates that defense counsel communicated to the jury the issue of Hairston's credibility as effectively as if he had proceeded under Rule 608. This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court erred in denying defendant's motion to dismiss the charge of first-degree murder for insufficiency of the evidence. By this assignment of error, defendant contends that there was insufficient evidence to show that the shooting of the victim was the proximate cause of her death. Defendant relies on the following portion of testimony given at trial by Russell Blaylock, the neurosurgeon who examined the victim when she was brought to the hospital:

> Q. When did she die?
>
> A. She lived throughout the night and died the next morning.
>
> Q. About what time?
>
> A. I think she was pronounced dead at nine-fifty a.m.
>
> Q. Could anything medically within reason be done for her?
>
> A. No. I discussed with the family the massive nature of her brain injury, and they decided, along with me, that there was no further course that we could take to try to save her life or bring her any kind of useful life.

Defendant argues, based on this testimony, that Dr. Blaylock and the victim's family determined that they would not pursue medical options available to keep the victim alive and therefore that the trial court erred in denying his motion to dismiss for insufficiency. We disagree. The law is well settled that when reviewing challenges to the sufficiency of the evidence in criminal trials, we must view the evidence in the light most favorable to the State. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). The State

receives the benefit of all reasonable inferences, and any contradictions or discrepancies are for the jury to resolve. *Id.* To hold a person criminally responsible for a homicide, the State must prove that his act caused or directly contributed to the death. *State v. Luther*, 285 N.C. 570, 206 S.E.2d 238 (1974).

The evidence presented in this case was clearly sufficient to establish that the gunshot wounds inflicted by defendant were the proximate cause of the victim's death. Pathologist Deborah L. Radish testified that the victim received five gunshot wounds to her back and head. One gunshot wound was to the victim's right upper back. This bullet went into the right chest, through her right lung, through her body to the left, and through the left carotid artery and was recovered from the victim's body below her left collar bone. A second bullet went into and through the muscle tissue of the victim's left back and was recovered from the victim's middle back. A third bullet entered the victim's back and went into the victim's abdominal cavity, through the small intestine several times, and through the large intestine and was recovered from the muscle tissue of the abdominal wall. A fourth bullet chipped the victim's skull. A fifth bullet went into the scalp, through the skull bone on the back of the head, through the left side of the brain, crossing over the midline of the brain towards the front, and exiting the right front of the brain. This bullet was recovered from between the dura and the brain. Dr. Radish testified that, in her opinion, the cause of death was multiple gunshot wounds. This evidence was clearly sufficient to allow the jury to find that the victim's death was caused by the shots fired by defendant into her body and head. Any contention by defendant that the testimony of Dr. Blaylock indicates some independent and intervening cause of the victim's death, even if supported by the evidence, amounts to nothing more than an argument that there exists a contradiction in the evidence. Thus, we conclude that the trial court did not err in denying defendant's motion to dismiss, as " 'contradictions and discrepancies do not warrant dismissal of the case—they are for the jury to resolve.' " *State v. Benson*, 331 N.C. at 544, 417 S.E.2d at 761 (quoting *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982)).

[3] As his final assignment of error, defendant contends that the trial judge committed prejudicial error when, in instructing on the elements of first-degree murder, he instructed the jury that the State must prove that defendant did not act in self-defense.

We disagree. Defendant failed to object to the challenged instruction at trial, and thus, any error must be reviewed under the plain error rule. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). 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 result. *State v. Faison*, 330 N.C. 347, 411 S.E.2d 143 (1991).

In *State v. Bush*, 307 N.C. 152, 297 S.E.2d 563 (1982), after determining that there was no evidence that would have supported a finding that the defendant formed a reasonable belief that it was necessary to kill in order to protect himself from death or great bodily harm, we held:

> [T]he trial court erred in giving the jury any instructions relative to self-defense. This error was favorable to the defendant and clearly harmless to him beyond a reasonable doubt, since it resulted in the jury giving consideration to acquittal upon a ground which the defendant was not entitled to have the jury consider. When a trial court undertakes to instruct the jury on self-defense in a case in which no instruction in this regard is required, the gratuitous instructions on self-defense are error favorable to the defendant even though they contain misstatements of law which would constitute reversible error in a case in which instructions on self-defense were required by the evidence. As the defendant in the present case was not entitled to any jury instructions on self-defense, any mistakes by the trial court in its instructions on self-defense were, at worst, harmless error not necessitating a new trial.

Id. at 161, 297 S.E.2d at 569 (citation omitted). Applying these principles to the case at bar, we conclude that defendant derived the benefit of an instruction to which he was not entitled and cannot demonstrate that this error was prejudicial to him. This assignment of error is overruled.

For the reasons stated above, we find that defendant received a fair trial free of prejudicial error.

NO ERROR.

BAKER CONSTRUCTION COMPANY, INC. v. WESLEY F. PHILLIPS AND DARLENE PHILLIPS

No. 273PA91

(Filed 12 March 1993)

Contractors § 7 (NCI4th)— licensing—general contractor—license not classified for all work—subcontractors properly classified—general contractor not barred from recovery

The trial court erred by granting summary judgment for defendants in an action by a general contractor to collect money due under a construction contract where defendants contended that plaintiff was barred from recovery because its general contractor's license was classified for public utilities and not for highway construction, which plaintiff had subcontracted to general contractors holding licenses classified for highway construction. Nothing in N.C.G.S. § 87-10 requires the general contractor personally to perform all construction work called for by the contract, nor does this section require the general contractor's license to be classified in all types of work called for by a contract. It permits a general contractor to do all the construction work when its license classifications cover each type of work required by the contract, and it also permits a general contractor to play a supervisory role, hiring subcontractors whose licenses are classified for the work in question.

Am Jur 2d, Building and Construction Contracts § 8.

Who is a "contractor" within statutes requiring the licensing of, or imposing a license tax upon, a "contractor" without specifying the kinds of contractors involved. 19 ALR3d 1407.

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

On plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals in an unpublished opinion, *Baker Constr. Co., Inc. v. Phillips*, 102 N.C. App. 822, 404 S.E.2d 369 (1991), pursuant to Rule 30(e), affirming an order entered by Rousseau, J., at the 25 June 1989 Session of Civil Superior Court, Forsyth County. Heard in the Supreme Court 14 February 1992.

Moore & Brown, by B. Ervin Brown, II, David B. Puryear, Jr., and R.J. Lingle, for plaintiff-appellant.

Thomas & Bennett, by Raymond D. Thomas, for defendant-appellees.

Johnston, Taylor, Allison & Hord, by James W. Allison and Greg C. Ahlum, for Carolinas AGC, Inc., amicus curiae.

EXUM, Chief Justice.

Plaintiff contractor seeks to recover money allegedly due under a construction contract between plaintiff and defendants, owners of a residential subdivision, for certain street and utility improvements to defendants' property. Plaintiff claims to have completed the work properly and that defendants owe it $13,501.98. Defendants answered, denying the complaint's material allegations.

Defendants subsequently moved for summary judgment on the sole ground that plaintiff was not licensed to enter into the contract. At the hearing on the motion the forecast of evidence showed that plaintiff held a general contractor's license unlimited[1] as to amount but which classified it as a public utilities contractor. The contract provided for grading and paving of streets and for the installation of under-street water and sewer lines and sewer outfall lines. Plaintiff itself performed the utilities portion of the contract and subcontracted the grading and paving to general contractors who held licenses classified for highway construction.

Defendants contend that because plaintiff's general contractor's license was classified for public utilities and not for highway construction and because the contract called for grading and paving to be done, plaintiff was not licensed to enter into the contract or to perform the work through subcontractors whose licenses were classified for the work; therefore, as an unlicensed general contractor plaintiff is barred from recovery on the contract.

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1. An "unlimited" license means that it is not limited as to the "value" of the project in question. N.C.G.S. § 87-10 provides for three categories of licenses based on the project's "value." At the time of the contract this statute provided: "The holder of an unlimited license shall be entitled to act as general contractor without restriction as to value of any single project; the holder of an intermediate license shall be entitled to act as general contractor for any single project with a value of up to five hundred thousand dollars ($500,000); the holder of a limited license shall be entitled to act as general contractor for any single project with a value of up to one hundred seventy five thousand dollars ($175,000). . . ." The limited license amount was increased to $250,000 in 1989. N.C.G.S. § 87-10 (1989).

The trial court agreed with defendants' contention and allowed defendants' motion for summary judgment. The Court of Appeals likewise agreed and affirmed. We think the lower courts misconstrued the controlling statutes and that under these statutes plaintiff was a duly licensed general contractor authorized to enter into the contract. Because plaintiff subcontracted the highway work to general contractors with licenses classified for highway construction, the fact that plaintiff itself did not hold a license so classified is no bar to recovery for the work performed. We, therefore, reverse.

The forecast of evidence at the hearing on defendants' summary judgment motion showed as follows:

Plaintiff and defendants entered into a contract on 10 April 1988 under which plaintiff was to make certain street and utility improvements to defendants' single-family residential subdivision in High Point. The contract was divided into four parts: section A, grading—$15,686.50; section B, utilities (streets)—$39,800.75; section C, utilities (outfall)—$22,247.00; and section D, paving—$19,962.25.

Plaintiff held an unlimited general contractor's license issued by the North Carolina Licensing Board of General Contractors pursuant to N.C.G.S. § 87-10 (1985) classifying it as a public utilities contractor. Plaintiff subcontracted with others to do the grading and paving portions of the contract. The grading subcontractor, Smith and Jennings, Inc., held "Grading and Excavation, Water & Sewer" license #4995. The paving subcontractor, Thompson-Arthur Paving, held "Unclassified" license #12459.[2] The work was completed in a workmanlike manner.[3]

The trial court, granting defendants' motion for summary judgment, concluded that since plaintiff "did not possess a license

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2. The "Unclassified" license classification includes "Building," "Residential," "Highway," "Public Utilities," and "Specialty" classifications. North Carolina Licensing Board for General Contractors, *Laws and Regulations Applicable to General Contracting in the State of North Carolina*, p. 2 (1990).

Defendants contend that there was no evidentiary showing before the trial court that Thompson-Arthur Paving was licensed. According to the discovery materials before the Court, however, specifically the plaintiff's answers to defendants' interrogatories, Thompson-Arthur Paving was licensed as stated in the text.

3. A dispute did arise between the parties as to whether plaintiff completed the work according to the contract schedule, but this is immaterial as the case is presented to us.

with the classification to construct and/or supervise the construction of public streets," plaintiff was not entitled to recover on its contract with defendants.

The Court of Appeals affirmed, holding that in order to recover on its contract with defendants, plaintiff was required by N.C.G.S. § 87-1 "to have a general contractor[']s license with *both* a public utilities classification and a highway contracting classification." *Baker Constr. Co., Inc. v. Phillips*, 102 N.C. App. 822, 404 S.E.2d 369 (1991).

Article I of Chapter 87, "An Act to Regulate the Practice of General Contracting," (the Act) controls this lawsuit. At the time the parties executed their contract, the Act defined a "general contractor" as follows:

> For the purpose of this Article any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor pursuant to this Article, the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more shall be deemed to be a "general contractor" engaged in the business of general contracting in the State of North Carolina.

N.C.G.S. § 87-1 (1985).[4]

Plaintiff concedes that in bidding on and contracting for the job it was acting as a general contractor under section 87-1 of the Act and required to be licensed as such. Plaintiff agrees that a general contractor who enters a construction contract without a valid license may not recover on the contract, *Brady v. Fulghum*, 309 N.C. 580, 308 S.E.2d 327 (1983), and, if the license expires and becomes invalid during the period of construction, the general contractor is not entitled to recover for work done while it was unlicensed, *Hall v. Simmons*, 329 N.C. 779, 407 S.E.2d 816 (1991).

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4. This section was amended in 1989 to increase the monetary amount from $30,000 to $45,000. The 1989 amendments also added a provision relating to the erection of manufactured modular buildings.

The issue which divides the parties is whether plaintiff was licensed as a general contractor when it entered into and performed the contract.

Section 87-10 of the Act, in addition to providing for the three categories of limitation based on the value of the project and for the various license classifications—building, residential, highway, public utilities, and specialty—sets out the prerequisites for obtaining a license as a general contractor. The 1985 version of this section provided:

> Before being entitled to an examination an applicant must show to the satisfaction of the Board . . . that the applicant is possessed of a good character and is otherwise qualified as to competency, ability, integrity,[5] and that the applicant has not committed . . . any act, which . . . would be grounds . . . for the suspension or revocation of contractor's license, or . . . done any act involving dishonesty, fraud, or deceit, or . . . been refused a license as a general contractor nor had such license revoked, . . . for reasons that should preclude the granting of the license applied for, and . . . has never been convicted of a felony involving moral turpitude, relating to building or contracting, or involving embezzlement or misappropriation of funds or property entrusted to the applicant. . . .
>
> The Board shall conduct an examination . . . of all applicants for license to ascertain the ability of the applicant to make a practical application of his knowledge of the profession of contracting, under the classification contained in the application, and to ascertain the qualifications of the applicant in reading plans and specifications, knowledge of estimating costs, construction, ethics and other similar matters pertaining to the contracting business and knowledge of the applicant as to the responsibilities of a contractor to the public and of the requirements of the laws of the State of North Carolina relating to contractors, construction and liens. If the results of the examination of the applicant shall be satisfactory to the Board, then the Board shall issue to the applicant a certificate to engage as a general contractor in the State of North Carolina, as provided in said certificate, which may be

5. The 1989 amendments to this section added at this point in the section the words, "and financial responsibility." N.C.G.S. § 87-10 (1989).

limited into five classifications as the common use of the terms are known . . . .

Section 87-1 of the Act, which defines the term "general contractor," considered together with section 87-10, quoted immediately above, demonstrates that the legislature thought of general contractors as being engaged in the common calling of bidding on, contracting for, and constructing the listed improvements to real property, which calling the legislature referred to as the "contracting business." These sections also demonstrate that the legislature intended that all those so engaged should meet certain basic prerequisites common to general contracting before being licensed, whatever limitations or classifications were finally placed on the license. These prerequisites, set out in section 87-10, relate to the license applicants' character and integrity, past conduct, criminal record, and knowledge of certain basic skills common to the construction trade. Having met these prerequisites in the manner prescribed by section 87-10, the applicant is entitled to be licensed as a general contractor. Once licensed, the general contractor is entitled, pursuant to section 87-1, to "bid upon . . . construct . . . superintend or manage, on his own behalf or for" others various kinds of construction.

We think it clear from the plain language of these sections of the Act that the legislature intended for a general contractor, having met the prerequisites for and been licensed as such, to be able to bid on and contract for any kind of construction project which involves the listed improvements to real property, notwithstanding its license classification.

The question then is how may the licensed general contractor go about completing the job once its bid has been accepted and the contract executed. This is controlled again by N.C.G.S. §§ 87-1 and 87-10, read together, and considered with a view toward the Act's purpose. "Words and phrases of a statute 'must be construed as a part of a composite whole and accorded only that meaning which other modifying provisions and the clear intent and purposes of the act will permit.' " *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970) (quoting 7 Strong's North Carolina Index 2d, *Statutes* § 5 (1968)). "The purpose of Article 1 of Chapter 87 of the General Statutes . . . is to protect the public from incompetent builders." *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. at 130, 177 S.E.2d

at 280 (quoting *Builders Supply v. Midyette*, 274 N.C. 264, 270, 162 S.E.2d 507, 510-11 (1968)). More specifically, its purpose is "to guarantee 'skill, training and ability to accomplish such construction in a safe and workmanlike fashion.' " *Brady v. Fulghum*, 309 N.C. 580, 584, 308 S.E.2d 327, 330 (quoting *Arnold Construction Company v. Arizona Board of Regents*, 109 Ariz. 495, 498, 512 P.2d 1229, 1232 (1973)).

Given these purposes of the Act and the language of the particular sections involved, we think the legislature intended as follows: If the project is one on which only a licensed contractor is authorized to contract, then any work on particular parts of the project which fall within one of the classifications listed in section 87-10 must be either supervised or performed by a contractor whose license is classified accordingly. This is what the words "undertakes to bid upon or to construct or who *undertakes to superintend or manage* . . . for any person, firm or corporation that is not licensed as a general contractor . . . the construction of . . . any building, . . . etc." plainly mean. (Emphasis supplied.)

Nothing in this section requires the general contractor personally to perform all the construction work called for by the contract, nor does this section require the general contractor's license to be classified in all types of work called for by a contract. It *permits* a general contractor to do all the construction work himself when his license classifications cover each type of work required by the contract. It also permits a general contractor to play a supervisory role, hiring subcontractors whose licenses are classified for the work in question to perform work for which the general contractor's license is not classified.

Indeed, we are satisfied that the language in section 87-1, "who undertakes to superintend or manage, on his own behalf or for any person, firm or corporation that is not licensed as a general contractor," was added for the purpose of permitting a licensed general contractor to perform the work through unlicensed subcontractors provided the general contractor's license is classified for the work to be done. It follows that if the general contractor's license is not so classified, it can perform the work through a subcontractor whose license is classified for the work. In either case the purpose of the Act, to protect the public from incompetent and unskilled work, is fully met.

This interpretation of the Act is not in conflict with *Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E.2d 273. There is language in *Vogel* to the effect that the legislature did not intend the Act to require the licensing of subcontractors. The *Vogel* Court, however, interpreted the facts to mean that the subcontractor in that case, essentially a supplier of labor and materials for "integral parts" of a building, was not, because of the type of work being done, within the definition of a general contractor in section 87-1. A license was therefore not required of either a general contractor or a subcontractor to perform the work in question. The rule in *Vogel*, that a subcontractor need not be licensed, is limited to the facts of that case. It would continue to apply only where the work in question is not the type of work referred to in section 87-1.

When, as here, subcontractors in fact hold licenses as general contractors classified in areas appropriate to the work they are doing, the purposes of Article 1 of Chapter 87—"to guarantee 'skill, training and ability to accomplish such construction in a safe and workmanlike fashion,'" *Brady v. Fulghum*, 309 N.C. at 584, 308 S.E.2d at 330—are amply served, and the letter as well as the spirit of the law is satisfied.

We hold a general contractor whose license is not classified for all work to be performed under the contract is not acting in violation of Article I, Chapter 87, when, as here, he subcontracts work for which his license is not classified to a contractor holding a general contractor's license that is so classified. Since plaintiff's forecast of the evidence shows such facts, summary judgment should not have been entered for defendants on the ground asserted. The decision of the Court of Appeals affirming the summary judgment is, therefore,

Reversed.

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

HERMAN A. WILKINS, EMPLOYEE, PLAINTIFF v. J.P. STEVENS & COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, AND/OR BURLINGTON INDUSTRIES, EMPLOYER; AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 16PA91

(Filed 12 March 1993)

Master and Servant § 68 (NCI3d)— chronic obstructive pulmonary disease—cotton dust not causal—aggravating factor—claim denied

The Industrial Commission properly denied plaintiff's claim for workers' compensation benefits where plaintiff contended that he was rendered totally disabled by chronic obstructive pulmonary disease caused by exposure to cotton dust, but the evidence showed that his exposure to cotton dust played no causal role, but probably aggravated his COPD. Plaintiff's incapacity for work caused by his COPD was not compensable because all the medical evidence tended to show that his work related exposure to cotton dust did not significantly contribute to and was not a causal factor in the development of his COPD. It must be shown that an aggravation itself was causally related to the incapacity for work for the incapacity to be compensable on the theory that conditions of the workplace aggravated a non-occupational disease. It is clear in this case that testimony referring to plaintiff's exposure to cotton dust referred to the impairment of his lungs and not the impairment of his capacity for work. To the extent plaintiff was incapacitated for work, his incapacity resulted from his non-occupational COPD standing alone.

Am Jur 2d, Workers' Compensation §§ 328, 346.

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

On plaintiff's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 100 N.C. App. 742, 398 S.E.2d 66 (1990), affirming the Opinion and Award of the North Carolina Industrial Commission. Heard in the Supreme Court on 9 September 1991.

Taft, Taft & Haigler, by Robin E. Hudson and Thomas F. Taft, for plaintiff-appellant.

Smith, Helms, Mulliss & Moore, by Jeri L. Whitfield and J. Donald Cowan, for defendant-appellees Burlington Industries and American Motorist Insurance Company.

Hunton & Williams, by Randall D. Avram, for North Carolina Citizens for Business and Industry, amicus curiae.

Maupin, Taylor, Ellis & Adams, P.A., by Richard M. Lewis, for North Carolina Textile Manufacturers Association, amicus curiae.

EXUM, Chief Justice.

This is a claim for workers' compensation benefits based on plaintiff's contention that he has been rendered totally disabled by chronic obstructive pulmonary disease (COPD) caused by his long exposure to cotton dust while working for defendant Burlington Industries (Burlington).[1] The evidence before the Industrial Commission (Commission) tended to show that plaintiff's exposure to cotton dust played no causal role in the development of, but probably aggravated, his COPD. The Commission denied plaintiff's claim on the ground that his COPD was not an occupational disease and did not address specifically the aggravation evidence. The Court of Appeals affirmed.

The question before us concerns the legal significance, if any, of the aggravation evidence. We hold that on this record it has no legal significance and affirm the decision of the Court of Appeals, which reached the same conclusion.

The evidence before the Commission included plaintiff's medical records, to which all parties stipulated, various employment and cotton dust level records and reports maintained by Burlington, and the testimony of plaintiff and Dr. Herbert A. Saltzman, a specialist in pulmonary medicine and a member of the Textile Occupational Disease Panel.

Plaintiff testified regarding his work history and conditions at Burlington: He worked at Burlington's Erwin Mill in Durham

1. The Industrial Commission dismissed without objection plaintiff's claim against defendant J.P. Stevens.

from the 1950's until the mill closed in 1986, during which time he was exposed to varying amounts of cotton dust. Because of limited education and job skills, he is not qualified to do anything but manual labor. He cannot do manual labor because of his breathing problems. He has not, therefore, been able to work since he worked at Burlington. He was fifty-six years old at the time of the hearing before the Hearing Examiner in July 1988. He began smoking cigarettes when he was twenty-three or twenty-four years old and smoked a pack a day for about twenty-seven years.

The medical evidence tended to show as follows:

Dr. Edward Williams, plaintiff's personal physician, wrote in his medical records, "I see nothing in this man's past to indicate he has suffered from the toxic effect of cotton fiber." Dr. Saltzman testified that plaintiff's lung condition was "indistinguishable from the changes of chronic bronchitis seen in individuals who smoke cigarettes and never enter a cotton mill." He expressed the opinion, based on "the late onset of [plaintiff's] symptoms [a]nd [on] the lack of . . . the more characteristic historical features of byssinosis" in plaintiff's history, that it was "[m]ore likely than not" that plaintiff's occupational exposure to cotton dust was not a significant causative factor in the development of his chronic obstructive lung disease.

Asked to assume that plaintiff's symptoms developed ten or fifteen years ago and that plaintiff's work history was as plaintiff described it in his testimony, including extremely dusty conditions in the mill in the 50's and 60's, Dr. Saltzman opined that plaintiff's thirty-year exposure to cotton dust "probably did aggravate his chronic obstructive pulmonary disease, but on a more likely than not basis, should not be considered as a primary causative factor." On these facts the aggravation, "[m]ore likely than not," would have been permanent. Later in his testimony, Dr. Saltzman reiterated his opinion that plaintiff's exposure to cotton dust while working at Burlington "[o]n a more likely than not basis, permanently aggravated [plaintiff's] impairment."

Dr. Saltzman testified that individuals with plaintiff's documented level of impairment are not able to engage in "ordinary full time industrial employment." As for plaintiff, Dr. Saltzman said, "I think also, that an industrial type job, eight hours a day, would overtax him."

On cross-examination, Dr. Saltzman confirmed his opinion that plaintiff's cotton dust exposure may have permanently aggravated plaintiff's condition to some degree, but that it was not a significant contributing factor in the development of his chronic obstructive pulmonary disease. Dr. Saltzman again said "that exposure superimposed on [plaintiff's] chronic obstructive pulmonary disease was a significant aggravating factor . . . and produced additional permanent impairment."

When Dr. Saltzman was asked to clarify whether plaintiff's exposure to cotton dust at Burlington was "a significant contributing factor in the development of his chronic obstructive pulmonary disease," Dr. Saltzman replied:

> Your question, as posed, in the development of it, that isn't a causation of his chronic obstructive pulmonary disease. And, my answer to that is that on a more likely than not basis, no. Now the question that was put to me was, as I understood it, was[:] did that long exposure to cotton dust contribute additional impairment to a disease that was already present. The answer to that is yes.

Under the Workers' Compensation Act (the Act), an occupational disease is "[a]ny disease . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C.G.S. § 97-57(13) (1991). We set out in *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), the test for determining whether a workers' compensation claimant's COPD is an occupational disease under N.C.G.S. § 97-57(13) when the claimant had on-the-job exposure to cotton dust and when other non-job-related factors played causal roles in the COPD's development. We said:

> [C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Id. at 101, 301 S.E.2d at 369-70.

Since all the medical evidence tended to show that plaintiff's work-related exposure to cotton dust did not significantly contribute to and was not a significant causal factor in the development of plaintiff's COPD, the Commission correctly concluded under *Rutledge* that plaintiff did not suffer from an occupational disease; therefore, plaintiff's incapacity for work caused by his COPD was not compensable.

The question is, what is the legal effect, in the context of a workers' compensation claim based on claimant's COPD, of evidence that claimant's work-related exposure to cotton dust did not cause, but probably aggravated, the COPD so as to produce additional permanent impairment to claimant's lungs. The answer is that, standing alone, such evidence has no legal effect.

Physical impairment alone is not compensable under the Act. For any physical impairment, including that caused by an occupational disease, to be compensable under the Act, it must be shown that the impairment has caused the claimant to have an incapacity for work. N.C.G.S. §§ 97-2(9), 97-29 and 97-30 (1991). "An occupational disease does not become compensable . . . until it causes incapacity for work. This incapacity is the basic 'loss' for which the worker receives compensation . . . ." *Calder v. Waverly Mills*, 314 N.C. 70, 75, 331 S.E.2d 646, 649 (1985). Conversely, any incapacity for work for which compensation is sought must be causally related to a condition of the workplace. In occupational disease cases, this means that something in the workplace helped to bring about the disease which, in turn, caused the incapacity for work for which compensation is sought. "[T]here must be proof of a causal connection between the disease and the employment." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981). To insure this causal relationship between conditions of the workplace and the claimant's incapacity to work in the context of a COPD claim, it must be shown factually that claimant's "occupational exposure was such a significant factor in the disease's development that without it the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Rutledge v. Tultex Corp.*, 308 N.C. at 102, 301 S.E.2d at 370.

Plaintiff relies on this statement from *Walston v. Burlington Mills*, 304 N.C. 670, 285 S.E.2d 822, *as amended*, 305 N.C. 296, 297, 285 S.E.2d 822, 828 (1982): "Disability [i.e., incapacity for work,

see N.C.G.S. § 97-2(9)] caused by and resulting from a disease is compensable when, and only when, the disease is an occupational disease, or *is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment.*" (Emphasis added.) The sense of the statement is that for an incapacity for work to be compensable under the Act on the theory that conditions of the workplace aggravated a non-occupational disease, it must be shown that the aggravation itself was causally related to the incapacity for work for which compensation is sought. In other words, it must be shown factually that but for workplace aggravation of the non-occupational disease there would not have been the same incapacity for work for which compensation is sought. Stated another way, if the same incapacity for work for which compensation is sought would have resulted because of the non-occupational disease itself, unaggravated by workplace conditions, there can be no compensation under the Act, even if workplace conditions, from a *medical* standpoint, aggravate the disease.

It is clear in this case that the evidence relating to aggravation rose only to the level of showing that plaintiff's non-occupational COPD was aggravated from a *medical* standpoint by his on-the-job exposure to cotton dust. When Dr. Saltzman testified that plaintiff's exposure to cotton dust aggravated his COPD, causing additional permanent impairment, it is clear that he was referring to the impairment of plaintiff's lungs and not to impairment of plaintiff's capacity for work. He testified as follows:

> Q. He had the pre-existing disease? Did then his exposure, in your opinion, did then his exposure to cotton dust aggravate his pre-existing C.O.P.D. to the extent that it worsened that disease, and resulted in further damage to his lungs?
>
> MS. WHITFIELD: Objection.
>
> THE COURT: Overruled.
>
> A. I answered that question on a more likely than not basis. That it did aggravate, probably aggravated his symptoms and probably caused additional permanent impairment.
>
> Q. To his lungs?
>
> A. To his lungs.

Taken as a whole the evidence shows that to the extent plaintiff was incapacitated for work, his incapacity resulted from his

non-occupational COPD standing alone. There is no evidence that his exposure to cotton dust was causally related to this incapacity, even if it might have aggravated, in a *medical* sense, his COPD. Without evidence of a causal relation between the aggravation caused by the cotton dust and plaintiff's total incapacity for work for which he seeks compensation, the aggravation is not legally significant and does not entitle plaintiff to compensation. For these reasons the decision of the Court of Appeals is

AFFIRMED.

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

GRADY LEE BEAVER AND WIFE, NANCY BEAVER v. LARRY P. HAMPTON AND LARRY O. HAMPTON

No. 242PA92

(Filed 12 March 1993)

1. **Appeal and Error § 210 (NCI4th)— notice of appeal—service on attorney for UIM carrier**

Notice of appeal served on the attorney for plaintiffs' underinsured motorist insurance carrier was sufficient to serve the defendants.

Am Jur 2d, Appeal and Error § 320.

2. **Judgments § 661 (NCI4th)— prejudgment interest—payment of liability insurance into court—award on entire judgment**

In an action arising from an automobile collision, the trial court erred in failing to award prejudgment interest on the full amount of the judgment of $30,000 and in awarding prejudgment interest only on the $5,000 remaining due on the judgment after defendants' liability carrier paid the policy limit of $25,000 into court before trial.

Am Jur 2d, Interest and Usury §§ 16, 17.

Interest on damages for period before judgment for injury to, or detention, loss, or destruction of, property. 36 ALR2d 337.

3. Appeal and Error § 447 (NCI4th)— issue not raised in trial court—not within scope of appeal

The issue of the allocation of liability for prejudgment interest between the liability and underinsured motorist carriers, a question of contract construction, was not properly within the scope of the appeal where this issue was not before the trial court.

Am Jur 2d, Appeal and Error §§ 702, 709.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 106 N.C. App. 172, 416 S.E.2d 8 (1992), affirming in part and reversing and remanding in part a judgment for plaintiff Grady Beaver entered by Mills, J., in Superior Court, Iredell County. Heard in the Supreme Court 16 February 1993.

Pressly & Thomas, by Edwin A. Pressly, for plaintiff-appellees.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and Matthew L. Mason, for unnamed defendant-appellant Nationwide Mutual Insurance Company.

PER CURIAM.

Plaintiff Grady Beaver was awarded damages in the sum of $30,000 for personal injuries sustained in an automobile accident caused by the negligence of defendant Larry P. Hampton while operating a vehicle owned by defendant Larry O. Hampton with the permission of the owner. The trial court allowed defendants' liability carrier to pay $25,000, the limits of defendants' liability policy, into the office of the Clerk of Superior Court, and ordered that the liability carrier was relieved of any further duty to provide a defense for defendants or to pay any additional damages. From the jury award of $30,000 the trial court deducted $25,000, the amount previously paid by defendants' liability carrier. The trial court awarded prejudgment interest only on the remaining $5,000.

The Court of Appeals affirmed in part and reversed and remanded in part. *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8 (1992). On 18 November 1992 we allowed discretionary review. We now review two issues arising from plaintiffs' appeal to the Court of Appeals.

[1] First, the Court of Appeals denied defendants' motion to dismiss plaintiffs' appeal pursuant to N.C. R. App. P. 3, holding that notice served on the attorney for plaintiffs' underinsured motorist coverage (UIM) carrier was timely and sufficient. On this issue, we affirm the Court of Appeals.

[2] Second, the Court of Appeals held that the trial court erred in failing to award prejudgment interest on $30,000, the full amount of the judgment. We agree with the Court of Appeals regarding plaintiffs' entitlement to prejudgment interest on the entire judgment, and on that point we also affirm.

[3] We vacate the portion of that court's decision, however, which remanded the case to the trial court to determine the allocation of liability for prejudgment interest between the liability and UIM carriers. This issue, a question of contract construction, was neither raised by the parties in the pleadings in this tort action nor designated among plaintiff-appellants' assignments of error. As this question was not before the trial court, it was not properly within the scope of the appeal to the Court of Appeals. *See* N.C. R. App. P. 10(a), (b).

Accordingly, the decision of the Court of Appeals holding that notice served on the attorney for plaintiffs' UIM carrier was timely and sufficient, and reversing the judgment of the trial court on the issue of plaintiffs' entitlement to prejudgment interest, is affirmed. The cause is remanded to the Superior Court, Iredell County, with instructions to enter a judgment in accord with that decision. The portion of the opinion of the Court of Appeals remanding the issue of allocation of prejudgment interest is vacated.

AFFIRMED IN PART; VACATED IN PART.

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

DANIEL JOEL BAILEY AND LINDA FAY SHULER v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 218PA92

(Filed 12 March 1993)

Insurance § 528 (NCI4th)— automobile insurance—named driver—injuries while passenger—Class II insured—no stacking of UIM coverages of insured vehicles

A person who was named in an automobile policy as a driver and lived in the same household with the insured but was not married or related to the insured and who was injured while a passenger in a vehicle covered by the policy was a Class II insured who could not stack the underinsured motorist coverages on the two vehicles covered by the policy.

Am Jur 2d, Automobile Insurance § 322.

Who is "member" or "resident" of same "family" or "household," within no-fault or uninsured motorist provisions of motor vehicle insurance policy. 96 ALR3d 804.

On discretionary review pursuant to N.C.G.S. § 7A-31, from a decision of the Court of Appeals, 106 N.C. App. 225, 415 S.E.2d 769 (1992), reversing and remanding a judgment entered by Allen (C. Walter), J., in the Superior Court, Buncombe County, on 7 March 1991. Heard in the Supreme Court 17 February 1993.

On 27 August 1988, plaintiff Bailey was driving his 1978 Harley-Davidson motorcycle and plaintiff Shuler was riding as a passenger. The motorcycle being driven by plaintiff Bailey was struck by a vehicle driven by John Wallace Vestal and owned by Tom Ray Vestal. The liability carrier for the Vestal vehicle tendered its $100,000 limit to the plaintiffs for bodily injury sustained by plaintiff Shuler.

The plaintiffs, alleging Shuler's damages to be in excess of $100,000, filed this declaratory judgment action for a determination of plaintiff Shuler's right to stack underinsured motorist coverage contained in plaintiff Bailey's policy of insurance. The policy, issued by defendant Nationwide, covered two vehicles owned by plaintiff Bailey, a 1988 Chevrolet and a 1978 Harley-Davidson motorcycle. The defendant provided underinsured motorist coverage for bodily injury for each covered vehicle in the amount of $100,000 per person

and $300,000 per accident. The policy provided such underinsured coverage as follows: to plaintiff Bailey as the named insured, to the spouse of the named insured if she resides in the same household, to any person related to Bailey by blood, marriage or adoption who was also a resident of Bailey's household, and to any person occupying one of Bailey's covered vehicles at the time of injury. Plaintiff Linda Fay Shuler, who is unrelated to Bailey, was living with Bailey at the time of the accident.

The superior court granted defendant Nationwide's motion for summary judgment. The Court of Appeals reversed and remanded for entry of judgment in favor of plaintiffs. We allowed discretionary review.

Bazzle, Carr & Gasperson, P.A., by Ervin W. Bazzle, for plaintiff appellee.

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

WEBB, Justice.

The question in this case is whether the plaintiff Linda Fay Shuler may stack the underinsured motorist coverages in Mr. Bailey's policy. We hold she cannot.

In *Nationwide Mutual Ins. Co. v. Silverman*, 332 N.C. 633, 423 S.E.2d 68 (1992), which involved facts substantially the same as the facts in this case, we held that a Class II insured could not stack underinsured motorist coverage. A Class II insured is a person who uses an insured vehicle with the consent of the named insured or a guest in such vehicle. A Class I insured is the named insured and, while residing in the same household, the spouse of the named insured and relatives of either.

If Linda Fay Shuler is a Class II insured she cannot stack the two coverages in Mr. Bailey's policy. She contends she is a Class I insured because she was named in the policy as a driver of the vehicle and she lives in the household with the insured. Neither the policy nor the statute, N.C.G.S. § 20-279.21(b)(3), provides that living in the household with the insured without being married to the insured or related to the insured or to the spouse of the insured or being listed on the policy as a driver of the vehicle makes a person a Class I insured. Linda Fay Shuler is

a Class II insured and cannot stack the coverages in Mr. Bailey's policy.

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

REVERSED AND REMANDED.

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

ABELS v. RENFRO CORP.

No. 33PA93

Case below: 108 N.C.App. 135

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 11 March 1993.

BEST v. N.C. STATE BOARD OF DENTAL EXAMINERS

No. 8P93

Case below: 108 N.C.App. 158

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

BLANKLEY v. WHITE SWAN UNIFORM RENTALS

No. 399P92

Case below: 107 N.C.App. 751

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

BOWLIN v. DUKE UNIVERSITY

No. 11P93

Case below: 108 N.C.App. 145

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

BUNCH v. BUNCH

No. 37P93

Case below: 108 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

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

CHEMICAL FINANCIAL CORP. v. STEPHENS

No. 2P93

Case below: 108 N.C.App. 353

Petition by defendant (North Carolina Farm Bureau Mutual Insurance Co.) for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

COVINGTON v. TOWN OF APEX

No. 21P93

Case below: 108 N.C.App. 231

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

HICKMAN v. FUQUA

No. 433P92

Case below: 108 N.C.App. 80

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

IN RE APPEAL OF PHILIP MORRIS U.S.A.

No. 49PA93

Case below: 108 N.C.App. 514

Petition by Cabarrus County for discretionary review pursuant to G.S. 7A-31 allowed 11 March 1993.

IN RE KING

No. 36P93

Case below: 108 N.C.App. 573

Petition by Granville County Department of Social Services for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

J. B. WOLFE CONST., INC. v. HITCHCOCK

No. 45P93

Case below: 108 N.C.App. 573

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

NATIONWIDE MUTUAL INS. CO. v. PREVATTE

No. 444P92

Case below: 108 N.C.App. 152

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

N.C. DEPT. OF TRANSPORTATION v. DAVENPORT

No. 3A93

Case below: 108 N.C.App. 178

Motion by plaintiff to dismiss defendant's appeal on the ground that there was no basis for an appeal in the dissenting opinion denied 11 March 1993.

NOBLES v. FIRST CAROLINA COMMUNICATIONS

No. 439P92

Case below: 108 N.C.App. 127

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

REED v. ABRAHAMSON

No. 23P93

Case below: 102 N.C.App. 318

Petition by defendants (Karen Barwick and Robert Leonard Barwick, Sr.) for writ of certiorari to the North Carolina Court of Appeals denied 11 March 1993. Petition by defendants (Clara

Parks Abrahamson and James Owen Abrahamson) for writ of certiorari to the North Carolina Court of Appeals denied 11 March 1993.

SEXTON v. CRESCENT LAND & TIMBER CORP.

No. 52P93

Case below: 108 N.C.App. 568

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

STATE v. ABSHER

No. 13PA93

Case below: 108 N.C.App. 356

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 11 March 1993.

STATE v. BONNER

No. 423P92

Case below: 108 N.C.App. 353

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 March 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993. Temporary stay dissolved 18 March 1993.

STATE v. BRUNO

No. 46P93

Case below: 108 N.C.App. 401

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 March 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

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

STATE v. McCLEES

No. 82P93

Case below: 108 N.C.App. 648

Petition by defendant for writ of supersedeas and temporary stay denied 11 March 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

STATE v. MORRELL

No. 57P93

Case below: 108 N.C.App. 465

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 11 March 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 11 March 1993.

STATE v. WILLIS

No. 104P93

Case below: 109 N.C. App. 184

Petition by Attorney General for temporary stay allowed 22 March 1993.

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

No. 266PA91

Case below: 102 N.C.App. 824
329 N.C. 504
330 N.C. 122

Motion by all parties to stay further consideration pending settlement negotiations allowed 5 March 1993. The parties are given 30 days to settle the case or notify the Court that it cannot be settled.

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

No. 4P93

Case below: 108 N.C.App. 354

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

TEAGUE v. WESTERN CAROLINA UNIVERSITY

No. 71P93

Case below: 108 N.C.App. 689

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

TUTTERROW v. LEACH

No. 411A92

Case below: 107 N.C.App. 703

Appeal by plaintiffs is dismissed *ex mero motu* by the Court in conference 11 March 1993.

WILKIE v. N.C. DEPARTMENT OF JUSTICE

No. 72P93

Case below: 108 N.C.App. 786

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 11 March 1993.

STATE OF NORTH CAROLINA v. RICHARD LANE HICKS, JR.

No. 75A92

(Filed 8 April 1993)

1. Evidence and Witnesses § 1240 (NCI4th)— murder—confession—custodial

A confession made before *Miranda* warnings were given should have been suppressed in a murder prosecution where officers asked defendant to take a polygraph test to "clear his name" and transported defendant over an hour's drive away from his home in Mocksville to an S.B.I. office in Hickory for the purpose of administering a polygraph test; defendant never was taken home or offered transportation home even though he refused to take the polygraph on three separate occasions during two hours of questioning; and, although the polygraph operator informed defendant during an explanation of the polygraph procedure that he was not under arrest, defendant never was told that he was free to leave. While the findings of fact made by the trial court following the *voir dire* hearing are conclusive and binding if they are supported by competent evidence, the trial court's conclusion that defendant was not in custody when he made his incriminating statement to officers is a conclusion of law and is fully reviewable on appeal. Under the totality of the circumstances, a reasonable person in defendant's position, knowing that he was a suspect in a murder case and having just stated to a law enforcement officer that he wanted to take responsibility for that murder, would feel that he was compelled to stay, not that he was free to leave.

Am Jur 2d, Criminal Law §§ 793, 794; Evidence §§ 545, 551, 555, 557.

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 § 732 (NCI4th)— murder—confession—harmless error analysis

The burden was on the State to establish that the admission of a murder defendant's initial confession, which he made

without benefit of *Miranda* warnings, was harmless beyond a reasonable doubt. Although defendants have the burden of establishing prejudice for errors relating to rights arising other than under the Constitution of the United States by showing a reasonable possibility of a different result had the error not been committed, and although the Supreme Court of the United States has stated that the *Miranda* exclusionary rule provides a remedy even to the defendant who has suffered no identifiable constitutional harm, states are required by *Miranda* to exclude unwarned statements resulting from custodial interrogation only because such an exclusion is required by the Constitution of the United States.

Am Jur 2d, Appeal and Error §§ 798, 799, 800, 803.

Supreme Court cases determining whether admission of evidence at criminal trial in violation of federal constitutional rule is prejudicial error or harmless error. 31 L. Ed. 2d 921.

3. Evidence and Witnesses § 732 (NCI4th)— murder—confession —admission harmless error

The admission of a murder defendant's first confession in violation of the *Miranda* exclusionary rule was harmless beyond a reasonable doubt where defendant admitted his guilt in his second confession, which was properly admitted, gave a more detailed description of the crime, showed officers where he had hidden the gun used to kill the victim, and drew a map showing officers where he had hidden the gun case and ammunition. Furthermore, evidence of a detailed statement by defendant's brother was properly introduced and was consistent with defendant's second confession.

Am Jur 2d, Appeal and Error §§ 798, 799, 800.

4. Evidence and Witnesses § 1227 (NCI4th)— murder—multiple confessions—Miranda violation in first—second admissible

The trial court properly admitted evidence concerning a murder defendant's second confession, made voluntarily after a waiver of rights, where a first confession was taken in violation of *Miranda*. Although defendant was in custody when he made his first, unwarned incriminating statement, that confession was made without coercion or other circumstances intended to undermine the exercise of his free will. Therefore, under *Oregon v. Elstad*, 470 U.S. 298, the officers' failure

to advise defendant of his *Miranda* rights before he made his first confession did not taint his subsequent waiver of his constitutional rights.

Am Jur 2d, Criminal Law § 797; Evidence § 537.

The progeny of Miranda v. Arizona in the Supreme Court. 46 L. Ed. 2d 903.

5. Evidence and Witnesses § 1227 (NCI4th)— murder—multiple confessions—state constitutional test

The admission of a second confession to murder, made after *Miranda* warnings and a voluntary waiver of rights, did not violate the Constitution of North Carolina where a first confession had been obtained before *Miranda* warnings were given. The test applied by the Supreme Court of the United States in *Oregon v. Elstad*, 470 U.S. 298, is adopted for determining whether Article I, sections 19 and 23 of the North Carolina Constitution require the suppression of a defendant's second confession, made after proper warnings and the defendant's voluntary waiver of his constitutional rights, when that confession follows an earlier confession which must be excluded under *Miranda*.

Am Jur 2d, Criminal Law §§ 941, 988; Evidence § 537.

6. Evidence and Witnesses § 162 (NCI4th)— murder—defendant's threats to potential witness—relevant—failure to hold voir dire—no error

The trial court did not err in a murder prosecution by overruling defendant's objection and by denying his request for a voir dire when the prosecutor asked defendant's brother "What, if anything, threatening did your brother do to you about whether or not you were to tell the truth or testify about this matter?" The form of the question made clear that the expected testimony would relate to threats made by defendant regarding actions defendant would take if his brother told the truth or testified against him. An attempt by a defendant to intimidate a witness in an effort to prevent the witness from testifying or to induce the witness to testify falsely in his favor is relevant to show defendant's awareness of his guilt. Given the specific basis for the defendant's objection

and request for a voir dire hearing, the trial court did not err by overruling the objection and denying the request.

Am Jur 2d, Evidence § 293.

Appeal of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence for first-degree murder, entered on 2 July 1991 by Freeman, J., in Superior Court, Alexander County, upon a jury verdict of guilty. Heard in the Supreme Court on 12 January 1993.

Michael F. Easley, Attorney General, by Robert J. Blum, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for the defendant.

MITCHELL, Justice.

The defendant was indicted by the grand jury of Davie County on 8 October 1990 for the first-degree murder of Misti Ann Mathena. The defendant's motion for a change of venue was allowed, and the case was transferred to Alexander County. The defendant was tried capitally, and the jury found the defendant guilty of first-degree murder. Following the capital sentencing proceeding, the jury recommended that the defendant be sentenced to life imprisonment. The trial court sentenced the defendant to life imprisonment on 2 July 1991.

Before trial, the defendant moved to suppress certain incriminating statements which he had made to law enforcement officers. Following a hearing, the trial court made findings of fact and denied the defendant's motion to suppress.

The defendant presented no evidence at trial. The State's evidence tended to show the following. The fourteen-year-old victim, Misti Ann Mathena, was found dead in her family's mobile home in Mocksville, North Carolina, at approximately 4 p.m. on 4 September 1990. Law enforcement officers found the victim lying on her back on the living room floor. She had been shot three times: once in the head, once in the upper back, and once in the elbow. In their search of the residence, investigators discovered two .22-caliber shell casings, a live .22-caliber round, the victim's diary, and several love notes which referred to the defendant, Richie Hicks, and the victim.

Special Agent William R. Foster of the State Bureau of Investigation testified that he and Detective Lieutenant John Stephens of the Davie County Sheriff's Department interviewed the seventeen-year-old defendant in Foster's car, near the defendant's residence, at 12:08 a.m. on 5 September 1990. The defendant's family lived near the victim's family in the La Quinta trailer park. During this interview, the defendant stated that he and the victim had dated for about eight months and that they had broken up on Saturday, 1 September 1990, because they had been spending too much time together. The defendant explained that he had shared a bedroom with the victim in her parents' trailer until 31 August 1990, when the victim's mother had "kicked him out." He stated that he had returned to the victim's home on 3 September 1990 in order to collect his belongings. He talked to the victim at that time. He also told Agent Foster that the victim had started dating another boy a few days before her death. The defendant stated that he did not walk past the victim's trailer on the morning of her death, that he returned home from school that day at about 3 p.m., and that he knew nothing of the killing until a neighborhood child reported it to him. When asked if he knew of anyone who might want to hurt the victim, he indicated that an ex-boyfriend of the victim's sister had threatened the family in the past and that the ex-boyfriend had been seen in the trailer park on the day before the killing.

Agent Foster next saw the defendant at 6 p.m. on 5 September 1990. The defendant was standing outside the victim's trailer at this time, and Agent Foster asked him to retrace the path that he had taken on his way to the school bus the day before. The defendant agreed. After the defendant showed Agent Foster where he had walked on the morning of the killing, Agent Foster took the defendant back to the trailer where he had picked him up and let him out of the car.

At about noon on Thursday, 6 September 1990, Agent Foster and Lieutenant Stephens located the defendant at a funeral home in Mocksville. The defendant was with Bobby Mathena, the victim's brother. The officers asked the defendant and Bobby Mathena to come to the sheriff's department for further questioning, and the two boys agreed. About ten minutes later, the defendant and Bobby Mathena arrived at the sheriff's department in Bobby Mathena's car. The defendant repeated his earlier account of his whereabouts and contacts with the victim in the days preceding her death,

again stating that he had gone to school as he normally did on the day of her death and that he did not go anywhere near the victim's trailer on the morning of 4 September 1990.

During this interview at the sheriff's department, Agent Foster told the defendant that, because he and the victim had just broken up before the murder, he was a possible suspect. Agent Foster asked the defendant if he would cooperate by taking a polygraph test to eliminate himself as a suspect. The defendant stated that he wanted to cooperate, but that he wanted to talk to his father before agreeing to take the polygraph test. Agent Foster told the defendant that, because he was a minor, the officers would have to get his parents to sign a parental consent form before he could take the polygraph test. The defendant agreed that they should talk to his father. The officers took the defendant to his family's home, where the defendant's father signed a polygraph consent form at approximately 1 p.m.

After the defendant's father had signed the polygraph consent form, Agent Foster and Lieutenant Stephens took the defendant to the S.B.I. office in Hickory to take the polygraph test. They arrived in Hickory at 3 p.m., and the defendant waited in the lobby of the S.B.I. office while the officers went through a security door and into the area where individual offices were located. At about 5 p.m., Agent Foster asked the defendant to follow him through the security door and into the office of Special Agent J. L. Jones, the polygraph officer.

Agent Foster left the defendant in that office and next saw him at about 6:15 p.m., when the defendant walked down the hall and asked to speak to Agent Foster privately. The defendant told Agent Foster that Special Agent Jones had called him a liar and had made him mad. The defendant then stated that he was sorry and asked to speak to Agent Jones again. Agent Foster asked Agent Jones to come into the room and talk to the defendant, and Agent Foster left.

Agent Foster next saw the defendant at approximately 6:55 p.m., when he saw Agent Jones and the defendant walk outside into the parking lot. Jones and the defendant talked and then came back into the building, and Agent Foster followed them into the computer room. Over the defendant's objection, Agent Foster testified that at this time, the defendant was stating that he wanted to take the blame and that he was "responsible for it." He said

that he had shot the victim and told the officers that he would sign whatever they wanted him to and that he wanted to die and be with the victim. Agent Foster and Lieutenant Stephens told the defendant that they could not just write out a statement and have him sign it, and they told the defendant that they wanted the truth about what had happened. The defendant asked if he could take a polygraph test to prove that he had killed the victim, and Agent Foster left to see if he could find someone other than Agent Jones to administer a polygraph test.

At approximately 8:40 p.m., Agent Foster walked back into the computer room, and Lieutenant Stephens informed him that the defendant had confessed to the killing and had stated that his brother, Danny Hicks, had known that the defendant had planned to commit the murder and that he had carried out those plans. The defendant had told the officers that he took a rifle and hid it in the woods the day before the murder. On the morning of 4 September 1990, he went into the trailer, shot the victim, threw the rifle into some weeds outside the trailer, and then went on to school. After school that afternoon, he and Danny Hicks buried the rifle case and the rest of the ammunition.

Agent Foster asked the defendant if he wanted to tell the complete truth, and the defendant stated that he did. Lieutenant Stephens then advised the defendant of his constitutional rights. After waiving his rights, the defendant made the following statement.

The defendant said that he and the victim broke up on Saturday, 1 September 1990. He called her on Sunday at about noon, and she told him that she was dating someone else. When he hung up the telephone, he hit a wall in the kitchen and made a hole in it.

The defendant stated that on Monday, 3 September 1990, he went to the victim's trailer to gather up some of his belongings. After he left her trailer, he went home and called the victim. She told him not to call her any more; when he asked her if making love meant anything to her, she said yes, and again told him not to call her any more. The defendant told the officers that at that point, he started thinking about another boy touching her, and he "went to pieces." He went into his brother Danny's bedroom and told Danny that he could not handle it and that he was going to have to get rid of her. Danny said that he "didn't give a sh--."

The defendant stated that Danny and the victim had never gotten along.

The defendant said that he told Danny that he was going to leave the gun in the woods, and Danny went with him. They left the gun in the woods behind the victim's house at about 9:45 or 10:00 p.m. The defendant told Danny that he was going to shoot the victim at her home the next morning.

The defendant stated that on the morning of 4 September 1990, he and Danny left the house at about 6:15 a.m. Before they got to the victim's trailer, they split up. The defendant turned and went into the woods, and Danny went to the bus stop. The defendant walked into the woods behind the victim's home and waited for her sisters to leave. He knew the sisters were gone when he heard the bus go by. He then picked up the rifle and entered the Mathenas' trailer through the back door. He turned on the stereo in the victim's room and started to walk toward the living room, where he met the victim. The defendant stated that they looked at each other without saying anything, and he shot her. She looked at him and turned around, and he shot her in the back. She fell to the floor and put her hands over her face, and he shot her in the head. The defendant pointed to his right temple area to describe to the officers where he had shot her. He stated that he thought that he had shot her three times.

The defendant stated that he went out the back door and ran into the woods behind the trailer. He crossed two barbed wire fences, and he tossed the gun over a fence into some weeds. He took off the winter gloves that he was wearing and threw them into the woods. One glove landed in a tree, and he did not bother to get it out.

The defendant stated that he then caught a ride to school with a friend. When he got to school, he waited for Danny. When Danny saw him, Danny asked, "Richie, did you do it?" The defendant answered that he had and asked Danny what he thought about it. Danny responded, "I don't give a sh--." Danny asked where he had shot the victim, and the defendant responded by pointing to his head.

When the boys got home from school, the defendant told Danny that they had to get rid of the gun case and bullets, which were hidden in a pump house. Danny agreed with the defendant, and

the two of them went to the pump house. The defendant stated that he and Danny buried the gun case by a lake.

When asked why he shot the victim, the defendant said that when he and Misti were going together, his mother had tried to get the two of them to love her. He and his mother never got along. When he told his mother that he and Misti were breaking up, his mother was not interested in him any more. She started spending time with Misti, which made him jealous.

The defendant also stated that he was in the trailer for a few minutes before he shot Misti. He stated that he was afraid that if he did not go through with the shooting, she would tell on him and he would be arrested for pointing a gun at her. He said that he was sorry that this had happened and that, if he got a chance, he was going to kill himself the way the victim had been killed.

After the defendant made this statement, the officers arrested him and took him back to Mocksville. That night, the defendant showed police where he had hidden the rifle, and the rifle was recovered. A fired cartridge was jammed in the rifle when it was found. The next day, officers returned to the site and located the gloves which the defendant had discarded. The defendant also drew a map to show officers where he had hidden the gun case and ammunition.

A pathologist testified that the victim suffered three gunshot wounds and died as a result of gunshot wounds in the forehead and upper back. Two bullets were recovered from the body. A firearms expert testified that he could not conclusively determine whether the recovered bullets had been fired from the defendant's gun. The expert did testify that two empty cartridge casings found at the scene of the killing were fired from the defendant's gun.

Special Agent Steven Cabe of the State Bureau of Investigation testified that the defendant's fourteen-year-old brother, Danny Hicks, had been charged with murder, accessory to murder, and aiding and abetting the murder of Misti Mathena, and that Danny Hicks' case was pending in Juvenile Court. Agent Cabe testified on direct examination that Danny Hicks had made a statement on 6 September 1990 at 10 p.m. The defendant's counsel, on cross-examination, asked Agent Cabe to read that statement. Agent Cabe read the 6 September 1990 statement of Danny Hicks, which was

consistent with the incriminating statements made by the defendant and previously admitted into evidence. Danny also told the officers during this statement that he had wanted to call the police but had been afraid of what the defendant might do to him.

Agent Cabe testified that he talked to Danny Hicks again on 7 September 1990 at 12:35 a.m. During this interview, Danny stated that he and the defendant had gone to the pond behind their father's house when they returned from school on the afternoon of the shooting and that the defendant had buried the gun case then.

In an earlier interview on 5 September 1990 at 5:30 p.m., before the defendant was arrested, Danny had told officers that the defendant was with him on the morning of 4 September 1990 and could not have killed the victim. Danny also had told the officers that he had heard that an ex-boyfriend of one of the victim's sisters had threatened the Mathena family.

Danny Hicks testified at trial that the defendant had threatened him and had told him that, if he told anyone about what the defendant had done, the defendant would deny it and would kill him. Danny testified that the defendant had knocked him to the floor, was straddling him and was holding a steak knife in the air when he made these threats.

The defendant assigns as error the admission into evidence of two incriminating statements which he made to law enforcement officers at the S.B.I. office in Hickory on 6 September 1990. He argues that the first incriminating statement, which he made after speaking with Agent Jones in the parking lot and before he was advised of his constitutional rights, was admitted into evidence in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966). He also contends that his second statement was admitted into evidence in violation of the rule set forth in *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985), and in violation of Article I, sections 19 and 23 of the Constitution of North Carolina.

Before trial, the trial court held a *voir dire* hearing to determine the admissibility of these two incriminating statements. After hearing evidence presented by both the defendant and the State, the trial court made the following findings of fact regarding the defendant's incriminating statements to police officers.

The trial court found that after the defendant had reported voluntarily to the sheriff's department for questioning, officers asked him to take a polygraph test "in order to clear his name," and he agreed. Officers transported the defendant from Mocksville to Hickory for the purpose of administering a polygraph test; this trip took approximately two hours, although the officers did stop for lunch on the way. After the officers and the defendant arrived at the S.B.I. office in Hickory at approximately 3 p.m., the defendant waited in the lobby until approximately 5 p.m., when Agent Jones, a polygraph operator, arrived. The defendant told Agent Jones at least three times that he did not want to take a polygraph test. No evidence was presented at the *voir dire* hearing which indicated, and the trial court did not find, that officers ever offered to take the defendant home or that the defendant ever was told that he was free to leave.

The trial court found that after the defendant refused to take the polygraph test the third time, he told Agent Jones that he would like to go outside. During his conversation with Agent Jones in the parking lot, the defendant told Jones that he would like to take responsibility for the killing of the victim. The defendant and Agent Jones then came back inside the building, and Agent Jones told Agent Foster and Lieutenant Stephens that the defendant wanted to confess to the crime. When the defendant refused to elaborate on the details of the crime, the officers told him that he would have to tell them what had happened and any details that he knew. The defendant then gave them details of what had happened and demonstrated how he had shot the victim. After the defendant explained details of the murder, the officers advised the defendant of his constitutional rights, and the defendant then gave another confession.

Based on its findings of fact, the trial court concluded that, although the defendant had been questioned prior to his first incriminating statement to officers, he was not in custody when he made that statement. The court further concluded that after the defendant was warned of his rights at 8:45 p.m., he voluntarily, knowingly, and intelligently waived those rights and voluntarily confessed to the crime.

[1] While the findings of fact made by the trial court following the *voir dire* hearing on the admissibility of his confessions are conclusive and binding on this Court if they are supported by

competent evidence, the trial court's conclusion that the defendant was not in custody when he made his first incriminating statement to officers is a conclusion of law and is fully reviewable by this Court on appeal. *State v. Mahaley*, 332 N.C. 583, 592-93, 423 S.E.2d 58, 64 (1992). In the present case, the trial court's findings of fact are supported by ample evidence presented in the *voir dire* hearing. We are thus bound by those findings of fact. Upon reviewing the trial court's conclusions of law, however, we conclude that the trial court erred in holding that the defendant's first confession was admissible. We hold that the facts as found by the trial court require the conclusion that the defendant was in custody when he made the first incriminating statement and that this statement therefore was admitted in violation of *Miranda*.

In *Miranda*, the Supreme Court of the United States prohibited the prosecution's use of statements "stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444, 16 L. Ed. 2d at 706. In the present case, the question is whether the defendant was in custody when he made an incriminating statement before he had been advised of his constitutional rights.

As we frequently have stated in the past, "the test for whether a person is 'in custody' for *Miranda* purposes is whether a reasonable person in the suspect's position would feel free to leave" or would feel "compelled to stay." *State v. Torres*, 330 N.C. 517, 525, 412 S.E.2d 20, 24 (1992), *cited in State v. Mahaley*, 332 N.C. 583, 591, 423 S.E.2d 58, 63 (1992); *see United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980); *Oregon v. Mathiason*, 429 U.S. 492, 494-95, 50 L. Ed. 2d 714, 719 (1977). Applying this objective test requires us to consider the particular facts and circumstances of each case. *Mahaley*, 332 N.C. at 591, 423 S.E.2d at 63 (citing *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580 (1982)).

We hold that a reasonable person in the defendant's position would have felt that he was in custody and was not free to leave. Officers asked the defendant to take a polygraph test to "clear his name" and transported the defendant over an hour's drive away from his home in Mocksville to an S.B.I. office in Hickory for the purpose of administering a polygraph test. Although he refused to take the polygraph on three separate occasions during

two hours of questioning, the defendant never was taken home or offered transportation home. *See State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 186 (1992) (defendant not in custody when, during previous, similar interview, he was taken home upon refusing to take polygraph); *Davis*, 305 N.C. at 415-17, 290 S.E.2d at 584-85 (same). Additionally, although the polygraph operator informed the defendant during an explanation of the polygraph procedure that he was not under arrest, the defendant never was told that he was free to leave. *See Torres*, 330 N.C. 517, 526, 412 S.E.2d 20, 25; *see also Phipps*, 331 N.C. at 443, 418 S.E.2d at 186 (defendant not in custody when he was told that he was free to leave). Under the totality of the circumstances, a reasonable person in the defendant's position, knowing that he was a suspect in a murder case and having just stated to a law enforcement officer that he wanted to take responsibility for that murder, would feel that he was compelled to stay, not that he was free to leave. We conclude that the defendant was in custody for *Miranda* purposes immediately following his statement to Agent Jones that he would "take responsibility" for the killing and that, after he made this statement, the defendant should have been informed of his *Miranda* rights before officers questioned him further. The confession resulting from the unwarned, custodial interrogation following his statement that he would "take responsibility" for the killing should have been suppressed.

[2] The trial court's admission into evidence of the defendant's first confession in violation of *Miranda* is subject to harmless-error analysis. Before we can conduct such analysis, however, it is necessary that we determine which of the standards of harmless-error review contained in N.C.G.S. § 15A-1443 must be applied to this error. In several opinions this Court has implied that, where the prophylactic *Miranda* rule has been violated, the State must bear the burden of proof applicable under N.C.G.S. § 15A-1443(b) to errors arising under the Constitution of the United States, which requires the State to demonstrate that the error was harmless beyond a reasonable doubt. *E.g., State v. Greene*, 332 N.C. 565, 578, 422 S.E.2d 730, 737 (1992) (concluding that admission of a confession taken in violation of *Miranda* was harmless beyond a reasonable doubt, without directly holding that standard to be required); *State v. Washington*, 330 N.C. 188, 410 S.E.2d 55 (1991) (*per curiam* opinion reversing the decision of the Court of Appeals in *State v. Washington*, 102 N.C. App. 535, 402 S.E.2d 851 (1991),

on the basis of a dissent filed in the Court of Appeals which applied the heightened standard of review of N.C.G.S. § 15A-1443(b)); *State v. Crawford*, 301 N.C. 212, 270 S.E.2d 102 (1980) (admission of confession, even if in violation of *Miranda*, was harmless beyond a reasonable doubt); *State v. Siler*, 292 N.C. 543, 234 S.E.2d 733 (1977) (admission of confession taken in violation of *Miranda* held harmless beyond a reasonable doubt, without directly holding that standard required). In none of those cases, however, did we analyze why the standard of harmlessness "beyond a reasonable doubt" was the appropriate standard to apply. We attempt to do so now.

It is well established that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 710-11 (1967); N.C.G.S. § 15A-1443(b) (1988). On the other hand, for errors relating to rights arising other than under the Constitution of the United States, the defendant has the burden of establishing prejudice by showing that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (1988). Therefore, if the admission of this defendant's first confession, given without the benefit of *Miranda* warnings, did not violate the Constitution of the United States, the State need not establish harmlessness beyond a reasonable doubt and, instead, the defendant must prove prejudice.

The Supreme Court of the United States has stated that:

> The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer Miranda warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under Miranda. Thus, in the individual case, Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. See New York v Quarles, supra at 654, 81 L Ed 2d 550, 104 S Ct 2626; Michigan

v Tucker, 417 US 433, 444, 41 L Ed 2d 184, 94 S Ct 2357 (1974).

Oregon v. Elstad, 470 U.S. 298, 306-307, 84 L. Ed. 2d 222, 230-31 (1985) (footnote omitted). Despite our giving the greatest deference to the Supreme Court of the United States and its decisional law, we are unable to believe that this statement in *Elstad* means what it seems so clearly on its face to declare. We respectfully suggest that even the Supreme Court of the United States does not have the constitutional authority—although it may have the raw power—to require that this or any other state court exclude evidence from a criminal trial, unless the use of that evidence violates the Constitution of the United States. *Elstad*, 470 U.S. at 370-71, 84 L. Ed. 2d at 272 (Stevens, J., dissenting). Accordingly, we must assume that states are required by *Miranda* to exclude unwarned statements resulting from custodial interrogation only because such an exclusion is required by the Constitution of the United States. Based on our assumption that the *Miranda* exclusionary rule is required by the Constitution of the United States, we conclude that the burden is upon the State in this case to establish that the admission of this defendant's first confession, which he made without benefit of *Miranda* warnings, was harmless beyond a reasonable doubt.

[3] We next turn to the issue of whether the admission of this defendant's first confession in violation of the *Miranda* exclusionary rule was harmless beyond a reasonable doubt. In his second confession, which we will conclude at a later point in this opinion was properly admitted at trial, the defendant admitted his guilt and gave a more detailed description of the crime than he had given in his first confession. The defendant also showed the officers where he had hidden the gun he had used to kill the victim, which was recovered, and drew a map showing officers where he had hidden the gun case and ammunition. Furthermore, evidence of a detailed statement made by the defendant's brother, Danny Hicks, was properly introduced and was consistent with the defendant's second confession. Considering the extremely incriminating evidence properly admitted at trial, we conclude that the admission of the defendant's first confession in violation of the *Miranda* exclusionary rule was harmless beyond a reasonable doubt.

[4] The defendant next argues that his second confession, made after he had been given the *Miranda* warnings and had waived

his constitutional rights, was admitted into evidence in violation of the rule established by the Supreme Court of the United States in *Elstad*. The defendant further argues that the admission of this second confession violated his rights under Article I, sections 19 and 23 of the Constitution of North Carolina. We disagree with these arguments.

In *Elstad*, the Supreme Court of the United States held that a defendant's waiver of rights and confession, following an initial confession taken in violation of *Miranda*, is tainted if the initial confession resulted in fact from "deliberately coercive or improper tactics." 470 U.S. at 314, 84 L. Ed. 2d at 235. The Court further held, however, that such subsequent confessions, made by the defendant after a voluntary and informed waiver of rights, need not be suppressed unless his first confession was both taken in violation of *Miranda* and taken in violation of the defendant's constitutional right against compelled self-incrimination. *Id.* at 307-309, 84 L. Ed. 2d at 231-32. In *Elstad*, the Court stated that

> [i]t is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 309, 84 L. Ed. 2d at 232, *quoted in State v. Barlow*, 330 N.C. 133, 139, 409 S.E.2d 906, 910 (1991). Thus, if the defendant in fact made his first statement voluntarily and without actual coercion, his subsequent voluntary and informed waiver is untainted, and the statement which he made after receiving *Miranda* warnings and voluntarily waiving his rights may properly be admitted into evidence.

When determining the voluntariness of a confession, we examine the "totality of the circumstances surrounding the confession." *Barlow*, 330 N.C. at 140-41, 409 S.E.2d at 911 (citing *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986)). The following factors are among those to be considered in determining whether a confession was voluntarily made: (1) whether the defendant was in custody when he made the statement; (2) the mental capacity of the defendant; (3) the presence of psychological coercion, threats, or promises; and (4) physical torture. *Id.* (citing *State v. Gray*, 268 N.C. 69, 78, 150 S.E.2d 1, 8 (1966), *cert. denied*, 386

U.S. 911, 17 L. Ed. 2d 784 (1967)). Also properly considered are the physical environment in which the interrogation was conducted and the manner of the interrogation. *Elstad*, 470 U.S. at 315, 84 L. Ed. 2d at 236.

Although the defendant was in custody when he made his first, unwarned incriminating statement, the custodial situation was not inherently coercive. *See Barlow*, 330 N.C. at 141, 409 S.E.2d at 911. Prior to being taken into custody, the defendant voluntarily reported to the sheriff's department for questioning and voluntarily accompanied officers to Hickory for polygraph testing. When explaining the polygraph procedure to the defendant, Agent Jones advised the defendant that he was not under arrest. Evidence presented by the defendant at the suppression hearing did indicate that the defendant had attended summer school to catch up in school and that he had not done well in school since he was a junior-high-school student. However, he was in the twelfth grade at the time of the murder and had never repeated a grade. The trial court found, based upon competent, substantial evidence, that officers used no threats, promises, or force during the questioning of the defendant and that no weapons were displayed during the questioning. Furthermore, officers bought lunch for the defendant before taking him to the S.B.I. office in Hickory, and the defendant was allowed to sleep during the car ride and while waiting for the polygraph operator to arrive. Based on the totality of the circumstances, we conclude that the defendant's unwarned confession was made without coercion or other circumstances intended to undermine the exercise of his free will. Therefore, under *Elstad*, the officers' failure to advise the defendant of his *Miranda* rights before he made his first confession did not taint his subsequent waiver of his constitutional rights. The trial court properly admitted evidence concerning the defendant's second confession, which he made voluntarily after he had been advised of his constitutional rights and had voluntarily waived those rights.

[5] The defendant also argues that, even if his second confession is admissible under *Elstad*, Article I, sections 19 and 23 of the Constitution of North Carolina require its suppression. We note that, "[i]n construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984) (citing *White v. Pate*, 308 N.C. 759,

304 S.E.2d 199 (1983); *Bulova Watch Co. v. Brand Distributors, Inc.*, 285 N.C. 467, 206 S.E.2d 141 (1974)); *see also State v. Carter*, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988). We do, however, give great weight to decisions of the Supreme Court of the United States interpreting provisions of the Constitution of the United States which are parallel to provisions of the State Constitution to be construed. *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260.

Article I, section 19 of the Constitution of North Carolina provides in part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." In this context, the term "law of the land" is synonymous with the term "due process of law" in the Constitution of the United States, but when applying the "law of the land" clause this Court is not bound by decisions of the Supreme Court of the United States interpreting the Fourteenth Amendment. *Bulova Watch Co.*, 285 N.C. at 474, 206 S.E.2d at 146; *see University of North Carolina v. Foy*, 5 N.C. (1 Mur.) 57 (1805).

Article I, section 23 of the Constitution of North Carolina provides that

> [i]n all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

Although the language of this provision differs from the language of the Fifth Amendment to the Constitution of the United States, both provisions guarantee an accused the right to be free from compelled self-incrimination.

The proper tests to be used in resolving questions arising under the Constitution of North Carolina can be determined with finality only by this Court. *Arrington*, 311 N.C. at 643, 319 S.E.2d at 260. However, we adopt the test applied by the Supreme Court of the United States in *Elstad* for our use in determining whether Article I, sections 19 and 23 of the Constitution of North Carolina require the suppression of a defendant's second confession, made after proper warnings and the defendant's voluntary waiver of

his constitutional rights, when that confession follows an earlier confession which must be excluded under *Miranda*. When the *Elstad* test is applied in the present case, the defendant's claim that the admission of his second confession violated his rights under the Constitution of North Carolina is without merit.

[6] The defendant next assigns as error the trial court's failure to hold a *voir dire* hearing to determine the admissibility of testimony to be given by the defendant's brother, Danny Hicks. At trial, the State called Danny Hicks as a witness. During the direct examination of Danny Hicks, the prosecutor asked, "What, if anything, threatening did your brother do to you about whether or not you were to tell the truth or testify about this matter?" The defendant objected and moved for a *voir dire* hearing on the admissibility of Danny Hicks' response to this question; the defendant based this objection and request for a *voir dire* solely on the ground that any such evidence was not relevant. The trial court overruled the defendant's objection and denied his request for a *voir dire*. Danny Hicks then testified that the defendant had pushed him to the floor, held a steak knife over him, and threatened to kill him if he told anyone what the defendant had done.

The form of the prosecutor's question made clear to the trial court that the expected testimony of Danny Hicks would relate to threats made by the defendant regarding actions he would take if Danny told the truth or testified against him. An attempt by a defendant to intimidate a witness in an effort to prevent the witness from testifying or to induce the witness to testify falsely in his favor is relevant to show the defendant's awareness of his guilt. *State v. Minton*, 234 N.C. 716, 723-24, 68 S.E.2d 844, 849 (1952); *State v. Smith*, 19 N.C. App. 158, 159, 198 S.E.2d 52, 53, *cert. denied*, 284 N.C. 123, 199 S.E.2d 662 (1973); N.C.G.S. § 8C-1, Rule 401 (1991); *see also State v. Canady*, 99 N.C. App. 189, 190, 392 S.E.2d 457, 457-58 (1990), *rev'd on other grounds*, 330 N.C. 398, 410 S.E.2d 875 (1991); *State v. Neagle*, 29 N.C. App. 308, 311, 224 S.E.2d 274, 275, *rev. denied*, 290 N.C. 665, 228 S.E.2d 456 (1976). Thus, the form of the question in the present case made it obvious that the testimony to follow would be relevant. Given the specific basis for the defendant's objection and request for a *voir dire* hearing in the present case, the trial court did not err by overruling the objection and denying the request. *See State v. Eppley*, 282 N.C. 249, 258-59, 192 S.E.2d 441, 447-48 (1972).

For the foregoing reasons, we conclude that the defendant's trial was free of prejudicial error.

NO ERROR.

CYNTHIA BOCKWEG AND HUSBAND, GREGORY BOCKWEG v. STEPHEN G. ANDERSON, BONNEY H. CLARK, EXECUTRIX OF THE ESTATE OF R. PERRY B. CLARK, AND LYNDHURST GYNECOLOGIC ASSOCIATES, P.A.

No. 7PA92

(Filed 8 April 1993)

1. **Appeal and Error § 118 (NCI4th)— res judicata—denial of summary judgment—right of immediate appeal**

The denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right and is immediately appealable because denial of the motion could lead to a second trial in frustration of the underlying principle of *res judicata* that a final judgment on the merits of a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them.

Am Jur 2d, Appeal and Error § 104.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

2. **Judgments § 205 (NCI4th)— res judicata—claim preclusion—collateral estoppel—issue preclusion**

Where the second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action. Where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to issues actually litigated and determined in the original action.

Am Jur 2d, Judgments §§ 396, 405-407, 409, 410, 415, 417.

3. Judgments §§ 215, 294 (NCI4th)— federal court action—voluntary dismissal of negligent diagnosis and treatment allegations—subsequent state court action—federal judgment not res judicata—consent to separation of claim

Where plaintiffs originally alleged in a federal court action that defendants were liable to plaintiffs for (1) the negligent failure to provide adequate nutrition which caused the female plaintiff to suffer brain damage, and (2) the negligent diagnosis and treatment of the female plaintiff's pelvic infection which led to the loss of her reproductive organs, and before the federal trial the parties stipulated to the voluntary dismissal of the allegations regarding defendants' negligence in diagnosing and treating the pelvic infection, the only issue presented by the pleadings in the federal court action was plaintiffs' claim based on defendants' negligent failure to provide the female plaintiff with the appropriate nutrition, and the judgment on the jury verdict in the federal court action is not *res judicata* to the present state court action involving defendants' alleged negligent diagnosis and treatment of the pelvic infection. Even if it is assumed *arguendo* that the two actions pursued by plaintiffs should be treated as raising the same claim under the transactional approach, defendants consented to the separation of plaintiffs' claim into two actions when they signed the stipulated dismissal of the pelvic infection allegations and may not now be heard to complain.

Am Jur 2d, Judgments §§ 418, 419.

Waiver of, by failure to promptly raise, objection to splitting cause of action. 40 ALR3d 108.

Justice MEYER dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of the denial of defendants' motion for summary judgment on the basis of *res judicata* by Hairston, J., entered on 8 October 1991 at the Civil Non-Jury Session of Superior Court, Forsyth County. By order dated 4 March 1992 the Supreme Court allowed defendants' petition for discretionary review in addition to writs of certiorari and supersedeas

pursuant to N.C.G.S. § 7A-32(b). Heard in the Supreme Court 11 September 1992.

Grover C. McCain, Jr., Kenneth B. Oettinger, and William R. Hamilton for plaintiff-appellees.

Petree Stockton & Robinson, by J. Robert Elster, Stephen R. Berlin, and Henry C. Roemer, III, for defendant-appellants.

FRYE, Justice.

This case presents two issues for our review. First, we must determine whether the trial court's denial of defendants' motion for summary judgment based on the doctrine of *res judicata* is immediately appealable. If it is, we must then determine whether the trial court erred in this case by concluding that *res judicata* does not bar plaintiffs' present action. While we hold that the denial of defendants' motion for summary judgment based on *res judicata* is immediately appealable, we also hold that the trial court correctly concluded that the doctrine of *res judicata* does not bar plaintiffs' action in this case.

I.

Prior to the present action, plaintiffs filed a negligence action in the United States District Court for the Middle District of North Carolina [hereinafter the federal court action] against these and other defendants. Plaintiff Cynthia Bockweg claimed, *inter alia*, that: 1) defendants were negligent in their failure to monitor her nutrition and in their failure to provide the proper vitamins and trace elements in the intravenous feeding solution during her hospital stay which caused her to suffer brain damage; and 2) defendants were negligent in their failure to appropriately diagnose and treat a pelvic infection which led to the unnecessary loss of her reproductive organs. Plaintiff Gregory Bockweg claimed damages for loss of consortium, companionship, society and services resulting from defendants' negligence. On 2 November 1987, by stipulation, the parties voluntarily dismissed without prejudice the claim regarding the loss of Mrs. Bockweg's reproductive organs as to defendants Anderson, the Estate of R. Perry B. Clark (Estate of Clark), Lyndhurst Gynecologic Associates (Lyndhurst Associates) and another defendant. After the partial voluntary dismissal, the Estate of Clark was no longer a party defendant in the federal court action. Before proceeding to trial in federal court, plaintiffs settled

with various other defendants with respect to the claim regarding Mrs. Bockweg's brain damage. The case proceeded to trial in federal court in March 1989 as against defendants Anderson and Lyndhurst Associates based on the claim regarding Mrs. Bockweg's brain damage. The jury returned a verdict in favor of defendants, finding that plaintiffs were not damaged by the negligence of these defendants. Judgment was entered accordingly on 27 March 1989.

On 18 October 1988, within one year of the partial voluntary dismissal, the claim regarding the loss of Mrs. Bockweg's reproductive organs was refiled by plaintiffs in Forsyth County Superior Court [hereinafter the state court action]. Defendants moved to dismiss the action on the basis of the statute of limitations set forth in N.C.G.S. § 1-15(c). The trial court treated the motion as a motion for summary judgment and granted the motion. Plaintiffs appealed to the Court of Appeals which reversed the trial court. *Bockweg v. Anderson*, 96 N.C. App. 660, 387 S.E.2d 59 (1990). On discretionary review requested by defendants, this Court affirmed the Court of Appeals, holding that the savings provision of N.C.G.S. § 1A-1, Rule 41(a)(1) applies when parties "stipulate to a voluntary dismissal without prejudice of an action in a federal district court sitting in North Carolina and plaintiffs file the same action within the one-year period in a North Carolina state court." *Bockweg v. Anderson*, 328 N.C. 436, 437, 402 S.E.2d 627, 627, *reh'g denied*, 329 N.C. 277, 406 S.E.2d 599 (1991) (*Bockweg I*).

Upon remand to the Superior Court, defendants Anderson, the Estate of Clark, and Lyndhurst Associates filed a motion to dismiss, an alternative motion for summary judgment based on *res judicata* and estoppel, a motion for credit and their answer. Judge Hairston denied defendants' motion for summary judgment on 8 October 1991. Defendants appealed to the Court of Appeals and filed a petition in this Court for discretionary review prior to determination by the Court of Appeals on the *res judicata* issue. On 21 January 1992, plaintiffs filed a motion to dismiss appeal in the Court of Appeals. The Court of Appeals dismissed the appeal on 4 February 1992. Defendants then filed petitions for writs of certiorari and supersedeas in this Court. On 4 March 1992, this Court allowed the writs and petition. We now affirm the trial court.

II.

In reviewing the trial court's denial of defendants' motion for summary judgment, we must view the facts in the light most

favorable to the non-moving party. *Flippin v. Jarrell*, 301 N.C. 108, 111, 270 S.E.2d 482, 485 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981). Taken in this light, the allegations of the complaint in the present state court action show the following sequence of events. On 4 December 1983 plaintiff Cynthia Bockweg was admitted to Forsyth Memorial Hospital by her obstetrician R. Perry B. Clark for delivery of her baby. The baby was delivered by cesarean section. During the cesarean section, a laceration of a uterine segment occurred and was reportedly repaired by Dr. Clark. Post-operatively, Mrs. Bockweg developed an infection and fever and was treated with antibiotics prior to her discharge from the hospital on 11 December 1983.

Due to her continued fevers and discomfort, Mrs. Bockweg was readmitted to the hospital on 16 December 1983 by Stephen Anderson, the medical partner of Dr. Clark. Both of the doctors practiced with Lyndhurst Associates. When Mrs. Bockweg was readmitted she was diagnosed as having a "wound infection." A pelvic examination resulted in a diagnosis of parametritis, pelvic cellulitis, and probable ovarian abscess. On 2 January 1984, Dr. Anderson performed a laparotomy for the purpose of draining her abscess and also performed a complete hysterectomy and bilateral salpingo-oophorectomy on plaintiff. Subsequently, on 9 January 1984, Dr. Anderson performed another incision and drainage operation. On 7 February 1984, Mrs. Bockweg was finally discharged from the hospital. As a result of defendants' negligent diagnosis and treatment of the pelvic infection, Mrs. Bockweg underwent a hysterectomy and salpingo-oophorectomy resulting in the loss of her ability to bear children, prolonged hospitalization, pain, suffering, disability, loss of income and medical expenses.

III.

[1] Plaintiffs contend that defendants' appeal from the trial court's order denying their motion for summary judgment is interlocutory, premature and should be dismissed. As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a "substantial right." *See Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978). However, we have noted that while "[t]he right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal, . . . the right to avoid the possibility of two trials on the same issues can be

such a substantial right." *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982) (quoting *Survey in Developments in N.C. Law*, 1978, 57 N.C. L. Rev. 827, 907-08 (1979)). *See also Patterson v. DAC Corp.*, 66 N.C. App. 110, 310 S.E.2d 783 (1984) (appeal from order allowing summary judgment as to some defendants not premature where defendants' actions were interrelated since plaintiff might otherwise face a second trial based on the same issues and a possibility of inconsistent verdicts).

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable. N.C.G.S. § 1-277 (1983); N.C.G.S. § 7A-27(d) (1989). *See also Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965) (holding that an order "which *sustains* a demurrer to a plea in bar [*res judicata*] affects a substantial right and a defendant may appeal therefrom"). Accordingly, we reject plaintiffs' contention that defendants' appeal in this case should be dismissed.

IV.

We now turn to whether the trial court erred in denying defendants' motion for summary judgment based on *res judicata*. We conclude that the trial court did not err in denying defendants' motion. Thus, the present action is not barred by the final judgment in the prior federal court action.

[2] The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation. *See Park Lane Hosiery Co. v. Shore*, 439 U.S. 322, 58 L. Ed. 2d 552 (1979); *see also McInnis*,

318 N.C. 421, 349 S.E.2d 552. Both doctrines involve a form of estoppel by judgment. Where the second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action. *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556; *see also Cromwell v. County of Sac*, 94 U.S. 351, 352-53, 24 L. Ed. 195, 197-98 (1877). Where the second action between the same parties is upon a different claim, the prior judgment serves as a bar only as to issues actually litigated and determined in the original action. *McInnis*, 318 N.C. at 429, 349 S.E.2d at 557.

[3] Defendants make no contention that the issues relating to the diagnosis and treatment of the pelvic infection were actually litigated and determined in the prior federal action. Thus, they do not argue collateral estoppel. Rather, defendants argue *res judicata*, contending that the claims are the same and therefore the judgment from the prior federal action serves as a bar to the prosecution of this state court action. Thus, we must determine whether the present action involves the same claim as was brought to judgment in the federal court action.

We first note that the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit. *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957). Where a plaintiff has suffered multiple wrongs at the hands of a defendant, a plaintiff may normally bring successive actions, *see Jackson v. Kearns*, 185 N.C. 417, 117 S.E. 345 (1923); *Clothing Co. v. Hay*, 163 N.C. 495, 79 S.E. 955 (1913), or, at his option, may join several claims together in one lawsuit. N.C. R. Civ. P. 18(a) (1990).

While it is true that a "judgment is conclusive as to all issues raised by the pleadings," *see Hicks v. Koutro*, 249 N.C. 61, 64, 105 S.E.2d 196, 199 (1958), the judgment is not conclusive as to issues not raised by the pleadings which serve as the basis for the judgment. In *Hicks v. Koutro*, this Court held that where a party raises issues in the pleadings, it cannot, even with the consent of the opposing party, try those issues in a piecemeal fashion. *Id.* However, if certain issues are not raised by the pleadings, parties may agree to try those issues separately. *See Ferebee v. Sawyer*, 167 N.C. 199, 203, 83 S.E. 17, 19 (1914) (quoting *Tyler v. Capehart*, 125 N.C. 64, 70, 34 S.E. 108, 109 (1899) ("A judgment is decisive of the points raised by the pleadings, or which might

be properly predicated upon them; but does not embrace any matters which might have been brought into the litigation, or causes of action which the plaintiff might have joined, but which in fact are neither joined nor embraced by the pleadings.")).

We observe that the present action involves the same issues which were voluntarily dismissed by the parties from the federal court action. In the federal court action, plaintiffs originally alleged that Dr. Clark,[1] Dr. Anderson and Lyndhurst Associates were liable to plaintiffs for two different negligent acts leading to two different injuries: 1) the negligent failure to provide adequate nutrition which caused Mrs. Bockweg to suffer brain damage, and 2) the negligent diagnosis and treatment of her pelvic infection which led to the loss of her reproductive organs. Before the action went to trial, the parties stipulated to the voluntary dismissal of the allegations regarding defendants' negligence in diagnosing and treating the pelvic infection. The dismissed allegations, which are the subject of this state court action, were no longer a part of the federal court action. Therefore, the pleadings no longer raised the issue of defendant's negligence in reference thereto, nor could the issue have been submitted to or decided by the jury in the federal court action. It must follow then that the judgment on the jury verdict in the federal court action was not a final judgment on the merits of the dismissed claim so as to bar this state court action. The only issue presented by the pleadings in the prior action was plaintiffs' claim based on defendants' negligent failure to provide Mrs. Bockweg with the appropriate nutrition. Therefore, the judgment in the prior action is not *res judicata* to the present action involving defendants' negligent diagnosis and treatment of the pelvic infection.

Defendants advocate applying the "transactional approach," as outlined in the Restatement (Second) of Judgments § 24 (1982), to this case for a finding that the two issues are part of one claim which may not be split. Under that approach, all issues arising out of "a transaction or series of transactions" must be tried together as one claim. The transactional approach has been adopted generally by the federal courts and several state courts. *See, e.g., Expert Electric, Inc. v. Levine*, 554 F.2d 1227 (2nd Cir.), *cert. denied*, 434

1. In the prior federal court action, plaintiffs originally alleged that Dr. Clark was negligent only in regard to the second claim. Once those allegations were dismissed from the action, Dr. Clark was no longer a party to the action.

U.S. 903, 54 L. Ed. 2d 190 (1977); *United States v. Athlone Industries, Inc.*, 746 F.2d 977 (3rd Cir. 1984); *Kaspar Wire Works, Inc. v. Leco Engineering & Mach., Inc.*, 575 F.2d 530 (5th Cir. 1978). Defendants cite *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E.2d 909 (1955), for the proposition that this Court has also applied the approach. While *Gaither* may be read broadly as defendants contend, *Gaither* dealt with *res judicata* only in the context of a second suit for damages under an entire and indivisible contract, not a negligence action as in the instant case. In *Gaither*, we observed, "for the breach of an entire and indivisible contract only one action for damages will lie." *Id.* at 536, 85 S.E.2d at 912.

Defendants have not pointed to any authority to support their argument that, under the transactional approach, allegations of two different instances of negligence leading to two different injuries should constitute one claim which may not be split. The cases relied upon by defendant involve very different situations. *See, e.g., Alexander v. Chicago Park Dist.*, 773 F.2d 850, 854 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 89 L. Ed. 2d 894 (1986) (mere change in legal theory does not create a new cause of action); *Harnett v. Billman*, 800 F.2d 1308, 1314 (4th Cir. 1986), *cert. denied*, 480 U.S. 932, 94 L. Ed. 2d 763 (1987) (change in theory or measure of relief does not create a new claim). These cases make it clear that subsequent actions which attempt to proceed by asserting a new legal theory or by seeking a different remedy are prohibited under the principles of *res judicata*. That is not the situation in this case. Plaintiffs did not merely change their legal theory or seek a different remedy. Rather, plaintiffs are seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury.

It has been noted that "the transactional test defines a process rather than an absolute concept." Charles A. Wright, *Federal Practice and Procedure* § 4407 at 63. In deciding whether a factual grouping constitutes a "transaction" or "series of transactions," the Restatement recommends that a court consider, among other things, "whether their treatment as a unit conforms to the parties' expectations[.]" Restatement (Second) of Judgments § 24(2). It is further noted that a limitation to the transactional approach is recognized where "[t]he parties have agreed in terms or in effect that the plaintiff may split his claim or the defendant has acquiesced therein[.]" *Id.* § 26(a).

Assuming, *arguendo*, that the two actions pursued by plaintiffs should be treated as raising the same claim under the transactional approach, we nonetheless find that plaintiffs' present action is not barred. We believe that the facts of this case demonstrate that the parties intended to treat the two allegations of negligence separately. Plaintiffs contend that the stipulation to voluntarily dismiss the allegations pertaining to defendants' negligent treatment of the pelvic infection demonstrates defendants' understanding that those allegations raised a separate issue of negligence. Defendants complain that their agreement to allow plaintiffs to voluntarily dismiss part of the action does not amount to an agreement to defend the same claim twice. They further argue that under the federal rules plaintiffs should have amended the complaint rather than have taken a partial voluntary dismissal. Even so, in examining defendants' actions, we do not believe that this procedural argument alters the fact that defendants signed the stipulated dismissal indicating their consent to separate the action. Defendants had the option of withholding their consent to the partial voluntary dismissal without prejudice, thus forcing plaintiffs to decide whether to go forward on the claim or to seek a court-ordered dismissal. Fed. R. Civ. P. 41(a).

Further evidence of defendants' understanding that the issues would be treated separately is found in the fact that defendants proceeded in the defense of two actions without complaining on the ground that the two actions involved the same claim.[2] The present action for the negligent treatment of the pelvic infection was filed in state court on 18 October 1988, while the federal

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2. While it is clear that defendants could not raise their *res judicata* defense until and unless the federal court action resulted in a final judgment, defendants could have moved to dismiss on the grounds of a prior action pending involving the same claim. *See Gardner v. Gardner*, 294 N.C. 172, 175 n.5, 240 S.E.2d 399, 402 n.5 (1977) (defendant may raise "a defense in the nature of the old plea in abatement" under Rule 12(b)) (*quoting Lehrer v. Manufacturing Co.*, 13 N.C. App. 412, 414, 185 S.E.2d 727, 729 (1972)). *See also Lehrer*, 13 N.C. App. at 416, 185 S.E.2d at 730 ("the defense of the prior pending action . . . should be considered first, as preliminary to a hearing on the merits"); *Brooks v. Brooks*, 107 N.C. App. 44, 47, 418 S.E.2d 534, 536 (1992) ("[a] plea in abatement based on a prior pending action, although not specifically enumerated in Rule 12(b) of the Rules of Civil Procedure is a preliminary motion of the type enumerated in Rule 12(b)(2)-(5)"). Since such an objection could result in dismissal of the action, raising it would certainly be in defendants' interest. Thus, the failure to assert such a defense may be considered in determining whether defendants intended to treat the issues raised by the two actions separately.

court action based on defendants' failure to provide adequate nutrition was still pending. The federal court action went to judgment on 27 March 1989, over five months after the present action was filed. We find no record evidence of an objection by defendants to the pendency of two actions involving the same claim. Rather, defendants vigorously defended both actions simultaneously. While the two actions were pending, defendants moved to dismiss the state court action on the grounds that the action was barred by the statute of limitations. Defendants pursued that defense all the way to this Court, where they lost. *Bockweg I*, 328 N.C. 436, 402 S.E.2d 627.

Even where a factual grouping is found to constitute one claim under the transactional approach, tacit consent to claim-splitting has been recognized if a defendant fails to object to splitting a single claim between two pending actions. *See Patrons Mut. Ins. v. Union Gas System*, 250 Kan. 722, 728, 830 P.2d 35, 40 (1992) (citing *Todd v. Central Petrol. Co.*, 155 Kan. 249, 124 P.2d 704 (1942)); *Shaw v. Chell*, 176 Ohio St. 375, 199 N.E.2d 869 (1964). *See also* Restatement (Second) of Judgments § 26 cmt. a, illus. 1. While it may be impractical to require a defendant to object to a plaintiff's failure to join every claim growing out of a single transaction, "a defendant who is defending two simultaneous actions has little to lose and much to gain by an objection to the splitting." 18 Charles A. Wright, *Federal Practice and Procedure* § 4415, at 125. Failure to timely object to the other action pending may be viewed as consent to the claim-splitting.

In conclusion, we find that plaintiffs' present action is not barred by the final judgment in the prior federal court action since the pleadings upon which the judgment in the prior action was based did not raise the claim now presented. Further, even if we assume without deciding that the present claim should have been raised in the prior action under the transactional approach, we find that defendants acquiesced in the separation of the claim into two actions and may not now be heard to complain. To allow the judgment in the prior federal action to serve as a bar to the present state court action would, under the facts of this case, frustrate rather than further the underlying principles of *res judicata*. Notwithstanding defendants' contentions to the contrary, and notwithstanding two appeals to this Court, plaintiffs have not had their day in court on the claim that defendants were negligent

in their failure to properly diagnose and treat a pelvic infection which led to the loss of Mrs. Bockweg's reproductive organs.

For the foregoing reasons, the doctrine of *res judicata* is not applicable to bar plaintiffs' present action. We therefore affirm the trial court's denial of defendants' motion for summary judgment.

AFFIRMED.

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

Justice MEYER dissenting.

I agree with the majority that the denial of defendants' motion for summary judgment based on *res judicata* is immediately appealable. However, I disagree with the majority's conclusion that the doctrine of *res judicata* does not bar plaintiffs' action in this case.

I believe that only one claim exists in this case for one course of medical treatment. This claim is based on a single core of operative facts and on two tightly intertwined theories of medical negligence: (1) negligence in the diagnosis and treatment of plaintiff Cynthia Bockweg's pelvic infection, and (2) failure to monitor properly plaintiff's nutritional status. Both legal theories arise from one single core of facts—plaintiff's continuing course of medical treatment by defendants at Forsyth Memorial Hospital from December 1983 to February 1984.

Under the doctrine of *res judicata*, a final judgment on the merits in a court of competent jurisdiction precludes further litigation involving the same claim by the parties or their privies. *Montana v. United States*, 440 U.S. 147, 153, 59 L. Ed. 2d 210, 216-17 (1979); *see also Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962); *Gaither Corp. v. Skinner*, 241 N.C. 532, 85 S.E.2d 909 (1955).

The "claim-splitting rule," an adjunct of the *res judicata* doctrine, requires that a plaintiff's *whole* claim, including all theories of liability and all damages arising out of the transaction, be determined in *one* action. The majority purports to uphold the rule against claim-splitting but, in actuality, eviscerates it. As we said in *Gaither*:

> The bar of the judgment in such cases extends not only to matters actually determined, *but also to other matters which in the exercise of due diligence could have been presented for determination in the prior action.*

241 N.C. at 535-36, 85 S.E.2d at 911 (emphasis added) (citing *Bruton v. Carolina Power & Light Co.*, 217 N.C. 1, 6 S.E.2d 822 (1940); *Moore v. Harkins*, 179 N.C. 167, 169, 101 S.E. 564, 565 (1919), *cert. denied*, 179 N.C. 525, 103 S.E. 12 (1920); *Piedmont Wagon Co. v. Byrd*, 119 N.C. 460, 26 S.E. 144 (1896); 1 Am. Jur. *Actions* § 96 (1936); 30 Am. Jur. *Judgments* §§ 179-180 (1940)); *see Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) ("all matters, either fact or law, that were or should have been adjudicated in the prior action are deemed concluded"); *see also Smokey Mountain Enterprises, Inc. v. Rose*, 283 N.C. 373, 196 S.E.2d 189 (1973); *Jocie Motor Lines, Inc. v. Johnson*, 231 N.C. 367, 57 S.E.2d 388 (1950).

When a plaintiff brings an action for just part of a claim, under the general rule prohibiting claim-splitting, he or she is precluded from bringing a second action for the residue of the claim. *Gaither*, 241 N.C. 532, 85 S.E.2d 909. We held in *Hicks v. Koutro*:

> A judgment is conclusive as to all issues raised by the pleadings. When issues are presented it is the duty of the court to dispose of them. Parties, even by agreement, cannot try issues piecemeal. The courts and the public are interested in the finality of litigation.

249 N.C. 61, 64, 105 S.E.2d 196, 199 (1958). The claim-splitting rule seeks to prevent plaintiffs from bifurcating one claim into two lawsuits.

Proper application of the doctrine of *res judicata* and its prohibition against claim-splitting depends on an accurate determination of what constitutes a claim. Under the modern, transactional approach, a claim is defined as "a single core of operative facts." *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095, 89 L. Ed. 2d 894 (1986). The transactional approach is fact-oriented, and a change in legal theory does not create a new claim. *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). On the facts of this case, I believe that only one claim exists. All the factual issues in this one claim surround plaintiff's hospitalization by defendants. The

fact that there were two acts of negligence and two resulting injuries in no way indicates that they arose out of a different set of facts. A claim "may arise out of the same transaction or series of transactions even if they involve different harms or different theories or measures of relief." *Harnett v. Billman*, 800 F.2d 1308, 1314 (4th Cir. 1986), *cert. denied*, 480 U.S. 932, 94 L. Ed. 2d 763 (1987). Plaintiff was admitted to the hospital by her obstetrician in December of 1983 for delivery of her baby. Following the cesarean section that was performed, plaintiff developed an infection that required her readmission to the hospital in early 1984. During her second stay in the hospital, part of plaintiff's treatment for the infection involved intravenous feedings. Ultimately, after unsuccessful attempts to cure her infection with antibiotics, a hysterectomy was performed. Plaintiffs' injuries arose out of a continuing course of treatment that constitutes a single core of operative facts. As such, that claim was tried before a federal court jury and resulted in a verdict for the defendants. Plaintiffs made a strategic decision in failing to pursue the pelvic infection issue in the federal court action. I believe that their attempt to recast this issue as a separate claim and to pursue a second action is barred because it is *res judicata*.

I disagree with the majority on yet another issue. Contrary to the implication in the majority opinion, defendants did not stipulate to the bifurcation of claims and, thus, to defending two actions on the same set of integral facts. Rule 41 of the Federal Rules of Civil Procedure differs from the corresponding state rule. Rule 41(a) of the Federal Rules of Civil Procedure refers only to a dismissal of an "action," not an issue or allegation. The proper procedure when plaintiffs want to dismiss some but not all of their allegations is technically one of amending the pleadings under Rule 15(a). 5 James Wm. Moore, Jo Desha Lucas & Jeremy C. Wicker, *Moore's Federal Practice* ¶ 41.06-1 (2d ed. 1993). To dismiss their federal court action or any portion thereof, plaintiffs had to obtain either an order from the court permitting a dismissal or a stipulation of all parties that plaintiffs could dismiss *without the court's order*. Defendants stipulated only that plaintiffs could dismiss *without obtaining a court order*. Defendants did *not* stipulate to submitting themselves to the burden of defending a second lawsuit on the same claim.

Astoundingly, the majority says that "[f]urther evidence of defendants' understanding that the issues would be treated separate-

ly is found in the fact that defendants proceeded in the defense of the two actions without complaining on the ground that the two actions involved the same claim" and that there is "no record evidence of an objection by defendants to the pendency of the two actions involving the same claim." These statements indicate a remarkable lack of familiarity with a fact well known to all experienced trial attorneys and a failure to recognize a time-honored trial strategy. First, defendants moved in the state action for summary judgment on the ground of *res judicata* (claim preclusion) at their very first opportunity. The motion for summary judgment was filed following the trial and entry of judgment for defendants in the federal court action. Defendants could not have filed their motion any sooner because it is only the entry of the final judgment in the federal action that constitutes the adjudication of the federal claim. Simply put, the defense of *res judicata* did not arise until the entry of the final judgment in the federal action. Secondly, and perhaps more importantly, had the defendants "complain[ed] on the grounds that the two actions involved the same claim" or, as the majority suggests in a footnote, filed a plea in abatement, they would have disclosed their defense in the state action and would thereby have enabled the plaintiff to reassert the pelvic infection facet of plaintiff's claim in the federal action. The majority, in that footnote, says, "Since such an objection could result in dismissal of the action, raising it would certainly be in defendants' interest." Nothing could be further from the truth. If a plea in abatement in the state action had been successful, plaintiff could have reasserted that facet in the federal action, the state action would have been terminated, and defendants would have lost the opportunity to defeat the pelvic infection facet of the claim by a *res judicata* defense in the state action. No thinking attorney representing the defendants in this case would have tipped his hand in this manner and thus lost the chance of defeating the pelvic infection facet of plaintiff's claim by a plea of *res judicata* in the state action. Defendants were under no obligation to file a plea in abatement or to plead in the state action that there was a prior action pending in the federal court. Just as defendants acted at their peril in not insisting in the federal action on continued consolidation of the two facets of the same claim and relying on the *res judicata* defense in the state action, the plaintiff acted at his peril by running the risk that the defendants would remain silent, not raise in the state action a plea in abatement or a defense of prior action pending, wait for the entry of the federal judgment,

and only then raise the claim-splitting defense in a motion for summary judgment on the ground of *res judicata*. Defendants' trial strategy was in all respects correct, particularly in view of the fact that defendants were successful in defeating the remaining facet of plaintiff's claim in the federal action. It is only by reason of the majority's erroneous determination of the case that defendants' strategy did not prove successful.

I dissent from the opinion of the majority and vote to reverse the trial court's order denying defendants' motion for summary judgment on the basis of *res judicata*.

STATE OF NORTH CAROLINA v. JAMES WILLIAM JEFFERIES

No. 396A91

(Filed 8 April 1993)

1. Grand Jury § 10 (NCI4th)— murder—selection of grand jury foreman—prima facie racial discrimination

The trial court did not err in a murder prosecution by holding that defendant had made a *prima facie* case of racial discrimination in the selection of grand jury foremen where defendant offered certified documents listing all grand jury members and foremen for the previous nineteen years and a witness testified that he had examined the documents and was able to determine that 83 foremen had been selected during that time, he was able to identify the race of 78 of the foremen, and 3.8 percent were black while 19.73 percent of the members of the grand jury were black. The State's argument that the documents were not sufficiently authenticated and that the witness made invalid assumptions went to the weight of the evidence.

Am Jur 2d, Jury §§ 173, 184, 185.

2. Grand Jury § 10 (NCI4th)— murder—selection of grand jury foreman—prima facie racial discrimination—rebuttal

The trial court did not err in a murder and assault prosecution by holding that the State successfully rebutted the defendant's *prima facie* case of racial discrimination in the selection of the foremen of the two grand juries which indicted

him where the case was governed by *Cofield I*, 320 N.C. 297, but not *Cofield II*; the judge who appointed the foreman of the grand jury which returned the murder indictment testified that he did not remember appointing the foreman but would have followed a procedure outlined in a grand jury manual for Mecklenburg County, pursuant to which he would have followed the recommendation of the sitting grand jury at the end of its term as to the appointment of the foreman of the next grand jury; the foreman of the previous grand jury testified that he recommended a member of his grand jury for appointment as foreman of the next grand jury following talks with other people on the grand jury as to the diligence or earnestness with which members were serving on the grand jury, that these discussions were about both black and white members of the grand jury, and that the only qualification discussed was diligence or earnestness as to the performance of the job that had to be done; and the foreman of the grand jury which returned the felonious assault indictment testified that the foreman of the grand jury in the previous term had told him that it would be necessary to select a foreman for the next term, that the alternate foreman presided at the last meeting of that grand jury, at which most of the members were present, that the alternate foreman reminded them that they had to select someone to recommend and asked if anyone would volunteer, said again that they needed to come up with someone when there were no volunteers, and the person who was to serve then volunteered.

Am Jur 2d, Jury §§ 173, 184, 185, 186.

3. Evidence and Witnesses § 1070 (NCI4th)— assault and murder—flight—instruction—evidence sufficient

The trial court did not err in a murder prosecution by giving the pattern jury instruction on flight where the State's evidence showed that defendant came to Charlotte the day before the murder; defendant and Robinson went to the victim's apartment late one night; they induced the murder victim to leave with them under the pretense of "getting the money"; they attempted to kill a potential witness; they put the murder victim's body in a remote area and abandoned the automobile; they convinced a friend to drive them to Richmond the morning after the murder; defendant stayed in Richmond and was not apprehended for two years; and Robinson returned to

Charlotte the next day and retained an attorney. Defendant took steps after the killing to avoid detection and apprehension and flight was a part of this effort. Although defendant argued that commenting on evidence of flight gives unfair emphasis to that evidence and that the charge did not instruct the jury as to how it must consider evidence of flight, the Supreme Court declined to change the rule as to instructions on flight and the Pattern Jury Instruction given was a correct statement of the law.

Am Jur 2d, Evidence §§ 280 et seq.; Trial §§ 1164, 1168, 1333, 1334.

4. Evidence and Witnesses § 775 (NCI4th)— murder and assault—disposition of charges against codefendant—excluded—no prejudicial error

There was no prejudicial error in a murder and assault prosecution where one of the State's theories was that defendant and George Robinson acted in concert to commit the two crimes, a detective testified that Robinson was arrested for the two charges, and the court would not let defendant elicit on cross-examination of the detective that the charges against Robinson had been dismissed and excluded from evidence documents from the clerk's office showing that the charges had been dismissed. Although it was error to exclude the evidence, evidence as to the disposition of a co-defendant's case is peripheral to the question of the defendant's guilt. It would not have affected the outcome of the trial.

Am Jur 2d, Appeal and Error §§ 797, 798, 802, 803; Evidence §§ 320, 321.

5. Criminal Law § 794 (NCI4th)— murder and assault—instructions—acting in concert—evidence sufficient

The evidence in a murder and assault prosecution supports the submission to the jury of acting in concert with George Robinson where Robinson was at the scene, the meeting between the men was on account of a debt Robinson owed to one victim, Robinson drove the four men in his automobile, and Robinson said, after the two men were shot, "[d]amn, I didn't mean for you to do this in my car." The jury could find from this evidence that Robinson was at the scene acting

together with defendant to kill one victim and feloniously assault the other.

Am Jur 2d, Evidence § 227.

6. Criminal Law § 1101.1 (NCI4th)— assault—nonstatutory aggravating factor—elimination of witness

The trial court did not err when sentencing defendant for felonious assault by finding as a nonstatutory aggravating factor that defendant's motive in shooting the victim, Surginer, was to eliminate him as a witness where the court could have concluded that McClam was the person the defendant and Robinson intended to kill, Surginer went with them only because McClam asked him to do so, the defendant had no reason to kill Surginer other than to prevent Surginer from inculpating defendant in the crime, and defendant and Robinson continued to search for Surginer in order to kill him after he escaped from the car.

Am Jur 2d, Assault and Battery §§ 48, 49.

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

Justice MITCHELL dissenting.

Justice FRYE concurring in part and dissenting in part.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment for first degree murder entered by Saunders, J., at the 9 July 1990 regular Criminal Session of Superior Court, Mecklenburg County, upon a jury verdict of guilty of first degree murder. The defendant's motion to bypass the Court of Appeals as to an additional judgment was allowed by the Supreme Court 28 January 1992. Heard in the Supreme Court 6 October 1992.

The defendant was tried for his life upon a bill of indictment charging him with the first degree murder of Anthony Scott McClam. He was also tried for assault with a deadly weapon with intent to kill inflicting serious injury upon Darrell Leon Surginer.

The State's evidence tended to show that George Robinson was indebted to Anthony Scott McClam, the murder victim, for a drug purchase. The defendant accompanied Robinson to McClam's

apartment on the night of 28 October 1986 around midnight. The three men discussed the debt and decided to go to Robinson's house to get the money. McClam told Darrell Leon Surginer, his roommate, that they were going to the store and asked him to accompany them. All four of the men left the apartment in Robinson's car. Robinson was driving, the defendant was in the front passenger seat, McClam was in the back seat behind the defendant, and Surginer was in the back seat behind Robinson. They proceeded past the local convenience store which was closed. Surginer became suspicious and asked McClam, "[w]hat's up?" McClam responded that they were going to Robinson's house to get the rest of his money. They reached Robinson's apartment, at which time Robinson went inside, but returned saying his money had not yet arrived. The defendant said, "[i]f you take me by my aunt and uncle's house, I'll give you the money . . . ."

Robinson drove for awhile and appeared to be unsure of where he was going. McClam said to the defendant, "[y]ou sure act like you don't know where your aunt or uncle live." The defendant said, "[w]hat? What?," then, without warning, shot McClam twice in the face with a pistol. The defendant then shot Surginer twice. Robinson turned off the headlights and accelerated the automobile, saying, "[d]amn, I didn't mean for you to do this in my car." In fear for his life, Surginer jumped from the moving car and heard two more gunshots. He hid near some houses. Robinson stopped the car, turned around, and drove back down the street slowly, looking for Surginer. When the car left the area, Surginer was able to get a nearby resident to call the police. Robinson and the defendant dumped McClam's body in a nearby wooded area and abandoned the car.

On 29 October 1986, Robinson and the defendant had a friend drive them from Charlotte, North Carolina to Richmond, Virginia. In Richmond, the defendant left the car at an apartment complex. Robinson went to his grandmother's house with his friend where they spent the night. Robinson and his friend returned to Charlotte on 30 October 1986 and each consulted an attorney. The defendant was arrested two years later, on 11 October 1988.

At trial, the defendant was convicted of first degree murder and felonious assault. 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 assault conviction.

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] In his first assignment of error, the defendant, a black male, contends it was error not to dismiss the two indictments against him because the foremen of the two separate grand juries which indicted him were not selected in a racially neutral manner. The defendant made a motion to dismiss the indictments before pleading to them. In *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) (*Cofield I*), we held that a minority defendant, by showing that the selection process was not racially neutral or that for a substantial period in the past relatively few blacks have served as foreman on grand juries, although a substantial number have served on grand juries, may establish a *prima facie* case of racial discrimination in the selection of the foreman of a grand jury requiring that the indictment be dismissed unless the State can rebut the *prima facie* case by showing that the foreman was chosen in a racially neutral manner. In *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (*Cofield II*), we held that a process for the selection of a grand jury foreman could not be racially neutral unless it operates so that all members of the jury are considered. This rule operates prospectively and does not apply in this case because the order overruling the defendant's motion was made before *Cofield II* was decided. A hearing on the defendant's motion was held prior to trial by Judge Hollis M. Owens, Jr.

In order to make a *prima facie* case of discrimination, the defendant relied on the second method prescribed by *Cofield I*. He offered evidence that for a substantial period in the past relatively few blacks had served as foreman of a grand jury in Mecklenburg County, although a substantial number have served on grand juries. This evidence consisted of certified documents listing all grand jury members and foremen for the previous nineteen years. He then offered two witnesses, one of whom testified that he had examined the documents and was able to determine that 83 foremen

had been selected during that time. He testified further that he was able to identify the race of 78 of the foremen. He testified that 3.8 percent of these foremen were black while 19.73 percent of the members of the grand jury were black. The court found facts consistent with this evidence and concluded the defendant had established a *prima facie* case of discrimination in the selection of the grand jury foremen.

The State argues that documents on which the witness based his testimony were not sufficiently authenticated to be reliable. The State also contends that the witness made certain assumptions which were not valid in reaching his conclusions in regard to the composition of the grand juries and the race of the foremen for them. The State's argument goes to the weight of the evidence. We might have found different facts but the findings of fact by the superior court were supported by sufficient evidence and we are bound by them. *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984). It was not error for the court to hold that the defendant had made a *prima facie* case of racial discrimination in the selection of the foremen of the grand juries.

[2] We next face the question of whether the superior court committed error in holding that the State successfully rebutted the defendant's *prima facie* case of racial discrimination. We hold that the court did not commit error.

The defendant was tried on two separate indictments. One of them charged him with murder and the other charged him with a felonious assault. Judge Chase B. Saunders appointed the foreman of the grand jury that returned the murder indictment. He testified that he did not remember appointing the foreman, but he would have followed a procedure outlined in a grand jury manual for Mecklenburg County. Pursuant to this procedure, he would have followed the recommendation of the sitting grand jury at the end of its term as to the appointment of the foreman of the next grand jury. He testified, "it appeared to me that the jurors, by making that recommendation, were satisfied as to the leadership qualities of that individual and that that individual had a level of experience in conducting the proceedings which would be beneficial to the administration of justice in that hearing process."

The foreman of the grand jury, which sat immediately prior to the grand jury which returned the murder indictment, testified that he recommended a member of his grand jury to Judge Saunders

for appointment as foreman of the next grand jury. Prior to making this recommendation, he talked to other people on the grand jury "as to the diligence or earnestness with which members were serving on the grand jury[.]" These discussions were about other members of the grand jury both black and white. He testified that the only qualification that was discussed was diligence or earnestness "[a]s to the performance of the job that had [to be] done[.]"

The court made findings of fact consistent with this testimony and held that the State had rebutted the defendant's *prima facie* case. In this we perceive no error. The essential requirement of *Cofield I* is that race must play no part in the selection of the foreman of a grand jury. This requirement is proved in this case by the testimony of Judge Saunders who appointed the foreman and the testimony of the foreman of the preceding grand jury. Their testimony was to the effect that their purpose in the selection process was to get the best possible person as foreman. They did not mention race in their testimony, but we can conclude from this testimony that their purpose was to select the best person for the job regardless of race. The State successfully rebutted the *prima facie* case of racial discrimination in the selection of the foreman of the grand jury which returned the indictment for murder.

The only evidence in regard to selection of the foreman of the grand jury that returned the indictment for felonious assault was the testimony of the foreman. He testified that near the end of the previous term, the foreman of the grand jury then sitting told him it would be necessary to select a foreman for the next term. At the last meeting of that grand jury, the foreman was absent and the alternate foreman presided. Most of the members were present. The alternate foreman reminded the grand jury that it had to select someone to recommend to the court to serve as grand jury foreman. He asked if anyone would volunteer to serve in this capacity. No one volunteered. The witness testified, "I would say a fair amount of time, twenty seconds or so passed, and he said, '[c]ome on. Somebody has got to do this. You know, we need to come up with somebody who is willing to serve and do this[.]' " The person who was to serve as the foreman of the next grand jury then volunteered.

We believe this testimony shows that the foreman of this grand jury was chosen in a racially neutral manner. Indeed, by

giving anyone who would volunteer to do so the opportunity to serve as foreman, it enabled any person who wanted to be foreman to have the job, including members of a minority. This was a racially neutral selection process. The defendant's first assignment of error is overruled.

[3] The defendant next assigns error to the court's instructing the jury as to flight. The court instructed the jury as follows:

> Now, the State contends that the Defendant fled. Evidence of flight may be considered by you, together with all other facts and circumstances in this case, in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient in itself to establish the Defendants [sic] guilt. Further, this circumstance has no bearing on the question of whether the Defendant act[ed] with premeditation and deliberation. Therefore, it must not be considered by you as evidence of premeditation or deliberation.

The defendant argues that this instruction was not supported by the evidence and it did not correctly apply the law to the evidence. The defendant contends that in order to support an instruction on flight, the evidence must show not only that the defendant left the vicinity of the crime or fled from law enforcement officers, but that this behavior was a reaction to the crime charged. The defendant says that the evidence in this case raises no more than a suspicion that the defendant's behavior reflected a consciousness of guilt.

The defendant concedes that the cases in which we have upheld the giving of flight instructions have ranged so broadly that they "seemingly encompass almost every situation in which the accused fails to remain at the" scene of the crime. He says that some cases define flight as hiding from the police or resisting arrest. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986). He says some cases have defined flight to mean the defendant left or attempted to leave the state or the city in which the crime occurred. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. Harris*, 289 N.C. 275, 221 S.E.2d 343 (1976). He says that other cases hold that flight has occurred when the officers are unable to locate the defendant at home or in places he might be expected to be found. *State v. Tucker*, 329

N.C. 709, 407 S.E.2d 805 (1991); *State v. Lampkins*, 283 N.C. 520, 196 S.E.2d 697 (1973).

The defendant also concedes that in *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980), a case with facts similar to this case, we held that a charge on flight was properly submitted. In that case, the defendant, who was a resident of New York City, murdered a taxicab driver in Charlotte and returned to his home in New York two days later after telling two people that he had killed the driver.

We believe the evidence supports a finding by the jury that the defendant was in actual flight as opposed to mere departure when he left Charlotte and that his flight reflected a consciousness of guilt. This supports the instruction on flight. The State's evidence showed that the defendant came to Charlotte the day before the murder. He and Robinson went to McClam's apartment late on the night of 26 October 1986. They induced McClam to leave with them under the pretense of "getting the money." The evidence supports a finding that defendant and Robinson planned the murder. They attempted to kill Mr. Surginer in order to eliminate a potential witness. They also put Mr. McClam's body in a remote area and abandoned the automobile. On the morning after the murder, they convinced a friend to drive them to Richmond. The defendant stayed in Richmond and was not apprehended for two years. Robinson returned to Charlotte the next day and retained an attorney. This evidence shows the defendant took steps after the killing to avoid detection and apprehension. Flight was a part of this effort and a charge on this evidence was proper.

The defendant argues that we should reconsider the rules we have developed for the consideration of evidence of flight. He says that evidence of flight is simply evidence and that commenting on such evidence when we do not comment on other evidence, gives unfair emphasis to this evidence for the State. He cites cases from five jurisdictions which have abolished the flight instruction for this reason. The defendant calls attention to the fact that in this case the court elected not to recapitulate the evidence in its charge, which it may do pursuant to N.C.G.S. § 15A-1232, but by emphasizing one part of the State's evidence without recapitulating any of the defendant's evidence, the court expressed an opinion on the evidence in violation of this section. *State v.*

Holden, 280 N.C. 426, 185 S.E.2d 889 (1972). We decline to change our rule at this time as to instructions as to flight.

In addition to his argument that it was error to give an instruction on flight, the defendant contends that the instruction that was given was erroneous. He says that when a question of flight arises, the jury must determine whether the conduct found to have existed constituted flight rather than simple departure and if the jury finds there was a flight, whether the flight reflected a consciousness of guilt of the crime charged. He says the charge did not instruct the jury as to how it must consider evidence of flight and this was error.

The charge given was based on the Pattern Jury Instructions, N.C.P.I.—Crim. 104.36. Although it may not explain in detail how the evidence of flight should be considered by the jury, it is a correct statement of the law. *State v. Tucker*, 329 N.C. 709, 407 S.E.2d 805. It should aid the jury in its deliberation and it was not error to give it.

[4] The defendant next argues it was error to exclude certain evidence he offered in regard to the dismissal of the charges against George Robinson. One of the State's theories was that the defendant and George Robinson acted in concert to commit the two crimes. A detective testified that Robinson was arrested for the two charges. The court would not let the defendant elicit, on cross-examination of the detective, testimony that the charges against Robinson had been dismissed. The court also excluded from the evidence documents from the office of the Clerk of Superior Court showing that the charges against Robinson had been dismissed.

When a party introduces evidence favorable to its case, the other party has the right to introduce evidence to explain or rebut such evidence, although the latter evidence would be inadmissible had it been offered initially. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984); *State v. Albert*, 303 N.C. 173, 277 S.E.2d 439 (1981). Assuming the evidence which the defendant attempted to introduce would have been inadmissible if offered originally, it became admissible when the State's witness testified on this subject. It was error to exclude this evidence.

The question we face is whether this was harmless error. The error involved a ruling on the evidence and does not implicate

a right arising under the federal or state Constitution. The test is whether there is a reasonable possibility that had the error not occurred, a different result would have been reached at the trial. N.C.G.S. § 15A-1443(a) (1988); *State v. Milby*, 302 N.C. 137, 273 S.E.2d 716 (1981). We are confident that applying this test, the error is harmless. Evidence as to the disposition of a co-defendant's case is peripheral to the question of the defendant's guilt. If this evidence had been admitted, it would not have impeached the testimony of the State's witnesses. We cannot hold the evidence would have affected the outcome of the trial. This assignment of error is overruled.

[5] The defendant next contends that it was error for the court to instruct on acting in concert. He says there was no evidence that he and George Robinson were acting in concert. A person may be found guilty of committing a crime if he is at the scene acting together with another person with a common plan to commit the crime, although the other person does all the acts necessary to commit the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). We hold the evidence supports the submission to the jury of acting in concert with George Robinson.

Robinson was at the scene. The meeting between the men was on account of a debt Robinson owed to McClam. Robinson drove the four men in his automobile. After the two men were shot, Robinson said, "[d]amn, I didn't mean for you to do this in my car." From this evidence, the jury could find that Robinson was at the scene acting together with defendant to kill Mr. McClam and feloniously assault Mr. Surginer. This assignment of error is overruled.

[6] In his last assignment of error, the defendant contends it was error to enhance his sentence for assault based on the nonstatutory aggravating factor that the "motive in shooting Leon Surginer was to eliminate him as a witness." This nonstatutory aggravating factor is close kin to the statutory aggravating factor in N.C.G.S. § 15A-1340.4(a)(1)(b), which reads "[t]he offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." *State v. Green*, 321 N.C. 594, 365 S.E.2d 587, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988).

The defendant contends there was not sufficient evidence to support this aggravating factor. He says there must be more evidence than the shooting to support the finding of this aggravating factor.

There is such evidence in this case. The court could have concluded that McClam was the person the defendant and Robinson intended to kill. Surginer went with them only because McClam asked him to do so. The defendant had no reason to kill Surginer other than to prevent Surginer from inculpating defendant in the crime. When this evidence is coupled with the evidence that after Surginer escaped from the automobile the defendant and Robinson continued to search for him in order to kill him, it supports the finding of this aggravating factor.

NO ERROR.

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

Justice MITCHELL dissenting.

In *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (*Cofield II*), a majority of this Court held that for the selection of a grand jury foreman to be racially neutral, all grand jurors must be "considered" by the presiding judge for selection as the foreman. I did not and do not find the reasoning of the majority in applying the "consideration" test when addressing the issue of racial neutrality in the selection of a grand jury foreman to be persuasive. Instead, it has been and is my view that "article I, section 26 [of the Constitution of North Carolina] assures that every grand juror will have an equal opportunity to serve as foreman—not that all grand jurors will be 'considered' for that position." *Id.* at 466, 379 S.E.2d at 842 (Mitchell, J., concurring in result).

For reasons discussed in my concurring opinion in *Cofield II*, I do not believe that in the present case either selecting one grand jury foreman by asking for volunteers, or selecting the other by permitting the outgoing grand jury foreman to select his successor on the basis of what he perceived to be that successor's qualifications, gave all grand jurors an equal opportunity to serve as foreman. *Id.* at 465-66, 379 S.E.2d at 841-42. Therefore, I would vacate the verdicts and judgments against this defendant and quash the indictments returned against him by the two grand juries. Certainly, if this were a case to which the prospective holding of *Cofield II* applied, it could not seriously be argued that the *presiding judge* "considered" all grand jurors as that case requires.

I recognize that, in determining the proper construction and interpretation of the Constitution of North Carolina, there is no higher authority than a majority of this Court. *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). Accordingly, I do not intend to raise this issue again. However, I feel compelled to remind the majority one last time that—as demonstrated by this case—the "consideration" requirement it has adopted is of little practical value in determining whether the members of any group have been denied the right to an equal opportunity to serve as foreman of a grand jury.

For the foregoing reasons, I dissent.

Justice FRYE concurring in part, dissenting in part.

As stated by the Court, the rule of *State v. Cofield*, 324 N.C. 452, 379 S.E.2d 834 (1989) (*Cofield II*), operates prospectively and does not apply in this case because the order overruling defendant's motion was made before *Cofield II* was decided. More specifically, our holding in *Cofield II* "that, in meeting the racially neutral standard for selecting the foreman of the grand jury, the trial judge must consider all the grand jurors, . . . will apply only to . . . cases in which the indicting grand jury's foreman is selected after the certification date of [*Cofield II*]." *Id.* at 461, 379 S.E.2d at 839. Thus, it is unnecessary for us to decide whether the selection procedures used in this case "insure[d] that all grand jurors [were] considered by the presiding judge for his selection . . . ." *Id.* Rather, we must decide whether the selection process here was racially neutral under *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987) (*Cofield I*). Since defendant has shown a *prima facie* case of racial discrimination in the selection of the forepersons of the grand juries which indicted him, we must determine whether the State rebutted the *prima facie* case by showing that the forepersons were chosen in a racially neutral manner. *Id. See also State v. Moore*, 329 N.C. 245, 404 S.E.2d 845 (1992).

With reference to the selection of the foreman of the grand jury that returned the indictment for felonious assault, I concur in the result reached by the Court. However, I dissent from the result reached by the Court with reference to the selection of the foreman of the grand jury that returned the indictment for murder. The combined testimony of the judge and previous grand jury foreman shows rather clearly that the judge essentially ac-

cepted the subjective judgment of the foreman of the previous grand jury as to who should be appointed as the current foreman. This was essentially the same procedure that had been followed in the past, giving rise to a statistical pattern of underrepresentation of Blacks sufficient to create a *prima facie* case of racial discrimination. This testimony is simply insufficient to show that the process used in this case was racially neutral so as to rebut the *prima facie* case of racial discrimination in the selection of the grand jury foreman. *See State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (*Cofield I*).

STATE OF NORTH CAROLINA v. LONNIE WINSLOW BALLARD

No. 255A92

(Filed 8 April 1993)

Indigent Persons § 19 (NCI4th)— indigent defendant—psychiatric assistance—right to ex parte hearing

The trial court's denial of an indigent defendant's motion for an *ex parte* hearing of evidence supporting his request for the assistance of a psychiatric expert violated defendant's privilege against self-incrimination and his right to the assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance, and only in such an atmosphere can the defendant's privilege against self-incrimination and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State. Because the appellate court cannot know what additional evidence defendant might have proffered in support of his request had he been able to do so out of the presence of the prosecutor, the trial court's error cannot be shown to be harmless beyond a reasonable doubt.

Am Jur 2d, Criminal Law §§ 701, 714.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hight, J., at the 26 February 1992 Regular Criminal Session of Superior Court, Durham County, on a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 17 March 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine Crawley, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was tried in a noncapital trial for murder in the first degree of Marlon Branch. The trial court denied defendant's motion that he be allowed to give evidence supporting his request for appointment of a psychiatric expert *in camera* and *ex parte*. We hold that an indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing, and that the trial court erred in denying defendant's request to be heard on this matter *ex parte*.

On 11 October 1990 defendant's court-appointed counsel moved before Judge Orlando F. Hudson for an *in camera* review of information supporting the appointment of a psychiatric expert to assist defendant in the preparation of his defense. When Judge Hudson asked whether the *in camera* review was to be "with or without the prosecutor," defense counsel responded: "Without the presence of the District Attorney." Judge Hudson then denied the motion, but offered to hear such information in open court. Defense counsel moved for the appointment of a psychiatric expert but stated that he could not "particularize [defendant's] need in the presence of the District Attorney . . . because in so doing . . . I may jeopardize my client's defense." The trial court, in its discretion, again ruled that it would "not hold an *in camera* . . . hearing, *ex parte* of the State," to which defendant excepted.

Defendant's court-appointed attorney was permitted to withdraw as counsel on 13 December 1990. He was succeeded by the appointment of the Public Defender, who was subsequently disqualified following a hearing on the State's motion because of a potential conflict of interest.

On 3 September 1991 Judge Coy Brewer, Jr., heard two motions from a third court-appointed attorney. The first motion requested that defendant be committed to Dorothea Dix Hospital for an evaluation of his competency to proceed to trial. In the second the attorney requested the court's permission to withdraw as defendant's counsel. Both motions were granted, and on 5 September 1991 a fourth attorney was appointed to represent defendant.

On 21 November 1991 Judge J. Milton Read, Jr., held a hearing regarding defendant's competency to stand trial. Dr. Patricio P. Lara, a forensic psychiatrist at Dorothea Dix Hospital, testified that defendant had declined to take psychological tests normally given to patients undergoing evaluation. Nevertheless, defendant was interviewed and observed over the course of eighteen or nineteen days at the hospital, and Dr. Lara was able to conclude, based on these observations, that defendant was competent to stand trial.

On 10 February 1992 defendant's fourth court-appointed attorney moved to withdraw as counsel, in part because defendant had recently refused to meet with him or to respond to the attorney's letters. Subsequently, at trial, defendant stated that he wished to represent himself; the trial court allowed defendant to proceed *pro se* and directed defendant's fourth counsel to assist him in his defense.

Defendant contends that denying his motion for an *ex parte* hearing of evidence supporting his request for the assistance of a psychiatric expert forced him to jeopardize his privilege against self-incrimination and his right to the effective assistance of counsel, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. We agree.

In *Ake v. Oklahoma*, 470 U.S. 68, 84 L. Ed. 2d 53 (1985), the Supreme Court held that once a defendant has made "an *ex parte* threshold showing to the trial court that his sanity is likely to be a significant factor in his defense," fundamental fairness requires "the State . . . , at a minimum, [to] assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 82-83, 84 L. Ed. 2d at 66. Since *Ake*, this Court has frequently recognized that "fundamental fairness and the principle that an indigent defendant must be given a fair opportunity to present his defense" underlie the indigent defend-

ant's right to the assistance of an expert at state expense. *State v. Parks*, 331 N.C. 649, 655, 417 S.E.2d 467, 471 (1992) (quoting *State v. Tucker*, 329 N.C. 709, 718, 407 S.E.2d 805, 811 (1991)). We have applied these principles to defendants' motions for many kinds of experts, including independent investigators, *e.g.*, *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); pathologists, *e.g.*, *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); medical experts, *e.g.*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); psychiatrists, *e.g.*, *State v. Parks*, 331 N.C. 649, 417 S.E.2d 467; and fingerprint experts, *e.g.*, *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992). In each of these cases we have noted, in accord with *Ake*, that the indigent defendant is entitled to the assistance of an expert in preparation of his defense when he makes a "threshold showing of specific necessity." *E.g.*, *State v. Parks*, 331 N.C. at 656, 417 S.E.2d at 471. The indigent defendant must "make[ ] a particularized showing that (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case." *Id.*

In none of these cases, however, did we address directly the question raised in this appeal—whether the trial court is constitutionally required, upon timely motion, to allow a defendant to show a need for psychiatric assistance in an *ex parte* hearing. In *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178, this Court considered whether a defendant's rights to due process of law, to effective assistance of counsel, and to reliable sentencing in a capital trial mandated that his motion for an independent fingerprint expert be heard *ex parte*. Under the facts of that case, we concluded: "Whereas an indigent defendant's access to the 'basic tools of an adequate defense' is a core requirement of a fundamentally fair trial, the need for an *ex parte* hearing on a motion for expert assistance is not." *Phipps*, 331 N.C. at 450, 418 S.E.2d at 190 (quoting *Ake*, 470 U.S. at 77, 84 L. Ed. 2d at 62). Although we stated in *Phipps* that "an *ex parte* hearing is not constitutionally required in every case," we acknowledged that "[t]here are strong reasons for conducting the hearing *ex parte*," *id.* at 451, 418 S.E.2d at 191, including the defendant's "right to obtain [the expert] assistance [necessary to assist in preparing his defense] without losing the opportunity to prepare the defense in secret." *Id.* at 449, 418 S.E.2d at 189 (quoting *Brooks v. State*, 259 Ga. 562, 565, 385 S.E.2d 81, 84 (1989)).

When the indigent defendant is seeking the assistance of a psychiatric expert, the "strong reasons for conducting the hearing *ex parte*" are especially applicable. To expose to the State testimony and evidence supporting a defendant's request for an independent psychological evaluation and a psychiatrist's trial assistance lays bare his insanity or related defense strategy. A hearing open to the State necessarily impinges upon the defendant's right to the assistance of counsel and his privilege against self-incrimination. We hold that these constitutional rights and privileges, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, entitle an indigent defendant to an *ex parte* hearing on his request for a psychiatric expert.

That the defendant in *Phipps* was requesting an *ex parte* hearing in order to apply for funds for a *fingerprint* expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature. The public, adversarial nature of an open hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can daunt the defendant's desire to put before the trial court all his evidence in support of his motion. This was plainly one reason defendant in this case failed to make a threshold showing of his need for an independent psychiatric expert: he was willing to present evidence to the trial court in chambers, but he was not willing to reveal it to the State.

Moreover, because the area of psychiatric expertise differs importantly from that of fingerprint analysis, defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist. *See State v. Moore*, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring) ("The issue of sanity is one about which experts can and frequently do disagree, even though all experts in the field have received years of intensive and highly specialized and demanding training. . . . The taking and analysis of fingerprints is largely a mechanical function, although admittedly one which requires some training and experience."). In *State v. Moore*, we held that the defendant

made the requisite threshold showing of specific necessity for a fingerprint expert by showing that (1) he would be unable to assess adequately the State's conclusion that a palm print found at the scene of the crime was his; (2) because there were no eyewitnesses to the crime, the print was critical evidence; and (3) defendant's mental retardation limited his abilities to communicate and reason and thus his ability to assist his counsel in his defense. *Moore*, 321 N.C. at 344-45, 364 S.E.2d at 653. None of these statements nor their underlying proof, including objective evidence of the defendant's mental retardation, would jeopardize the defendant's privilege against self-incrimination or violate his right to the effective assistance of counsel or the associated attorney-client privilege.

The privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, is to be liberally construed. It applies not only to criminal prosecutions but to any proceeding sanctioned by law and to any investigation, litigious or not. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964) (quoting 98 C.J.S. *Witnesses* § 433, at 245 (1955)). "[T]he protection afforded by the privilege against self-incrimination 'does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.' " *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502, *cert. denied*, 298 N.C. 304, 259 S.E.2d 300 (1979) (quoting *Maness v. Meyers*, 419 U.S. 449, 461, 42 L. Ed. 2d 574, 585 (1975)). The privilege against self-incrimination protects against real, not remote and speculative dangers, *Zicarelli v. Investigation Comm'n*, 406 U.S. 472, 478, 32 L. Ed. 2d 234, 240 (1972), *quoted in Trust Co. v. Grainger*, 42 N.C. App. at 339, 256 S.E.2d at 502, but a witness need not prove the hazard. To require him to do so would compel him to surrender the very protection the privilege is designed to guarantee. The privilege, to be sustained, need be evident only from the implications of the question and in the setting in which it is asked. These must show only that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. *Hoffman v. United States*, 341 U.S. 479, 486-87, 95 L. Ed. 2d 1118, 1124 (1951), *quoted in Trust Co. v. Grainger*, 42 N.C. App. at 339-40, 256 S.E.2d at 502, *and in State v. Smith*, 13 N.C. App. 46, 52, 184 S.E.2d 906, 910 (1971).

In the setting of a pre-trial hearing at which the defendant must make a threshold showing of need for psychiatric assistance or risk losing his opportunity to rely on the defense of insanity, what the defendant must divulge is compelled by the circumstances; his statements, therefore, are not voluntary testimony by which he would waive the privilege. *See Marshall v. United States*, 423 F.2d 1315, 1318 (10th Cir. 1970) ("Certainly the movant cannot be said to 'waive' disclosure of his case and his concomitant rights against self-incrimination and to due process by proceeding under subsection [3006A](e)."[1]). *Cf. Harrison v. U.S.*, 392 U.S. 219, 222, 20 L. Ed. 2d 1047, 1051 (1968) (a defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives); *State v. Glover*, 77 N.C. App. 418, 421, 250 S.E.2d 86, 89 (1978).

When a defendant has already been evaluated by a psychiatrist, who is to aid in the defendant's showing, the information at the psychiatrist's disposal may include "not only what [the patient's] words directly express; he lays bare his entire self, his dreams, his fantasies, his sins, and his shame." *Taylor v. United States*, 222 F.2d 398, 401 (1955) (quoting Manfred F. Guttmacher and Henry Weihofen, *Psychiatry and the Law* 272 (1952)). When a defendant must make this showing absent such assistance, he somehow must prove to the court the instability of his mental state at the time of the crime, not only opening his thoughts and feelings to public and prosecutorial scrutiny, but also risking exposure of his role in potentially incriminating events in which such thoughts and feelings arose. Cross-examination by the State exacerbates the risk.

The Sixth Amendment right to the assistance of counsel presupposes the right to the *effective* assistance of counsel. *E.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14, 25 L. Ed. 2d 763, 773 n.14 (1970). The effective assistance of counsel requires adequate trial

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1. 18 U.S.C. 3006A(e)(1) (1988) provides, in pertinent part:

> Upon request.—Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

preparation, including access to expert witnesses where appropriate. *See United States v. Wright*, 489 F.2d 1181, 1188 n.6 (D.C. Cir. 1973); *see also, e.g., Mason v. Arizona*, 504 F.2d 1345, 1351 (1974), *cert. denied*, 420 U.S. 936, 43 L. Ed. 2d 412 (1975) (due process right to effective assistance of counsel includes right to ancillary services necessary in the preparation of a defense). When insanity is the principal defense, access to psychiatric experts is essential to assist the attorney in presenting an adequate case. *United States v. Taylor*, 437 F.2d 371, 377 n.9 (4th Cir. 1971); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038, 1047 (1976), *aff'd*, 556 F.2d 556 (2d Cir.), *cert. denied*, 431 U.S. 958, 53 L. Ed. 2d 276 (1977); *see also Ake*, 470 U.S. at 82, 84 L. Ed. 2d at 65 (psychiatrist can assist in determining whether the insanity defense is viable, in presenting testimony, and in preparing for cross-examination of the State's psychiatric witnesses).

The attorney-client privilege, critical to the effective assistance of counsel, "rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court." *United States ex rel. Edney v. Smith*, 425 F. Supp. at 1046. A defendant's disclosures to his counsel cannot be used to furnish proof in the government's case. "Disclosures made to the attorney's expert should be equally unavailable, at least until he is placed on the witness stand. The attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness." *Id.* at 1054.

The *ex parte* hearing procedure may be a critical component of the indigent defendant's right to expert psychiatric assistance—itself an indispensable tool to his defense once he has made a threshold showing of need. A hearing out of the presence of the prosecutor protects the defendant's insanity or diminished capacity defense strategy and enables him to put forward his best evidence in support of a motion that, if granted, might give him a reasonable chance of success, but if denied could devastate his defense. *See Ake*, 470 U.S. at 83, 84 L. Ed. 2d at 66. Only in the relative freedom of a nonadversarial atmosphere can the defense drop inhibitions regarding its strategies and put before the trial court all available evidence of a need for psychiatric assistance. Only in such an atmosphere can the defendant's privilege against self-incrimination

and his right to the effective assistance of counsel not be subject to potential violation by the presence of the State.

We thus hold that the trial court erred in denying defendant an *ex parte* hearing on his timely request for the appointment of a psychiatrist in violation of rights guaranteed him under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. Because we cannot know what defendant would have presented in support of his request had he not been required to make his showing in open court,[2] we cannot say that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). Defendant therefore is entitled to a new trial.

Because we award a new trial, we need not consider defendant's remaining assignments of error, which are unlikely to recur upon retrial.

NEW TRIAL.

STATE OF NORTH CAROLINA v. JOSEPH EARL BATES

No. 145A91

(Filed 8 April 1993)

Indigent Persons § 19 (NCI4th)— indigent defendant—assistance of forensic psychologist—right to ex parte hearing

The trial court's denial of an indigent defendant's motion for an *ex parte* hearing of evidence supporting his request for the assistance of a forensic psychologist to aid in his defense violated defendant's privilege against self-incrimination and his right to the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. Because the appellate court cannot know what additional evidence defendant might have proffered in support of his request had he been able to do so out of the

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2. We cannot expect defendant here to have made an offer of proof. "It could hardly be thought if the court would not hear the defendant outside of the presence of the government attorney that it would have heard an offer of proof with any greater privacy." *Holden v. United States*, 393 F.2d 276, 278 (1st Cir. 1968).

presence of the prosecutor, the trial court's error cannot be shown to be harmless beyond a reasonable doubt.

Am Jur 2d, Criminal Law §§ 701, 714.

Justice PARKER 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 Rousseau, J., at the 25 February 1991 Special Criminal Session of Superior Court, Yadkin County, on a jury verdict finding defendant guilty of first-degree murder and first-degree kidnapping. On 15 April 1992 this Court allowed defendant's motion to bypass the Court of Appeals on the kidnapping conviction. Heard in the Supreme Court 6 October 1992.

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

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

WHICHARD, Justice.

Defendant was tried capitally for murder in the first degree of Charlie Jenkins and, pursuant to the jury's unanimous recommendation, was sentenced to death for the murder. Defendant's pre-trial motion that his preliminary showing of need for funds to hire a mental health expert be heard *ex parte* was denied by the trial court. We hold, for reasons more fully articulated in *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993), that the trial court's ruling violated defendant's rights under the United States Constitution. As we held in *Ballard*, this error cannot be shown to have been harmless beyond a reasonable doubt. Defendant is accordingly entitled to a new trial.

On 31 August 1990, following advisement as to his constitutional rights, defendant gave a statement in which he admitted shooting the victim and throwing his hog-tied body into a river. The victim had approached defendant in the parking lot at a bar and asked for a ride home. Defendant had been living in a tent behind his boss's house since someone had broken into and fired into his house. Defendant believed his ex-wife and her boyfriend

were responsible for his harassment, and he thought the victim, who later admitted to defendant that he knew defendant's ex-wife, was setting him up and leading him into a trap.

On 29 November 1990 defendant filed a Motion for an *Ex Parte* Hearing at which he would apply for funds necessary to employ expert witnesses to aid in his defense. Defendant's Notice of Defense of Insanity and Intent to Introduce Expert Testimony Relating to Mental Disease, Defect or Condition was filed the next day.

At a pre-trial motions hearing held 18 December 1990, defendant moved orally for an *ex parte* hearing for funds necessary to employ expert witnesses to aid in his defense. The trial court denied defense counsel's specific request that the defense be permitted to present evidence supporting his motion for funds in an *ex parte* hearing. Defense counsel then tendered a Motion for Funds for Expert Assistance, to which he attached an affidavit by Dr. John Warren, a forensic psychologist. In the affidavit the psychologist concluded "that the defendant was probably psychologically disturbed to a significant degree," based on Dr. Warren's having been informed that at the time of the murder

> [defendant] had been suffering from extreme harassment by an individual or individuals which placed the defendant in such fear that he moved out of his home and into a tent in the woods, could not and did not sleep for a significant period of time, was later fired from his job because of the harassment and became obsessed with this fear for his life [and that] defendant . . . attempted suicide while incarcerated in the Yadkin County Jail.

In addition to Dr. Warren's affidavit, the motion was supported by defendant's testimony as to his depression, stress, and memory loss. Following her cross-examination of defendant, the prosecutor suggested to the trial court that defendant's motion "under all the circumstances, perhaps, . . . should be granted."

The trial court denied defendant's motion for his own expert, but allowed the State's motion that defendant be evaluated in response to defendant's notice of intent to rely on the defense of insanity. The trial court accordingly ordered that defendant be sent to Dorothea Dix Hospital for observation as to his capacity to proceed. The trial court's written order specifically stated that

defendant's being committed to Dorothea Dix Hospital was "for purposes of . . . evaluating his sanity at the time of the alleged offenses and determining his capacity to proceed to trial."

The resulting evaluation included findings that defendant was a heavy alcohol drinker with an IQ of 82 who feels uneasy in social situations and is possibly hypersensitive to criticism. The evaluation stated that defendant's memory was "intact with no obvious perceptual motor difficulties," his cognitive functioning represented no brain dysfunction or deterioration, and his personality showed "[n]o indications of mood thought disorder." The evaluating psychiatrist concluded that defendant did not have "a disorder that would prevent him from being capable of proceeding to trial or relieve him of responsibility for his actions."

At an open, pre-trial hearing held 16 January 1991, defense counsel again tendered a motion for the expert assistance of a psychologist. Defense counsel did not reiterate his request that the hearing be *ex parte*. The request was directed specifically at defendant's need for assistance with proof of the mitigating circumstances that the capital felony had been committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2) (1988); the capacity of the defendant to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6) (1988); and the "catchall factor," N.C.G.S. § 15A-2000(f)(9) (1988). To this motion defense counsel attached the affidavit by Dr. Warren and an affidavit by defendant. The results of defendant's evaluation at Dorothea Dix Hospital were also before the court. The trial court again denied defendant's motion for expert assistance.

On 24 January 1991 the trial court filed its written order denying defendant's 29 November 1990 motion for an *ex parte* hearing and denying defendant's 18 December 1990 Motion for Funds for Expert Assistance.

Defendant's petitions for *certiorari* and *supersedeas* and his motion for a temporary stay, filed with this Court 25 January 1991, cited both the trial court's failure to allow defendant's motion for expert assistance to be heard *ex parte* and its denial of the motion itself as subjects of the requested review. This Court denied defendant's petitions on 7 February 1991.

Defendant thus proceeded to trial without the assistance of a psychologist. The jury found him guilty of first-degree kidnapping and of first-degree murder on the bases of both premeditation and deliberation and felony murder. At sentencing the jury found the aggravating circumstances that the murder had been committed while defendant was engaged in the commission of a kidnapping and that it had been especially heinous, atrocious or cruel. Among the circumstances in mitigation the jury found that the murder had been committed while defendant was under the influence of mental or emotional disturbance, but it did not find that the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law had been impaired. After weighing the mitigating and aggravating circumstances it had found, the jury recommended that defendant be sentenced to death.

We held in *State v. Ballard* that it is error to deny the motion of an indigent defendant for an *ex parte* hearing regarding his request for the assistance of a psychiatrist. We reasoned that the risk of exposing the defendant's insanity or related defense strategy to the State and the associated risks of self-incrimination and encroachment upon the defendant's right to the effective assistance of counsel jeopardize the defendant's rights and privileges under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. *Ballard*, 333 N.C. at 519, 428 S.E.2d at 180.

Here, defendant sought the assistance of a forensic psychologist rather than a psychiatrist, but this is a distinction without a difference with regard to a defendant's entitlement to an *ex parte* hearing on the issue of expert assistance regarding an insanity defense. Both psychologists and psychiatrists are trained to recognize and treat mental illness. Their training and expertise, and the fact that the subject of their study cannot be mechanically assessed, distinguishes them materially from such experts in physical evidence as fingerprint analysts. *See State v. Moore*, 321 N.C. 327, 348-49, 364 S.E.2d 648, 659 (1988) (Mitchell, J., concurring). But their training, expertise, and subject of study does not significantly differentiate one from the other with regard to the ability of each to assist in an insanity defense.

It is impossible for this Court to know what additional evidence defendant might have proffered in support of his motion had he been able to do so out of the presence of the prosecutor. For

this reason, the trial court's error in denying the request for an *ex parte* hearing on his motion for a psychiatrist or psychologist cannot be shown to be harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). *See State v. Ballard*, 333 N.C. at 523, 428 S.E.2d at 183. Defendant thus is entitled to a new trial.

We do not address defendant's remaining assignments of error, as they will not likely recur on retrial.

NEW TRIAL.

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

MAURICE J. WORRELL v. N.C. DEPARTMENT OF STATE TREASURER, RETIREMENT SYSTEMS DIVISION

No. 314A92

(Filed 8 April 1993)

Retirement Systems § 4 (NCI4th)— Teachers' and State Employees' Retirement System—purchase of credit for military service—date of eligibility for purchase

A State employee became eligible to purchase retirement credit for his military service on 31 October 1987 where he became an employee of the Pender County Sheriff's Department and a member of the North Carolina Local Governmental Employees' Retirement System on 1 October 1973; he assumed a position with the North Carolina Employment Security Commission and became a member of the State System on 1 November 1977; his accumulated contribution and membership service credits in the Local System were transferred to the State System on 19 March 1980; appellant attempted to purchase retirement credits for his time in military service at the reduced rate on 14 November 1988; and appellant was advised by respondent that he would have to pay the full actuarial value for the benefits because more than three years had elapsed from the time he became eligible to purchase the benefits. Although respondent argues that membership service in the Local System must be a part of membership

service in calculating the time for purchasing service credit, the plain words of N.C.G.S. § 135-18.1 define membership service as "service as a teacher or State employee rendered while a member of the Retirement System." The "Retirement System" is "the Teachers' and State Employees' Retirement System." N.C.G.S. § 135-1(22).

Am Jur 2d, Pensions and Retirement Funds §§ 1643, 1645.

On appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 106 N.C. App. 640, 418 S.E.2d 241 (1992), reversing an order entered by Lewis (Robert D.), J., in the Superior Court, Buncombe County, on 8 February 1991. Heard in the Supreme Court 12 January 1993.

This appeal brings to the Court a question as to the cost to the appellant to purchase credit under the Teachers' and State Employees' Retirement System (State System) for time spent in the armed forces of the United States. The facts are not in dispute. On 1 October 1973, the appellant became an employee of the Pender County Sheriff's Department and a member of the North Carolina Local Governmental Employees' Retirement System (Local System). On 1 November 1977, he assumed a position with the North Carolina Employment Security Commission and became a member of the State System. On 19 March 1980, the appellant's accumulated contribution and membership service credits in the Local System were transferred to the State System.

On 14 November 1988, the appellant attempted to purchase retirement credits for his time spent in the military service at the reduced rate provided by law. He was advised by the respondent that he would have to pay the full actuarial value for the benefits because more than three years had elapsed from the time he became eligible to purchase the benefits.

The appellant filed a petition for a contested case hearing with the Office of Administrative Hearings. An administrative law judge recommended that the appellant be allowed to purchase his military service credit at the reduced rate. The Board of Trustees of the Teachers' and State Employees' Retirement System issued a final agency decision in which it determined that the recommended decision was erroneous and refused to adopt it. The superior court reversed the final agency decision and entered a judgment for the petitioner. The Court of Appeals reversed the superior court.

Talmage Penland for petitioner appellant.

Michael F. Easley, Attorney General, by Alexander McC. Peters, Assistant Attorney General, for respondent appellee.

WEBB, Justice.

The resolution of the issue in this case depends on the application of certain sections of Chapter 135 of the General Statutes which deal with the retirement system for teachers and state employees. The petitioner was given the right to purchase a service credit in the State System by N.C.G.S. § 135-4(f)(6), which has been repealed, with his right to purchase the credit preserved. This section provided in part:

> Notwithstanding any other provision of this Chapter, teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment . . . .

N.C.G.S. § 135-4(m) provides that if a member purchases credit for his or her military time at the reduced rate, it must be done within three years of the time at which the member becomes eligible. *See Osborne v. Consolidated Judicial Retirement System*, 333 N.C. 246, 424 S.E.2d 115 (1993).

The question posed by this appeal involves the determination of the date the petitioner became eligible to purchase a credit for military service. In order to purchase the credit at a reduced rate, the petitioner had to do so within three years of the date he became eligible. N.C.G.S. § 135-4(f)(6) says the purchase may be made "upon completion of 10 years of membership service." N.C.G.S. § 135-1(14) defines membership service as "service as a teacher or State employee rendered while a member of the Retirement System." N.C.G.S. § 135-1(22) defines Retirement System as "the Teachers' and State Employees' Retirement System of North Carolina."

The petitioner says the plain language of the pertinent sections of Chapter 135 requires that we hold that he was not eligible to purchase credit for his military service until 31 October 1987. He says that these sections require that he has to complete ten years of membership service, which service is rendered as a state employee and a member of the State System. He argues that he became a state employee and a member of the State System on 1 November 1977. He completed ten years of service on 31 October 1987 and the plain words of the statute provide that he became eligible to purchase the credit on that date.

The respondent says that in determining the eligibility date for the purchase of the service credit, we must look at N.C.G.S. § 135-18.1. That is the section which provides for the transfer of retirement credits from the Local System to the State System. The respondent says this section governs the petitioner's retirement status after the transfer. This section says in part:

> (a) . . . Any person who becomes a member of this Retirement System on or after July 1, 1951, shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the local system: Provided, the actual transfer of employment is made while his account in the local system is active and such person shall request the local system to transfer his accumulated contributions, interest, and service credits to this Retirement System; provided further, with respect to any person who becomes a member of this Retirement System after July 1, 1969, the local system agrees to transfer to this Retirement System the amount of reserve held in the local system as a result of previous contributions of the employer on behalf of the transferring employee.
>
> (b) The accumulated contributions withdrawn from the local system and deposited in this Retirement System shall be credited to such member's account in the annuity savings fund of this Retirement System and shall be deemed, for the purpose of computing any benefits subsequently payable from the annuity savings fund, to be regular contributions made on the date of such deposit.
>
> (c) Upon the deposit in this Retirement System of the accumulated contributions previously withdrawn from the local system the Board of Trustees of this Retirement System shall

request the Board of Trustees of the local system to certify to the period of membership service credit and the regular accumulated contributions attributable thereto and to the period of prior service credit, if any, and the contributions with interest allowable as a basis for prior service benefits in the local system, as of the date of termination of membership in the local system. Credit shall be allowed in this System for the service so certified in determining the member's credited service and, upon his retirement he shall be entitled, in addition to the regular benefits allowable on account of his participation in this Retirement System, to the pension which shall be the actuarial equivalent at age 65 or at retirement, if prior thereto, of the amount of the credit with interest thereon representing contributions attributable to his service credits in the local system.

The appellee argues that N.C.G.S. § 135-18.1 provides that membership service when transferred from the Local System to the State System is to be treated as membership service in the State System. This being the case, says the respondent, it must be a part of membership service in calculating the appellant's time for purchasing his service credit. The difficulty with this argument is that the statute provides a precise definition of membership service. It is "service as a teacher or State employee rendered while a member of the Retirement System." N.C.G.S. § 135-1(14) (1992). The "Retirement System" is "the Teachers' and State Employee's Retirement System." N.C.G.S. § 135-1(22) (1992). We can find nothing in N.C.G.S. § 135-18.1 which changes this definition. We are bound by the plain words of the statute. *Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950).

The respondent argues that if we hold that the transferred right is not treated as membership service in the State System, there will be several consequences that were obviously not intended by the General Assembly. As an example, it says a member's creditable service cannot be used to determine his eligibility for retirement. It is not necessary for us to determine this question in this case. The only thing we hold in this case is that Chapter 135 as applied in this case requires that the appellant became eligible to purchase retirement credit for his military time on 31 October 1987.

For the reasons stated in this opinion, we reverse and remand to the Court of Appeals for further remand to the Superior Court, Buncombe County, for reinstatement of its order.

REVERSED AND REMANDED.

TAMMY CARPENTER, PETITIONER v. N.C. DEPT. OF HUMAN RESOURCES, RESPONDENT

No. 343PA92

(Filed 8 April 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 107 N.C. App. 278, 419 S.E.2d 582 (1992), affirming an order entered by Stanback, J., on 19 January 1991, in Superior Court, Guilford County. Heard in the Supreme Court 18 March 1993.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for petitioner-appellee.

Michael F. Easley, Attorney General, by Marilyn A. Bair, Assistant Attorney General, for respondent-appellant Department of Human Resources.

Margaret Person Currin, United States Attorney, by R.A. Renfer, Jr., Chief, Civil Division (Raleigh, N.C.), on behalf of the United States Department of Agriculture, and Marcia K. Sowles, Attorney, Civil Division (Washington, D.C.), on behalf of the United States Department of Justice, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. AMIR H. AYAZI, FAROUKH HASHEMI AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 290PA92

(Filed 8 April 1993)

On writ of certiorari to review an opinion of the Court of Appeals, 106 N.C. App. 475, 417 S.E.2d 81 (1992), affirming a summary judgment in favor of the defendant Amir H. Ayazi, entered by Lamm, J., in the Superior Court, Watauga County, on 21 March 1991. Heard in the Supreme Court 17 March 1993.

Willardson & Lipscomb, by William F. Lipscomb, for plaintiff appellant.

Eggers, Eggers, & Eggers, by Rebecca Eggers-Gryder, for defendant appellee Nationwide Mutual Insurance Company.

PER CURIAM.

Petition for writ of certiorari improvidently allowed.

CONRAD RAY LUSK v. CRAWFORD PAINT COMPANY; RUSCON CORPORATION; GEORGE W. KANE, INCORPORATED; CAROLINA STEEL CORPORATION

No. 227PA92

(Filed 8 April 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 106 N.C. App. 292, 416 S.E.2d 207 (1992), reversing an order entered by Beaty, J., on 23 January 1991 in Superior Court, Forsyth County, and remanding to that court for further proceedings. Heard in the Supreme Court 16 March 1993.

Herman L. Stephens for plaintiff appellee.

Smith Helms Mullis & Moore, by Richmond G. Bernhardt, Jr., for defendant appellant Ruscon Corporation.

Robinson Maready Lawing & Comerford, by Robert J. Lawing and Jane C. Jackson, for defendant appellant George W. Kane, Incorporated.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., for defendant appellant Carolina Steel Corporation.

Teague, Rotenstreich and Stanaland, by Stephen G. Teague, for defendant appellant Crawford Paint Company.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

ALMOND v. RHYNE

No. 70P93

Case below: 108 N.C.App. 605

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

B. B. WALKER CO. v. BURNS INTERNATIONAL SECURITY SERVICES

No. 54P93

Case below: 108 N.C.App. 562

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

BALLANCE v. N.C. COASTAL RESOURCES COMM.

No. 19P93

Case below: 108 N.C.App. 288

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

BOYD v. NATIONWIDE MUTUAL INS. CO.

No. 39PA93

Case below: 108 N.C.App. 536

Petition by defendant (Nationwide Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1993.

BRITT v. N.C. DEPT. OF CRIME CONTROL AND PUBLIC SAFETY

No. 103P93

Case below: 108 N.C.App. 777

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

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

COLLINS v. SMITH

No. 85P93

Case below: 108 N.C.App. 786

Petition by defendant and third-party plaintiff (Franklin D. Smith) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

DUNGEE v. NATIONWIDE MUTUAL INSURANCE CO.

No. 63P93

Case below: 108 N.C.App. 599

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993. Petition by defendant (Nationwide Mutual Insurance Company) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993. Motion by defendant (Nationwide Mutual Insurance Company) to dismiss appeal by LeVern Allen, Jr. and LeVern Allen III for lack of substantial constitutional question allowed 7 April 1993. Petition by defendants (LeVern Allen, Jr. and LeVern Allen III) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

FERRELL v. FRYE

No. 56P93

Case below: 108 N.C.App. 521

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

FITCH v. FITCH

No. 84P93

Case below: 108 N.C.App. 786

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

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

GRIFFIN v. PRICE

No. 47PA93

Case below: 108 N.C.App. 496

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1993.

GURGANIOUS v. INTEGON GENERAL INS. CORP.

No. 442P92

Case below: 108 N.C.App. 163

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

HOMEBUILDERS ASSN. OF CHARLOTTE
v. CITY OF CHARLOTTE

No. 133P93

Case below: 109 N.C.App. 327

Petition by defendant for temporary stay is allowed 30 March 1993 pending receipt and determination of the defendant's petition for discretionary review.

IN RE APPEAL OF PERRY-GRIFFIN FOUNDATION

No. 55P93

Case below: 108 N.C.App. 383

Petition by Pamlico County and Pamlico County Board of Equalization for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

IN RE CARTER v. HODGES

No. 102P93

Case below: 108 N.C.App. 788

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

INVESTORS TITLE INS. CO. v. HUTCHINGS

No. 78P93

Case below: 108 N.C.App. 787

Petition by defendant (Marie D. Murdock) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

JUAREZ-MARTINEZ v. DEANS

No. 59P93

Case below: 108 N.C.App. 486

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

LOVELL v. NATIONWIDE MUTUAL INS. CO.

No. 41A93

Case below: 108 N.C.App. 416

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 7 April 1993.

MOORE v. MOORE

No. 99A93

Case below: 108 N.C.App. 656

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals allowed 7 April 1993 limited to issues in dissent.

NATIONWIDE MUTUAL INS. CO. v. ROCHELLE

No. 17P93

Case below: 108 N.C.App. 355

Petition by defendant (Lena Rice) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

NELSON v. BATTLE FOREST FRIENDS MEETING

No. 87A93

Case below: 108 N.C.App. 641

Appeal by plaintiffs pursuant to G.S. 7A-30 retained 7 April 1993. Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals allowed 7 April 1993.

PARTRIDGE v. ASSOCIATED CLEANING CONSULTANTS

No. 79P93

Case below: 108 N.C.App. 625

Motion by plaintiff to dismiss appeal for lack of substantial constitutional question allowed 7 April 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

SHOLAR v. HAMBY

No. 88PA93

Case below: 108 N.C.App. 787

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 April 1993 on issue of appealability only.

STATE v. CARMON

No. 89P93

Case below: 108 N.C.App. 787

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

STATE v. LINARDY

No. 147P93

Case below: 109 N.C.App. 698

Petition by defendant for writ of supersedeas and temporary stay denied 12 April 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 12 April 1993.

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

STATE v. WILSON

No. 77P93

Case below: 108 N.C.App. 575

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 7 April 1993. Petition by defendant (Johnny Wayne Wilson) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

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

No. 266PA91

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

On 31 March 1993, the parties to this action, the Commissioner of Insurance of the State of North Carolina and the North Carolina Rate Bureau, moved the Court in writing for an order allowing the withdrawal of the Commissioner's petition for discretionary review and remanding the matter to the Commissioner for entry of a consent order as set forth in exhibit A attached to the parties' motion.

The Court earlier allowed the Commissioner's petition on 14 August 1991 and heard arguments on 10 February 1992 but has not yet rendered an opinion.

The parties' motion is based on the parties having reached a settlement of all matters in dispute in this case.

The Court believes that the parties should be allowed to settle this case on such terms as they determine to be fair and in the best interests of all concerned and that the Court should not express any opinion on the merits of the settlement.

The Court, therefore, ORDERS that, without any determination by the Court on the merits of the settlement, the parties' motion to withdraw the Commissioner's petition for discretionary review and to remand the matter to the Commissioner for the entry of the consent order contemplated by the parties BE AND THE SAME IS, HEREBY, ALLOWED.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith certify a copy of this order to the parties.

Done by the Court in Conference this the 7 day of April, 1993.

WHITE v. JONES

No. 74P93

Case below: 108 N.C.App. 786

Petition by defendants (Rollins and Moore) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993. Petition by defendants (Bank & Brandon) for discretionary review pursuant to G.S. 7A-31 denied 7 April 1993.

STATE OF NORTH CAROLINA v. STEVEN RANDALL HARRIS

No. 21A92

(Filed 7 May 1993)

1. **Evidence and Witnesses § 732 (NCI4th)— murder—statement by defendant following invocation of right to remain silent—not prejudicial**

There was no prejudicial error in a murder prosecution where defendant made an oral statement, officers told defendant that he was not telling the truth, defendant said that he had nothing more to say, an SBI agent assured defendant that he wanted defendant's side of the story and was willing to record it, defendant gave the agent a detailed statement, the agent reduced the statement to writing and read it back to defendant sentence by sentence, and defendant signed and dated each individual page of the statement. Assuming that defendant invoked his right to silence before giving his second statement, the State carried its burden of showing that any error was harmless beyond a reasonable doubt given the incriminating nature of defendant's initial oral statement and other testimony at trial.

Am Jur 2d, Appeal and Error §§ 797-801, 803.

2. **Criminal Law § 491 (NCI4th)— murder—jury view of house—jury permitted to roam house—no error**

There was no error in a murder prosecution where the murder was committed inside a house and the jury was permitted to roam freely through the house during a jury view rather than being held together as a body. Although defendant contends that his right to be present at all phases of his trial was violated, there is no requirement that a defendant in a capital case be in the presence of all members of the jury, assembled as a single body, throughout such a jury view. Furthermore, defendant's right to a unanimous jury verdict was not violated. There is no authority to support the contention that the Constitution of North Carolina requires that jurors always view precisely the same evidence at the same time. N.C.G.S. § 15A-1229(a).

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Hudson, J., in the Superior Court, Alamance County, on 17 May 1991. Heard in the Supreme Court on 15 January 1993.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant Harris.

MITCHELL, Justice.

The defendant was indicted on counts of first-degree murder, conspiracy to commit murder, and robbery with a dangerous weapon. The jury convicted the defendant on all counts. At a separate capital sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment. The trial court entered judgment accordingly. The defendant appealed to this Court as a matter of right from the judgment imposing a life sentence for first-degree murder. This Court allowed the defendant's motion to bypass the Court of Appeals with regard to his appeal of the other related convictions.

The State's evidence introduced at trial tended to show, *inter alia*, the following. On 19 March 1990, Ronald Satterfield, sales administrator at MAP Enterprises in Burlington, found Roy Mahaley's body in the trunk of Roy's car. Satterfield testified that on the morning of 19 March 1990, he was concerned because Roy was not yet in the office and because Roy had failed to keep an appointment with another MAP Enterprises employee on the previous day. After hearing that Roy's car was parked in its normal place in the company parking lot, Satterfield walked over to the car and noticed that the keys were in the ignition. Satterfield then reached into the car, took the keys out of the ignition and opened the trunk, where he found Roy's body.

David Hedgecock, a special agent with the State Bureau of Investigation, testified that he went to MAP Enterprises on 19 March 1990 and participated with other officers in the investigation of Mahaley's death. During the investigation, Agent Hedgecock interviewed Ronald Satterfield. Satterfield gave Agent Hedgecock information concerning Marylin Mahaley's relationship with Roy, who was her husband, and with Steven Randall Harris, the defend-

ant. After speaking with Satterfield, Agent Hedgecock and Detective Kevin Crowder interviewed Marylin Mahaley and Eric Taylor. As a result of these interviews, the officers arrested the defendant at a Burlington motel.

Following his arrest at the motel, the defendant was transported to the Burlington Police Department where he was interviewed by Agent Hedgecock and Detective Crowder. After being informed of and waiving his constitutional rights, the defendant made an oral statement and then signed a written statement containing the following information. On Friday, 16 March 1990, Mahaley visited the defendant's room at the Knights Inn in Burlington. Roy was carrying a stick, and he hit the defendant on the arm. The defendant took the stick away from him and hit him with it several times. After the two men stopped fighting, they talked for approximately thirty minutes about resolving their differences. Roy left the defendant's room at approximately 11:30 p.m.

On the following day at approximately 3:00 p.m., the defendant spoke with Roy on the telephone about getting together to talk about their problems, but they did not set a specific time or date. At some point during that afternoon, Eric Taylor visited the defendant's room, where the two men drank vodka and played video games. At approximately 9:30 p.m., Marylin Mahaley called the defendant and told him that Roy was asleep. During their conversation, the defendant and Marylin both stated that if Roy was not cooperative, maybe they should kill him. The defendant then told Marylin that he was coming over to her home in fifteen minutes.

Taylor and the defendant drove to the Mahaley home and went to the back of the house. Marylin opened the door and told them that Roy was in the den. The defendant told Marylin to go into the bedroom and to stay there until he came to get her.

The defendant knelt beside Roy and saw the butt of a gun sticking out from underneath the couch. Roy opened his eyes and rolled toward the gun. The defendant grabbed a baby blanket from the floor and began to choke Roy. After the defendant choked Roy for a couple of minutes, Taylor took the blanket and began to choke Roy. At this point, the defendant went to the bedroom and asked Marylin if she had a piece of wire or rope. Marylin told the defendant that there was wire in the basement, so the defendant went to the basement and found a long piece of cloth near the furnace. The defendant went back upstairs and put the

piece of cloth around Roy's neck and laid the blanket aside. Taylor and the defendant both choked Roy with the piece of cloth. After choking Roy for approximately twenty minutes, the defendant told Marylin that Roy was dead.

Marylin told Taylor and the defendant to dress Roy in his work clothes and to take his body to MAP Enterprises. After dressing Roy's body in his work clothes, the two men put the body into the trunk of Roy's car. Before the two men left for MAP Enterprises, Marylin took money from her husband's wallet and gave it to Taylor so that he could pay a ticket. At approximately 2:30 a.m., the two men drove Roy's car to MAP Enterprises and parked it in his usual parking space.

At the defendant's trial, Eric Taylor, who had entered into a plea arrangement with the prosecution, testified that he met the defendant while they were working at the Hillsborough Innkeeper Motel in the fall of 1989. Taylor occasionally would go to the defendant's hotel room to drink, smoke marijuana and play video games. In late February 1990, the defendant 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, the defendant started talking about harming Roy. The defendant asked Taylor to provide him with an alibi. During the week of the killing, the defendant told Taylor that he wanted to kill Roy because Roy was investigating the forged check.

On the night of the killing, Taylor called the defendant. The defendant told Taylor that he and Roy Mahaley had fought and that he had injured Roy severely. The defendant said that he would have to kill Roy that night. Taylor went to the defendant's room at approximately 8:00 p.m. At approximately 8:30 p.m., the defendant called Marylin and told her to put out Roy's clothes so that he could dress Roy's body after killing him. The defendant also told Marylin to call him back when Roy was asleep. At approximately 10:30 p.m., Marylin Mahaley called the defendant and told him that Roy was asleep. The defendant told Marylin that he and Taylor would be over soon.

As the defendant and Taylor approached the Mahaley carport, they observed Roy Mahaley lying on the floor in the den. At that point, Marylin Mahaley opened the door for the two men, and the defendant told her to go back into the bedroom and wait. The defendant walked over to Roy and began to strangle him

with a necktie. While the defendant was choking Roy, the necktie broke, so the defendant used a blanket and a cord to finish the task. Taylor also choked Roy with the blanket and the cord. After killing Roy, the defendant dressed the body in work clothes and put it in the trunk of Roy's car. After placing Roy's body in the trunk, the defendant took money from Roy's wallet and gave $150 to Taylor and the rest to Marylin.

The defendant 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, Marylin recommended that the car be left at MAP Enterprises because it would raise less suspicion. In response to Marylin's recommendation, the defendant and Taylor left the car at MAP Enterprises and returned to the Mahaley home. Upon returning to the Mahaley home, Taylor noted that Marylin seemed relieved. As the defendant and Taylor prepared to leave, Marylin thanked Taylor for helping them and gave the defendant a kiss.

The defendant's evidence introduced at trial tended to show, *inter alia*, the following. The defendant testified that he met Marylin Mahaley at Oakleigh Rehabilitation Center and that they became friends. However, they were both discharged from the program because they tended to pair off and separate themselves from the group activities. Following their discharge from Oakleigh Rehabilitation Center, the defendant and Marylin began to have a relationship, despite the fact that Marylin was married to Roy.

The defendant became friends with Eric Taylor during October or November of 1989. The defendant and Taylor both worked at the Hillsborough Innkeeper as desk clerks. The two men drank beer, smoked marijuana and played video games together. The defendant also talked to Taylor about his relationship with Marylin. At one point, Taylor told the defendant that killing Roy Mahaley would solve their problems. The defendant admitted that he had taken one of Roy's checks. However, the defendant testified that Taylor signed the check and cashed it in order to pay some debts. A few days prior to the killing, the defendant told Taylor that Roy had reported the stolen check to the police.

On Friday, 16 March 1990, Roy visited the defendant's motel room and attacked him with a stick. The defendant took the stick from Roy and used it to beat him. Roy was bleeding badly, so the two men stopped fighting. After the fight, the defendant got a wet cloth for Roy's wound, and the two men talked. The defendant

apologized for opening the cut on Roy's head, and Roy apologized for starting the fight. The two men decided that it was critical that they discuss a peaceful resolution, so they agreed to talk at the Mahaley home on the following day after the Mahaleys' daughter, Samantha, was asleep.

The defendant testified that on Saturday, 17 March 1990, he called Roy and confirmed their plan to meet that evening. At some point during the day, Taylor visited the defendant's motel room, and the defendant purchased liquor for Taylor. Taylor left the defendant's motel room and returned after dinner. The two men smoked marijuana and had drinks. At approximately 10:30 p.m., Marylin called and told the defendant that Samantha was asleep and that Roy was watching television in the den. The defendant told Marylin that he would be over in a few minutes. The defendant testified that Taylor had asked him to talk to Roy about the check, but the defendant told Taylor that he should talk to Roy himself in order to avoid prosecution.

Upon arriving at the Mahaley home, Taylor and the defendant walked to the carport door, and Marylin told them to come in. Marylin appeared to be nervous, so the defendant tried to reassure her that everything was going to be all right. Marylin told the defendant that Roy had loaded his gun and that Roy had been drinking. The defendant told Marylin to go into the bedroom and stay with Samantha until he had had an opportunity to speak with Roy.

The defendant testified that when he and Taylor walked into the den, Roy reached for a gun which was underneath the couch. The defendant threw a blanket over Roy's head, and Roy hit his head on a table and was knocked unconscious. The defendant took the gun into the kitchen and put it on a counter. He then told Taylor to keep an eye on Roy. The defendant went into the bedroom and asked Marylin if she had some rope so that he could tie Roy's hands. Marylin said that there was probably some rope in the basement. The defendant found a piece of cord in the basement and went back to Marylin's bedroom.

The defendant testified that he heard loud voices, so he went into the den and found Taylor strangling Roy with the blanket. The defendant took the blanket from Roy's neck and checked his pulse; Roy was still alive. Taylor told the defendant that Roy had regained consciousness and started fighting with him, so he had

choked Roy until he passed out. The defendant again went into the bedroom to talk to Marylin. When he returned to the den, Taylor was choking Roy with the cord that the defendant had brought from the basement. The defendant tried to remove the cord, but he inadvertently tightened it on Roy's neck. The defendant checked Roy's pulse and determined that he was dead. The defendant then went into the bedroom and told Marylin that Roy was dead.

The defendant testified that he had been afraid to call the police because he felt that his relationship with Marylin would make the two of them natural suspects. After he talked to Marylin, they decided that it would be less suspicious to leave Roy's car at MAP Enterprises. Taylor and the defendant dressed Roy's body in work clothes and put it in the trunk of his car. Marylin picked up Roy's wallet, gave Taylor $150 and kept the rest for herself. The defendant drove Roy's car to the Knight's Inn and wiped the fingerprints from the car. He then drove the car to MAP Enterprises and left it parked in Roy's normal space.

John Kramer, a friend of the defendant, testified as follows. Kramer lived in Baltimore, Maryland, and had known the defendant since the defendant was twelve-years-old. The defendant once worked for Kramer, and they had been good friends over the years. Kramer had never met Eric Taylor, but Taylor called him one day and told him that the defendant needed $350 in order to get out of jail. Kramer testified that Taylor said that he did not like Roy Mahaley and would kill Roy if he thought that he could do so without being caught. At some point after the killing, the defendant called Kramer and told him that "Eric killed Roy."

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

[1] By his first assignment of error, the defendant contends that his written statement was obtained in violation of constitutional principles explained in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), because the officers continued to interrogate him after he invoked his right to remain silent. In *Miranda*, the Court stated that "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 474, 16 L. Ed. 2d at 723.

Following his arrest, the defendant in the present case was taken to the Burlington Police Department. After Detective Kevin Crowder informed the defendant of his constitutional rights, the defendant waived these rights and gave an oral statement to Detective Crowder and Special Agent David Hedgecock. Agent Hedgecock testified that:

> Mr. Harris stated that he met Marylin Mahaley at the Oakleigh Drug Rehabilitation Center in Durham. He stated that during that period at Oakleigh he found out that Marylin was married and that she was unhappily married. He said that they later moved out. She moved out of the house—after they left the Oakleigh Center that she later moved out of the house from Roy and they moved away together somewhere up north. He stated that they later returned because Marylin missed her daughter. When they moved back he went to Hillsborough. He stated that the previous Monday he moved to the Knights Inn in Burlington, however. He said that sometime Friday night his phone rang. It was around eight thirty p.m. He stated that a man that was on the other end of the phone cursed him and then hung up the phone. He said that at ten o'clock that night that Roy Mahaley came to [his] door at the Knights Inn; that Roy had some type of billy club and threatened him with it, hit him in the arm with it; and that he took away the billy club or the stick and beat Roy with it. He stated that after the fight that he and Roy talked some. Roy said something about a fight that he and Marylin had had where he threw Marylin through the door, through a kitchen door. He stated that he and Roy then fought again at the motel.
>
> After that Mr. Harris stated that he told Roy that he wanted to talk to both of them, Roy and Marylin, at the same time, and Roy indicated something about maybe the next night.
>
> Mr. Harris stated that later that night after Roy left the Knights Inn that he took a taxi cab and went to the emergency room of one of the hospitals in Burlington, and while he was there he saw Marylin. He got a key to the trunk of her car from Marylin, and he said something about a license plate that Roy had taken off [of] Marylin's car that he got out of Roy's and put back in the trunk of Marylin's car. Then he went home—went back to the Knights Inn.

He stated that the next day, which was Saturday, because he had told Roy that he would call him about them getting together to talk, that he called Roy or called the Mahaley residence about three o'clock p.m., talked to Roy. Roy agreed that they all needed to meet and talk it out, so he decided to go over to the house. He stated that sometime later that night he did in fact go over there. When he got there Roy was laying on the floor beside the couch. He stated that Roy had a handgun, and that he grabbed a blanket and wrapped it around Roy's neck and killed him. He said that he had a friend that helped him put Roy in the trunk—or that helped carry Roy out and put him in the trunk of his car.

He then said that—he indicated that the night he had fought with Roy at the Knights Inn that Roy had told him then that he had a gun with him that night. He hadn't said that earlier, but he interjected that at this point.

He also—at this point [noted that] the friend that had helped him carry Roy out to the trunk was identified as being Eric Taylor. He then said that he panicked when he saw the gun that Roy had. He said he drove over to MAP Enterprises afterwards after Roy was in the trunk. He stated that—then he backed up, as we were pressing him for a little bit of detail here. He said that he picked up the gun that Roy had and he emptied it. He described it as being a black revolver, about a .38 caliber. He said that Marylin wiped off the gun and put it on top of a cabinet, and put some bullets that were in the gun in a kitchen drawer.

He then said that Eric disposed of Roy's wallet, a xerox copy of a bad check that had been written on Roy's account in Eric's name. That was put in one bag. There was another bag that contained gauze bandage, some string from the basement, which at this point he indicated some string of some type had been used in the killing also. That was placed in a bag, also a couple of socks from the floor that had some blood on them. All these were put in another bag, and both of these bags were put in the car and disposed of subsequently.

At this point one of the officers, myself or Detective Crowder, asked Mr. Harris how much money he had on him or with him. He emptied his pockets. He had a little over

> a hundred dollars. He had a hundred dollar bill, he had two fives, several ones.
>
> Mr. Harris admitted, with reference to the check, that he had stolen that check from the Mahaley residence once when Roy was out of town and he was staying with Marylin at her house. He said he took it because it contained Roy's driver's license number and some other information he could use to mess with Roy. He said he was angry with Roy because he felt that Roy was responsible for his having been arrested for not paying some type of—some local motel bill of some type.

The trial court found as a fact that the defendant made his statement to the officers precisely as testified to by Agent Hedgecock.

Based on substantial evidence the trial court found that when the defendant concluded his oral statement, the two officers told him that he was not telling the truth. The defendant became angry and said "f--- you, if you don't believe me. That's the truth. If you don't believe me, I have nothing else to say." Agent Hedgecock then assured the defendant that he wanted his side of the story and "was perfectly willing to record it." The defendant agreed to give Agent Hedgecock a more detailed written statement. The defendant then gave a detailed statement to Agent Hedgecock, which Hedgecock reduced to writing and read back to the defendant sentence by sentence. Thereafter, the defendant signed and dated each individual page of the statement.

The defendant does not argue that the officers failed to fully advise him of his constitutional rights before he gave either his initial oral statement or the second statement which he signed after it was reduced to writing. Instead, he contends that when he said, "if you don't believe me, I have nothing else to say," he invoked his right to remain silent. He argues that the statement he made in response to questions asked by the officers after that invocation of his right to remain silent was admitted into evidence in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

We assume *arguendo* that the defendant invoked his right to silence before giving his second statement which was reduced to writing and that, in light of the continued questioning by the officers immediately after his assertion of that right, the defendant did not knowingly and intelligently waive his privilege against self-

incrimination as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. *See generally Michigan v. Mosley*, 423 U.S. 96, 46 L. Ed. 2d 313 (1975). A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the State demonstrates that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705 (1967); N.C.G.S. § 15A-1443(b) (1988). The presence of overwhelming evidence of guilt, however, may render errors of constitutional dimension harmless beyond a reasonable doubt. *State v. Autry*, 321 N.C. 392, 364 S.E.2d 341 (1988). This is such a case.

In his initial oral statement, the defendant admitted that he went to the Mahaley home and that he "grabbed a blanket and wrapped it around Roy's neck and killed him." The defendant also stated that some type of cord had been used in the killing. The defendant further stated that Eric Taylor had been present and had assisted him in removing and concealing Roy's body. While the defendant's written statement included additional details about the crime, his initial oral statement described his killing of the victim in substantial detail. Given the incriminating nature of the defendant's initial oral statement, coupled with Eric Taylor's testimony at trial, we conclude that the State has carried its burden of showing that any error in the trial court's failure to suppress the defendant's written statement was harmless beyond a reasonable doubt. Accordingly, this assignment of error is without merit and is overruled.

[2] By his next assignment of error, the defendant contends that the trial court erred by granting the defendant's motion for a jury view of the Mahaley home. We assume *arguendo* that the defendant is entitled to raise this issue on appeal. *But see* N.C.G.S. § 15A-1443(c) (1988). Nevertheless, we conclude that the assignment is without merit.

The defendant does not contend that the trial court abused its discretion in granting his motion for a jury view or that the trial court failed to follow N.C.G.S. § 15A-1229, the statute governing jury views. Instead, the defendant contends that since members of the jury were permitted to roam freely about the Mahaley home and were not held together as a body to inspect the premises, his state constitutional rights to a unanimous jury verdict and to be present at all stages of his capital trial were violated.

In the present case, the defendant requested a jury view of the Mahaley home pursuant to N.C.G.S. § 15A-1229(a), which provides that

> [t]he trial judge in his discretion may permit a jury view. If a view is ordered, the judge must order the jury to be conducted to the place in question in the custody of an officer. The officer must be instructed to permit no person to communicate with the jury on any subject connected with the trial,except as provided in subsection (b), nor to do so himself, and to return the jurors to the courtroom without unnecessary delay or at a specified time. The judge, prosecutor, and counsel for the defendant must be present at the view by the jury. The defendant is entitled to be present at the view by the jury.

N.C.G.S. § 15A-1229(a) (1988). In granting the defendant's request for a jury view, the trial court followed the procedures mandated by this statute. The trial court ordered the sheriff's department to permit no person to communicate with the jurors and further instructed the officers in charge not to communicate with the jurors. The trial court, the prosecutors, defense counsel, and the defendant were all present at the jury view. Finally, the trial court ordered the sheriff's department to return the jurors to the courtroom without unnecessary delay.

The defendant contends that his right to be present at all stages of his capital trial was violated because the jurors were permitted to roam independently through the Mahaley home during the jury view of the home. Contrary to the defendant's contention, there is no requirement, constitutional or otherwise, that the defendant in a capital case be in the presence of all members of the jury, assembled as a single body, throughout such a jury view. Even in a capital case, the Constitution of North Carolina and N.C.G.S. § 15A-1229(a) require only that the defendant be present during a jury view. *Cf. State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989) (establishing that the right of a capital defendant to be present at all stages of his trial is guaranteed by Article I, section 23 of the Constitution of North Carolina, but holding that the harmless error standard applicable to errors under the Constitution of the United States must, nevertheless, be applied to violations of the right). In the instant case, the defendant was present during the jury view.

The defendant further contends in support of this assignment that his right to a unanimous jury verdict under Article I, section 24 of the Constitution of North Carolina was violated because all jurors may not have viewed the same parts of the house at the same time. We find no authority to support the defendant's contention that the Constitution of North Carolina requires that jurors always view precisely the same evidence at the same time. On the contrary, it is standard practice in this state for photographs to be passed to a jury for viewing in the courtroom, and in such situations, jurors usually do not view the same photograph at the same time. By analogy, individual jurors may be permitted to look at different parts of a house at any given time during a jury view of the house. The defendant has failed to show that he has suffered any prejudice. In the present case, the trial court strictly complied with the requirements of N.C.G.S. § 15A-1229(a). In doing so, the trial court did not violate the defendant's right to a unanimous jury verdict. This assignment of error is overruled.

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error.

No error.

NORTH CAROLINA ASSOCIATION OF ELECTRONIC TAX FILERS, INC., AND ROCKET REFUND, INC. v. WILLIAM T. GRAHAM, COMMISSIONER OF BANKS, NORTH CAROLINA BANKING COMMISSION

No. 228PA92

(Filed 7 May 1993)

1. Taxation § 28.4 (NCI3d)— Refund Anticipation Loan Act—no violation of Supremacy Clause

The Refund Anticipation Loan Act does not violate the Supremacy Clause of the U.S. Constitution since no intent to preempt state legislation on refund anticipation loans has been shown in federal statutes or in regulations of the Internal Revenue Service, and the Act does not interfere with the business operations of out-of-state national banks or with any federal regulatory authority over national banks. N.C.G.S. §§ 53-245 *et seq.*

Am Jur 2d, Constitutional Law §§ 70 et seq.

State tax as inconsistent with federal law so as to violate supremacy clause (Art. VI, cl 2) of Federal Constitution—Supreme Court Cases. 93 L. Ed. 2d 1056.

2. Taxation § 28.4 (NCI3d)— Refund Anticipation Loan Act—no violation of Commerce Clause

The Refund Anticipation Loan Act does not violate the Commerce Clause of the U.S. Constitution since the Act does not directly regulate interstate commerce and does not favor in-state economic interests over out-of-state interests; North Carolina has a legitimate interest in ensuring that this state's residents are fully informed as to (1) the difference between a refund anticipation loan and simple electronic filing of refunds and (2) the potentially high cost of a refund anticipation loan; and the burden on interstate commerce is minimal and does not exceed the local benefits.

Am Jur 2d, Commerce §§ 1 et seq.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to a determination by the Court of Appeals of summary judgment for defendant entered by Stephens, J., at the 12 February 1992 Civil Session of Superior Court, Wake County. Heard in the Supreme Court 13 January 1993.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff-appellants.

Michael F. Easley, Attorney General, by Philip A. Lehman, Assistant Attorney General; and L. McNeil Chestnut and Mercedes Oglukian for defendant-appellee.

North Carolina Legal Services Resource Center, Inc., by Gregory C. Malhoit, and North State Legal Services, Inc., by Carlene McNulty, for North Carolina Clients Council, amicus curiae.

PARKER, Justice.

Plaintiffs filed this action for a declaratory judgment asserting that the Refund Anticipation Loan Act, N.C.G.S. §§ 53-245 to 53-254 (effective Oct. 1, 1990), violates both the Supremacy Clause and the Commerce Clause of the United States Constitution and asking

that the Act be declared unconstitutional on its face and in its application to refund anticipation loans made by out-of-state national banks. Plaintiffs moved for summary judgment; the trial court denied plaintiffs' motion and entered summary judgment in favor of defendant. The court concluded (i) there are no genuine issues of material fact and (ii) the Refund Anticipation Loan Act violates neither the Supremacy Clause nor the Commerce Clause of the United States Constitution. On 16 July 1992 this Court granted plaintiffs' petition for discretionary review. Before this Court plaintiffs again contend the Act violates the Supremacy Clause and the Commerce Clause. We disagree and affirm summary judgment for defendant.

Plaintiffs are North Carolina corporations, each with its principal place of business in Southern Pines, North Carolina. Plaintiff Association is composed of North Carolina businesses participating in the Internal Revenue Service Electronic Filing Program for Form 1040, which permits taxpayers to file income tax returns electronically. Plaintiff Rocket Refund is a member of the Association. Members of plaintiff Association also accept and facilitate refund anticipation loan ("RAL") applications utilizing the loan services of out-of-state national banks. To determine the validity of plaintiffs' arguments that the Refund Anticipation Loan Act violates the Supremacy and Commerce Clauses of the United States Constitution, we need at the outset to examine pertinent revenue procedures and the provisions of the Act itself.

To be accepted into the Electronic Filing Program for Form 1040, an applicant must complete an application, undergo testing of its transmitting capability, pass a suitability check, receive a letter of acceptance and obtain a filing or transmitter identification number. Rev. Proc. 91-69, 1991-2 C.B. 893, 894 (effective Jan. 1, 1992); *see also* Rev. Proc. 90-62, 1990-2 C.B. 659, 660 (effective Jan. 1, 1991). Once accepted, a participant becomes an electronic filer and is categorized as an electronic return originator, a software developer, a transmitter, or some combination thereof. Rev. Proc. 91-69, 1991-2 C.B. at 894. Revenue procedures inform electronic filers "of their obligations to the Internal Revenue Service, taxpayers, and other participants." *Id.* at 893. Responsibilities of electronic filers include ensuring that complete returns are accurately and efficiently filed and complying with all publications and notices of the Electronic Filing Systems Office. *Id.* at 895. If an electronic filer charges a fee for transmission of a tax return, the fee may

not be based on a percentage of the refund amount. *Id.* Penalties are provided for disclosure or use of tax return information. *Id.* at 896. In addition, electronic filers who also meet the definition of income tax preparers may be subjected to preparer penalties. *Id.* The Internal Revenue Service ("the Service") monitors electronic filers for conformity with revenue procedures; this monitoring includes checking on (i) timely receipt and legibility of forms and (ii) quality of transmission, including rejections, errors and other defects. *Id.* at 899. The Service also monitors complaints about filers. The Service may issue a warning letter describing specific corrective action for deviations from Revenue Procedure 91-69 or may immediately suspend a filer from the program. *Id.*

According to Section 9 of Revenue Procedure 91-69, "Direct Deposit of Refunds," a taxpayer expecting to receive a refund may file a return electronically and elect to have the refund deposited directly into a bank account. *Id.* at 897; *see also* Rev. Proc. 90-62, 1990-2 C.B. at 662. Section 10 of Revenue Procedure 91-69 recognizes that often taxpayers borrow against expected refunds:

> .01 A Refund Anticipation Loan (RAL) is money borrowed by a taxpayer that is based on a taxpayer's anticipated income tax refund. The Service has no involvement in RALs. This is a contract between the taxpayer and the lender. An acknowledgement from the Service that a taxpayer's return is accepted for processing is not a guarantee to either the taxpayer or a lender that the taxpayer will receive a refund or what the amount of any refund might be.

Rev. Proc. 91-69, 1991-2 C.B. at 897. By contrast, the predecessor procedure, Revenue Procedure 90-62, provided simply, "The Service has no involvement in RALs. This is a contract between the taxpayer and the financial institution." Rev. Proc. 90-62, 1990-2 C.B. at 663. Section 10 of Revenue Procedure 91-69 also provides as follows:

> .02 Any entity that is involved in the Electronic Filing Program, including a financial institution that accepts direct deposits of income tax refunds, has an obligation to every taxpayer who applies for an RAL to ensure that the taxpayer understands that an RAL is in fact a loan, and not a substitute for or a quicker way of receiving an income tax refund. Consequently, if a direct deposit is not made as originally anticipated

> by the taxpayer, the taxpayer may be liable for additional interest or fees.

Rev. Proc. 91-69, 1991-2 C.B. at 898. Other language in Section 10 regulating electronic filers facilitating RALs includes (i) a provision requiring written consent of the taxpayer before the filer may disclose tax information to a lender and (ii) a prohibition against guaranteeing the amount of the refund or the date it will be issued. *Id.* at 898.

The Refund Anticipation Loan Act defines an RAL as "[a] loan that the creditor arranges to be repaid directly from the proceeds of the debtor's income tax refund." N.C.G.S. § 53-246(8) (Supp. 1992). Creditors are those who make RALs, *id.* § 53-246(4); and facilitators are those who process, receive, or accept for delivery an application for an RAL or a check in payment of RAL proceeds or otherwise facilitate the making of RALs, *id.* § 53-246(6). RAL fees are "charges, fees, or other considerations charged or imposed by" creditors or facilitators. *Id.* § 53-246(9). RAL fees are distinct from charges for nonloan services such as preparation or electronic filing of returns. *Id.*

The Act requires persons handling RAL applications to register with the North Carolina Commissioner of Banks. *Id.* § 53-247(a). Banks, savings associations or credit unions doing business under North Carolina or United States law are specifically exempted. *Id.* § 53-247(c). Failure to register constitutes a misdemeanor punishable by imprisonment of up to sixty days, a fine of up to $2,000, or both. *Id.* § 53-247(b). Registration procedures include submitting an application and fee of $250.00 for each office wherein RALs will be facilitated. *Id.* § 53-248(a). In addition the Commissioner must find "that the responsibility and general fitness of the applicant are such as to command the confidence of the community and to warrant belief that the business of facilitating [RALs] will be operated" in accord with the Act. *Id.* If not renewed, registration expires on 31 December following the date issued; and the renewal fee is $100.00. *Id.* § 53-248(b).

Registrants are subject to additional regulation, in that they must file fee schedules, *id.* § 53-249(a); post them prominently, *id.* § 53-249(c); and make full disclosure to debtors, *id.* § 53-249(d). More specifically, registrants must disclose

> [e]xamples of the annual percentage rates, as defined by the Truth In Lending Act, 15 U.S.C. § 1607 and 12 C.F.R. Section 226.22, for refund anticipation loans of five hundred dollars ($500.00), seven hundred fifty dollars ($750.00), one thousand dollars ($1,000), one thousand five hundred dollars ($1,500), two thousand dollars ($2,000), and three thousand dollars ($3,000). Regardless of disclosures of the annual percentage rate required by the Truth In Lending Act, if the debtor is required to establish or maintain a deposit account with the creditor for receipt of the debtor's tax refund to offset the amount owed on the loan, the maturity of the loan for the purpose of determining the annual percentage rate disclosure under this section shall be assumed to be the estimated date when the tax refund will be deposited in the debtor's account.

Id. § 53-249(d)(6).

In addition, acts specifically prohibited include (i) misrepresentation of a material factor or condition of an RAL; (ii) failing to arrange for an RAL promptly upon application; (iii) engaging in fraud; (iv) facilitating an RAL for which the fee is different from that posted or filed with the Commissioner or has been determined to be unconscionable; (v) demanding part of the loan proceeds for check cashing, credit insurance, or other goods or services unrelated to preparing and filing returns or facilitating RALs; and (vi) arranging for a secured interest in property other than the debtor's refund proceeds. *Id.* § 53-250. Upon finding that any conduct of a registrant may be in violation of the Act or that a registrant has engaged in an unfair or deceptive act or practice, the Commissioner must give notice and an opportunity for the registrant to be heard. *Id.* § 53-251. Upon finding conduct to be in violation of the Act, the Commissioner shall issue a cease and desist order. *Id.* Appeals may be taken to the North Carolina Court of Appeals. *Id.* § 53-252. If a registrant fails to appeal and continues to engage in prohibited conduct cited in a cease and desist order, there is a mandatory $1,000 penalty for each such act. *Id.* § 53-251(a). Registration may be revoked for a course of conduct in violation of the Act or continually engaging in conduct cited in a cease and desist order. *Id.* § 53-251(b). Civil penalties include (i) for failure to deliver proceeds of an RAL within forty-eight hours of the time promised, refund of the RAL fee and (ii) for engaging in prohibited acts, treble RAL fees (or other unauthorized charges) plus a reasonable attorney's fee. *Id.* § 53-251(c).

[1] Plaintiffs' first contention is that the Refund Anticipation Loan Act violates the Supremacy Clause. We disagree.

As stated by the United States Supreme Court, under the Supremacy Clause

> the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." US Const, Art VI, cl 2. In determining whether Congress has invoked this pre-emption power, we give primary emphasis to the ascertainment of congressional intent. This may be manifested in several ways. Chief among the indications of an intent to pre-empt is where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. Pre-emption may also be found where state legislation would impede the purposes and objectives of Congress. In undertaking this analysis, however, we must be mindful of the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140, 93 L. Ed. 2d 449, 461-62 (1986) (citations omitted); *see also Cipollone v. Liggett Group, Inc.*, --- U.S. ---, ---, 120 L. Ed. 2d 407, 420 (1992) (reiterating that intent to preempt may be explicitly stated in statute and finding explicit statements in Federal Cigarette Labeling and Advertising Act of 1965 and Public Health Cigarette Smoking Act of 1969).

In *Reynolds Tobacco*, the issue was whether Congress had exercised its power under the Supremacy Clause to preempt state ad valorem taxation of imported goods stored in customs-bonded warehouses and destined for domestic markets. The federal statute at issue was 19 U.S.C. § 1556, and in deciding the preemption question in favor of the state, the Court said:

> Nor is there any suggestion that [ad valorem] taxation here would conflict with the central purpose behind the customs-bonded warehouses: to ensure that federal customs duties are collected. Not only is the present statutory and regulatory framework sufficient to permit customs officials to monitor

> the entrance and removal of goods [and] to guarantee collection of federal revenue, but Reynolds does not explain how . . . imposition of the North Carolina tax will prevent customs officials from receiving the duties. And the present statutes and regulations that guide this monitoring . . . are not so comprehensive as to leave no room for North Carolina's assessment of ad valorem taxes. Although the regulations are not themselves controlling on the pre-emption issue, where, as in this case, Congress has entrusted an agency with the task of promulgating regulations to carry out the purposes of a statute [19 USCS § 1556], as part of the pre-emption analysis we must consider whether the regulations evidence a desire to occupy a field completely. Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive. In this case, the current regulations, while detailed, appear to contemplate some concurrent state regulation and, arguably, even state taxation.

Id. at 148-49, 93 L. Ed. 2d at 467 (citations omitted). The Court held that North Carolina could, consistent with the Supremacy Clause, impose a nondiscriminatory ad valorem property tax on imported goods stored in a customs-bonded warehouse and destined for domestic manufacture and sale. *Id.* at 152, 93 L. Ed. 2d at 469.

Following *Reynolds Tobacco*, we begin with the principle that federal regulation is not deemed preemptive in the absence of persuasive reasons. We turn first to plaintiffs' argument that Congress has legislated so comprehensively that it has left no room for supplementary state legislation on RALs. The only federal taxation statute cited by plaintiffs provides as follows:

> **Regulations requiring returns on magnetic media, etc.**
>
> **(1) In general**
>
> The Secretary shall prescribe regulations providing standards for determining which returns must be filed on magnetic media or in other machine-readable form. The Secretary may not require returns of any tax imposed by subtitle A on individuals, estates, and trusts to be other than on paper forms supplied by the Secretary.
>
> **(2) Requirements of regulations**
>
> In prescribing regulations under paragraph (1), the Secretary—

> (A) shall not require any person to file returns on magnetic media unless such person is required to file at least 250 returns during the calendar year, and
>
> (B) shall take into account (among other relevant factors) the ability of the taxpayer to comply at reasonable cost with the requirements of such regulations.

26 U.S.C. § 6011(e) (Supp. II 1990). By its plain language this statute pertains only to electronic filing. One regulation cited by plaintiffs provides as follows:

> **Composite return in lieu of specified form.**
>
> The Commissioner may authorize the use, at the option of a person required to make a return, of a composite return in lieu of any form specified in this part for use by such a person, subject to such conditions, limitations, and special rules governing the preparation, execution, filing, and correction thereof as the Commissioner may deem appropriate. Such composite return shall consist of a form prescribed by the Commissioner and an attachment or attachments of magnetic tape or other approved media. Notwithstanding any provisions in this part to the contrary, a single form and attachment may comprise the returns of more than one such person. To the extent that the use of a composite return has been authorized by the Commissioner, references in this part to a specific form for use by such a person shall be deemed to refer also to a composite return under this section.

26 C.F.R. § 1.6012-5 (1992). By its plain language this regulation pertains to composite returns. Another regulation cited by plaintiffs, 26 C.F.R. § 301.7701-15(c) (1992), mentions neither electronic filing nor RALs.

The only authority cited by plaintiffs that specifically mentions RALs is Revenue Procedure 90-62, which as noted and discussed above has been superseded by Revenue Procedure 91-69. Defendant argues that revenue procedures, being informal Service publications, are without legal effect in Supremacy Clause challenges. *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Ct. Cl. 1978) (stating, "[I]nformal publications all the way up to revenue rulings are simply guides to taxpayers."); *see also* 26 C.F.R. § 601.601(d)(2)(i)(b) (1992) (defining "Revenue Procedure" as a state-

ment that affects rights or duties of taxpayers under the Code and related statutes); Michael D. Rose and John C. Chommie, *Federal Income Taxation* 9-10 (3d ed. 1988) (stating that less important Service interpretations include revenue rulings; other interpretations include revenue procedures).

Even if revenue procedures had the force and effect of a federal statute or regulation, however, we are unable to conclude that either Revenue Procedure 90-62 or its successor, Revenue Procedure 91-69, shows an intent to preempt by comprehensively legislating RALs. The detailed procedures govern electronic filing of tax returns, not RALs. In fact, both revenue procedures specifically disclaim such intention, stating, "The service has no involvement in RALS." Rev. Proc. 91-69, 1991-2 C.B. at 897; Rev. Proc. 90-62, 1990-2 C.B. at 663. The additional language in Revenue Procedure 91-69 requiring filers to ensure that taxpayers understand RALs are loans and not a substitute for or a quicker way of receiving income tax refunds is not, in our view, indicative of preemptive intent. The Service itself did not consider the 1991 additions to Revenue Procedure 90-62 to be significant changes. Rev. Proc. 91-69, 1991-2 C.B. at 894. Comparing the two revenue procedures with the comprehensive legislative schemes at issue in *Reynolds Tobacco* and *Cipollone*, we conclude plaintiffs have failed to show preemptive intent in federal statutes or in regulations or publications of the Service.

Plaintiffs also contend the Refund Anticipation Loan Act violates the Supremacy Clause because it infringes upon and interferes with business operations of out-of-state banks. Again we disagree.

Banks are specifically exempted from the operation of the Act. N.C.G.S. § 53-247(c). The requirements of the Act are applicable only to in-state, nonbank facilitators of RALs. Even if banks were not exempt, however, plaintiffs have cited neither a specific provision of the National Banking Act nor any interpretive regulation indicative of preemptive intent with respect to RALs, and our research discloses none. Moreover, the record discloses no evidence that any business activities of any national banks are impeded by the Act or that the Act interferes with any federal regulatory authority over national banks.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any

party is entitled to a judgment as a matter of law," summary judgment "shall be rendered forthwith." N.C.G.S. § 1A-1, Rule 56 (1990); *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Plaintiffs having failed to show any comprehensive legislative scheme indicative of Congress' intent to preempt state legislation on RALs, we conclude the Refund Anticipation Loan Act does not violate the Supremacy Clause; therefore, we hold the trial court did not err in granting summary judgment for defendants on this issue.

[2] Plaintiffs' second and final contention is that the Act violates the Commerce Clause. Again we disagree.

"Although the commerce clause conferred on the national government power to regulate commerce . . . in the absence of conflicting legislation by Congress, there is a residuum of power in the state[s] to make laws governing matters of local concern which nevertheless . . . affect interstate commerce or even . . . regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 766-67, 89 L. Ed. 1915, 1923 (1945); *see also Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669-70, 67 L. Ed. 2d 580, 586 (1981) (reaffirming same principle). "Not every exercise of state power with some impact on interstate commerce is invalid." *Edgar v. MITE Corp.*, 457 U.S. 624, 640, 73 L. Ed. 2d 269, 282 (1982). A two-tiered approach to analyzing state economic regulation under the Commerce Clause has been adopted by the United States Supreme Court:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause and the category subject to the . . . balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Brown-Forman Distillers v. N.Y. Liquor Auth., 476 U.S. 573, 578-79, 90 L. Ed. 2d 552, 559-60 (1986) (citations omitted). In *Brown-Forman Distillers*, appellant contended that a state statute directly regulated interstate commerce because it effectively regulated the price at which liquor was sold in other states and disadvantaged consumers in other states. *Id.* at 579-80, 90 L. Ed. 2d at 560. Defendant argues, and we agree, that the Refund Anticipation Loan Act does not directly regulate interstate commerce and that it does not favor in-state economic interests over out-of-state interests. In this respect we find plaintiffs' case to be distinguishable from *Brown-Forman.*

Turning, then, to the second tier of the *Brown-Forman* analysis, we note first that since all RAL facilitators are required to register, the Act regulates evenhandedly. In addition, the legitimacy of the Act's purpose is unassailable. The Act's primary purpose is consumer protection: It ensures disclosure of two kinds of information important to potential debtors. First, facilitators must disclose that RAL transactions are not the same as tax refunds or the electronic filing of tax returns. In addition the actual cost of an RAL must be disclosed.

The actual cost of an RAL, expressed as an annual percentage rate, may be quite high. The affidavit of W. Reitzel Deaton, Consumer Finance Administrator for the North Carolina Banking Commission, states that the typical transaction includes three separate fees, all deducted from the debtor's loan proceeds: (i) a preparation fee (if the registrant is also the preparer); (ii) a fee for electronic filing; and (iii) a fee charged by the creditor who makes the loan. The Commissioner's authority as to fees is limited to determining if loan fees are unconscionable. N.C.G.S. § 53-249(b). The average loan fee charged in 1991 was $33.00. The Commissioner has determined that a loan fee of $60.00 would be unconscionable. The effective annual percentage rate for a $500.00 RAL with a $60.00 loan fee would be 243.33%, based on an 18-day period for repayment by refund, the period used by the largest RAL facilitator in North Carolina. According to defendant, the effective annual percentage rate for a $500.00 RAL with a $30.00 loan fee would be over 100% for the same 18-day period. We agree with defendant that North Carolina has an interest in ensuring that this state's residents are fully informed as to (i) the difference between an RAL and simple electronic filing of refunds and (ii) the potentially high cost of an RAL.

The United States Supreme Court has recognized that state statutes enacted for a legitimate local purpose may still violate the Commerce Clause if they further the purpose only marginally or place an undue burden on interstate commerce. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 670, 67 L. Ed. 2d at 587. The burden imposed on interstate commerce by the Refund Anticipation Loan Act, however, is minimal. We also note that other courts have protected state registration statutes from challenges based on the Commerce Clause. *Sears, Roebuck and Co. v. Brown*, 806 F.2d 399 (2d Cir. 1986) (applying balancing test and holding banking statute, which regulated manner and extent to which bank or savings and loan holding companies could establish offices in state, did not violate Commerce Clause); *Oil Resources v. State of Fla., Dept. of Banking*, 583 F. Supp. 1027 (S.D. Fla.) (applying balancing test and holding statute, which required securities dealers to register with state banking department, did not violate Commerce Clause), *aff'd*, 746 F.2d 814 (11th Cir. 1984).

Furthermore, the Act is not different in scope from other North Carolina statutes which require registration or licensing of businesses for consumer protection purposes. These include statutes governing finance companies, N.C.G.S. §§ 53-165 to 53-191 (1990 and Supp. 1992); collection agencies, N.C.G.S. §§ 58-70-1 to 58-70-125 (1991); loan brokers, N.C.G.S. §§ 66-106 to 66-112 (1991); business opportunity sellers, N.C.G.S. §§ 66-94 to 66-100 (1992); mortgage brokers, N.C.G.S. §§ 53-233 to 53-244 (1990 and Supp. 1992); and automobile dealers and manufacturers, N.C.G.S. §§ 20-285 to 20-308.2 (1989 and Supp. 1992). All these businesses may be engaged in interstate commerce. Nevertheless, the constitutionality of such state regulatory statutes is accepted because they serve the legitimate purpose of consumer protection and impose only a minimal burden on interstate commerce.

Having determined that the Act's burden on interstate commerce is only incidental; that the burden does not exceed the local benefits; and that no pervasive federal regulatory scheme exists for RALs, we conclude the Refund Anticipation Loan Act does not place an undue burden on interstate commerce. Accordingly, we hold that under *Collingwood*, the trial court did not err in granting summary judgment for defendant on this issue.

AFFIRMED.

COUNTY OF GUILFORD v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., AND JEFFERSON INSURANCE COMPANY OF NEW YORK

No. 417A92

(Filed 7 May 1993)

Appeal by defendant Jefferson Insurance Company of New York pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 1, 422 S.E.2d 360 (1992), reversing the judgment of Rousseau, J., entered 21 May 1991 in Superior Court, Guilford County. Heard in the Supreme Court 14 April 1993.

Jonathan V. Maxwell, County Attorney and J. Edwin Pons, Deputy County Attorney, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and ToNola D. Brown, for defendant-appellant Jefferson Insurance Company of New York.

PER CURIAM.

AFFIRMED.

CANADY v. MANN

[333 N.C. 569 (1993)]

DONALD R. CANADY, SR., AND CONNIE H. CANADY v. OSCAR MANN, GAINES R. JOHNSON, WILLIAM J. BRINN, JR., AND CAROLINA LAKES CORPORATION

No. 349PA92

(Filed 7 May 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 107 N.C. App. 252, 419 S.E.2d 597 (1992), insofar as it reversed in part summary judgment for defendants Brinn and Carolina Lakes Corporation entered by Clark, J., in Superior Court, Cumberland County, on 1 April 1992. Heard in the Supreme Court 13 April 1993.

Rose, Ray, Winfrey & O'Connor, P.A., by Ronald E. Winfrey and Pamela S. Leslie, for plaintiff-appellees.

Brown & Robbins, by D.T. Scarborough III, for defendant-appellants Brinn and Carolina Lakes Corporation.

PER CURIAM.

After consideration of the new briefs and oral arguments, the Court determines that defendants Brinn and Carolina Lakes Corporation's petition for discretionary review was improvidently allowed.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

CONSTANCE M. MITCHELL v. JACKIE GOLDEN AND OBERIA BECK GOLDEN

No. 380A92

(FIled 7 May 1993)

Appeal by defendants pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 413, 420 S.E.2d 482 (1992), finding no error in a trial which resulted in a judgment for plaintiff entered by Beaty, J., on 31 December 1990 in Superior Court, Forsyth County. On 18 November 1992 this Court allowed discretionary review of an additional issue. Heard in the Supreme Court 13 April 1993.

Beverly R. Mitchell for plaintiff appellee.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy, Harold L. Kennedy, Jr., and Harold L. Kennedy, III, for defendant appellants.

PER CURIAM.

AFFIRMED.

PHILLIPS v. HOLLAND

[333 N.C. 571 (1993)]

DAVID ANDREW PHILLIPS, BY AND THROUGH HIS GUARDIAN AD LITEM, RICHARD B. SCHULTZ, AND BEVERLY PHILLIPS v. LORRIE S. HOLLAND

No. 406A92

(Filed 7 May 1993)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 688, 421 S.E.2d 608 (1992), reversing the judgment of Davis (James C.), J., at the 25 February 1991 Civil Session of Superior Court, Cabarrus County. Heard in the Supreme Court 15 April 1993.

Tim L. Harris & Associates, by Sheri A. Harrison and Jerry N. Ragan, for plaintiff-appellees.

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

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMOTHY SCOTT BRIDGES

No. 407A92

(Filed 7 May 1993)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 668, 421 S.E.2d 806 (1992), affirming the judgment of Johnston, J., at the 1 February 1991 Criminal Session of Superior Court, Mecklenburg County. Heard in the Supreme Court on 14 April 1993.

Michael F. Easley, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Isabel Scott Day, Public Defender, by Marc D. Towler and Grady Jessup, Assistant Public Defenders, for the defendant-appellant.

PER CURIAM.

AFFIRMED.

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

PERRY-GRIFFIN FOUNDATION, A NORTH CAROLINA CORPORATION v. JIMMIE PROCTOR, JOSEPH ANTHONY WEATHERINGTON, JR., RAYNORWOOD, INC., A CORPORATION OF NORTH CAROLINA, BILL MORRIS, MIKE WOODARD, AND FREDDIE PRICE

No. 374PA92

(Filed 7 May 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 107 N.C. App. 528, 421 S.E.2d 186 (1992), reversing and remanding a judgment and order entered by Lake, Jr. (I. Beverly), J., on 3 January 1991 in Superior Court, Pamlico County. Heard in the Supreme Court 13 April 1993.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for plaintiff-appellee.

Carl A. Barrington and J. Jefferson Newton, for Jimmie Proctor, defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

ACCELERATED PERSONNEL, INC. v. D. H. DAGLEY ASSOC.

No. 110P93

Case below: 108 N.C.App. 786

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

ACE, INC. v. MAYNARD

No. 443P92

Case below: 108 N.C.App. 241

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

ANDERSEN v. BACCUS

No. 111PA93

Case below: 109 N.C.App. 16

Petitions by plaintiff, defendants and State Farm Mutual Automobile Insurance for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

CLINTON v. WAKE COUNTY BD. OF EDUCATION

No. 109P93

Case below: 108 N.C.App. 616

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

IVEY v. FASCO INDUSTRIES

No. 115P93

Case below: 109 N.C.App. 123

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

LANG v. LANG

No. 44P93

Case below: 108 N.C.App. 440

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993. Motion by plaintiff for sanctions denied 6 May 1993.

LAW BUILDING OF ASHEBORO, INC. v. CITY OF ASHEBORO

No. 10P93

Case below: 108 N.C.App. 182

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

REBER v. BOOTH

No. 80A93

Case below: 108 N.C.App. 731

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as the basis for the dissenting opinion denied 6 May 1993.

RUDISAIL v. ALLISON

No. 81P93

Case below: 108 N.C.App. 684

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

SMITH v. STATE FARM FIRE AND CASUALTY CO.

No. 127P93

Case below: 109 N.C.App. 77

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

STATE v. BAKER

No. 171P93

Case below: 109 N.C.App. 557

Petition by Attorney General for temporary stay allowed 26 April 1993 pending consideration and determination of the State's petition for discretionary review. Petition by Attorney General for writ of supersedeas allowed 6 May 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

STATE v. BAYMON

No. 25A93

Case below: 108 N.C.App. 476

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993. Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question denied 6 May 1993.

STATE v. BURTON

No. 12P93

Case below: 108 N.C.App. 219

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 May 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

STATE v. GUTHRIE

No. 178P93

Case below: 110 N.C.App. 91

Petition by Attorney General for temporary stay allowed 7 May 1993 pending consideration and determination of the State's petition for discretionary review.

STATE v. JOHNSON

No. 5PA93

Case below: 108 N.C.App. 550

Petition by Attorney General for writ of supersedeas allowed 6 May 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

STATE v. McCARROLL

No. 172P93

Case below: 109 N.C.App. 574

Petition by Attorney General for temporary stay allowed 6 May 1993.

STATE v. MORGAN

No. 51PA93

Case below: 108 N.C.App. 673

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

STATE v. PARKER

No. 86P93

Case below: 108 N.C.App. 787

Motion by the Attorney General to dismiss appeals by defendants (Parker and Davis) for lack of substantial constitutional question allowed 6 May 1993. Petitions by defendants (Parker and Davis) for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

STATE v. POWELL

No. 129A93

Case below: 109 N.C.App. 1

Petition by defendant for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to

those presented as the basis for the dissenting opinion allowed 6 May 1993.

STATE v. RHODES

No. 14P93

Case below: 108 N.C.App. 356

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

UNION GROVE MILLING AND MANUFACTURING CO. v. FAW

No. 117PA93

Case below: 109 N.C.App. 248

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

W. H. ODELL & ASSOC. v. GARLAND

No. 116P93

Case below: 109 N.C.App. 134

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

WINTER v. WILLIAMS

No. 106P93

Case below: 108 N.C.App. 739

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 6 May 1993.

WORLEY v. WORLEY

No. 128PA93

Case below: 108 N.C.App. 789

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 6 May 1993.

STATE OF NORTH CAROLINA v. PATRICIA WELLS JENNINGS

No. 555A90

(Filed 4 June 1993)

1. **Jury § 227 (NCI4th)— first degree murder—jury selection—views on death penalty—contradictory and equivocal responses—excusal for cause**

The trial court did not err by excusing a prospective juror for cause in a murder prosecution where the prospective juror initially responded to both the prosecutor and the court that she did not have any moral or religious convictions against and could vote for the death penalty; she subsequently responded, upon further questioning by the prosecutor, that she would vote against the death penalty without regard to the evidence and notwithstanding the facts or circumstances; and, upon further questioning by the court, she was unable to affirmatively agree to follow the law and recommend a sentence based on the evidence and the law and felt that she would be trying to find ways to vote against the death penalty and would be predisposed or biased in some respect.

Am Jur 2d, Jury § 290.

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

2. **Evidence and Witnesses § 2264 (NCI4th)— first degree murder—torture—opinion of pathologist**

The trial court did not err in a first degree murder prosecution by admitting the opinion of the forensic pathologist who performed the autopsy that the victim had been tortured. The witness did not testify that defendant tortured the victim; he gave his expert medical opinion about the pattern and types of injuries he observed during the autopsy. The challenged testimony summarized the pattern of injuries and constituted a medical conclusion which the witness was fully qualified to reach. To the extent that the witness also addressed a legal conclusion or standard, the term "torture" is not a legal term of art which carries a specific meaning not readily apparent to the witness.

Am Jur 2d, Expert and Opinion Evidence § 244.

3. Evidence and Witnesses § 2264 (NCI4th)— first degree murder— sexual assault upon victim—opinion of pathologist

The trial court did not err in a murder prosecution by allowing the forensic pathologist who performed the autopsy to testify that there had been a sexual assault upon the victim. The challenged testimony relates back to a pattern of injuries about which the pathologist had testified and constitutes a medical conclusion which he was fully qualified to render. The witness used the term "sexual assault, attack" merely to describe the pattern of injuries and, to the extent that he stated a conclusion, "sexual assault or attack" is not a legal term of art which carries a specific meaning not readily apparent to the witness.

Am Jur 2d, Expert and Opinion Evidence § 244.

4. Evidence and Witnesses § 3106 (NCI4th)— first degree murder—corroboration—new evidence—no error

The trial court did not err in a murder prosecution by allowing an emergency room nurse, a medical examiner, and a police detective to testify about statements made to them by three prior witnesses. Although defendant argues that the testimony contained entirely new evidence, the challenged testimony was properly admitted because it tended to strengthen and add weight to the original witness and the testimony was not contradictory.

Am Jur 2d, Witnesses §§ 1001 et seq.

5. Evidence and Witnesses § 1081 (NCI4th)— murder—right to remain silent—evidence that right exercised—invited error

Any error in a murder prosecution in the admission of testimony from an officer that defendant had exercised her right to remain silent was invited by defendant where the challenged testimony was elicited by the defense counsel, not the prosecutor, the defense counsel did not object or make a motion to strike, and, although defense counsel innocently broached the subject by asking whether defendant had reviewed her typewritten statement, he persistently continued along that path, repeatedly asking the agent to explain his answers.

Am Jur 2d, Evidence §§ 638 et seq.; Homicide § 339.

Failure to object to improper questions or comments as to defendant's pretrial silence or failure to testify as constituting waiver of right to complain of error-modern cases. 32 ALR4th 774.

6. Evidence and Witnesses § 1081 (NCI4th)— murder—testimony that defendant refused to allow search—harmless error

Testimony in a murder prosecution that defendant refused to allow a search of her hotel room and car was harmless error where defendant argued that the evidence attacked her credibility, implied her guilt, and denied her a fair trial, but there was other testimony which suggested that defendant was not trying to hide anything, defendant did not unequivocally refuse the search, and the challenged testimony was but a tiny fraction of the State's overall case.

Am Jur 2d, Evidence §§ 638 et seq.; Homicide § 339.

7. Evidence and Witnesses § 736 (NCI4th)— murder—statement by magistrate when issuing search warrant—no prejudice

Assuming error in a murder prosecution in admitting testimony that the magistrate, when issuing a search warrant, asked if the officer wanted a warrant for murder, the Supreme Court was not convinced that the jury would probably have reached a different verdict absent the error.

Am Jur 2d, Appeal and Error §§ 797 et seq.

8. Evidence and Witnesses § 2068 (NCI4th)— murder—testimony disparaging defendant's character—emotions toward victim—admissible

The trial court did not err in a murder prosecution by allowing the victim's financial advisor to testify that defendant had wanted part of the victim's (her husband's) assets transferred to her immediately, that defendant had talked of the victim as if he was not human, that there was no compassion for the victim, and that the victim's face turned white. The witness's "opinions or inferences" as to the emotions displayed by defendant toward her husband, and her husband's responses, manifested by a change in his physical aspect, were rationally based on the witness's perceptions and were helpful to a clear understanding of his testimony or the determination of a fact in issue. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Evidence §§ 336 et seq.; Expert and Opinion Evidence §§ 359 et seq.

Opinion evidence as to character of accused under Rule 405(a) of Federal Rules of Evidence. 64 ALR Fed. 244.

9. Evidence and Witnesses § 2786 (NCI4th)— murder—direct examination—assumption of facts not in evidence—no error

The trial court did not err in a murder prosecution by allowing the prosecutor to ask a pathologist whether three wounds on the victim's body could have been caused by a sharp object such as a hypodermic needle being moved around and rotated. Although defendant argued that this question assumed facts not in evidence, there had been prior testimony that a hypodermic needle was found inside defendant's cosmetic bag.

Am Jur 2d, Witnesses § 750.

10. Evidence and Witnesses § 2797 (NCI4th)— murder—cross-examination—allegedly impertinent and insulting—no error

There was no error in a murder prosecution where defendant contended that the prosecutor continually interrupted her during cross-examination and attempted to humiliate her by asking impertinent and insulting questions. Counsel generally have wide latitude on cross-examination to test matters related by the witness on direct examination, subject to the discretion of the trial court and the requirement that the questions be asked in good faith. While the record discloses a vigorous cross-examination, it does not disclose that the prosecutor asked the questions in bad faith.

Am Jur 2d, Witnesses §§ 743, 744, 852.

Privilege of witnesses to refuse to give answers tending to disgrace or degrade him or his family. 88 ALR3d 304.

11. Evidence and Witnesses § 788 (NCI4th)— murder—testimony of paramedic concerning deceased—lack of medical qualifications—other testimony from medical examiner

There was no prejudice in a murder prosecution in allowing a paramedic to testify that the deceased had been in cardiac arrest for more than 15 minutes when he arrived at the scene, even though defendant contended that the witness was not medically qualified to give this opinion, in light of the

similar, more damning testimony given by the county medical examiner and the pathologist who performed the autopsy.

Am Jur 2d, Appeal and Error § 806.

12. Evidence and Witnesses §§ 781, 264 (NCI4th)— murder—character of victim—admissible in rebuttal—similar evidence admitted without objection

There was no prejudicial error in a murder prosecution in the admission of testimony about the victim's good character where some of the evidence was properly admitted under N.C.G.S. § 8C-1, Rule 404(a) to rebut prior evidence elicited by defendant upon cross-examination that the victim suffered from dementia and that he displayed behavior characteristic of dementia. As to the general good character evidence, similar evidence was admitted without objection.

Am Jur 2d, Appeal and Error § 806; Evidence §§ 339 et seq.

13. Evidence and Witnesses § 2633 (NCI4th)— murder—conversation between defendant and a judge—not privileged

There was no error in a murder prosecution where the prosecutor was allowed to question both the defendant and a judge, who had known the victim for thirty years, about a conversation in which defendant asked the judge how closely doctors performing an autopsy could come in determining how long a person had been dead. The record establishes that the judge was actively serving when the communication in question was made, so that he was prohibited from practicing law, and defendant could not establish an attorney-client relationship.

Am Jur 2d, Witnesses § 386.

14. Criminal Law § 720 (NCI4th)— murder—three lines omitted from Pattern Jury Instruction—subsequently corrected—harmless error

There was harmless error in a first degree murder prosecution in the omission from the jury charge of one of the five essential elements of first degree murder and in giving the definition of deliberation under the heading of premeditation where the court immediately discovered its error, promptly and expressly retracted it, recharged the jury on all five elements of first degree murder, and subsequently restated all five elements when the jury requested clarification. Fur-

thermore, the jurors requested a reinstruction on the five points and specifically mentioned premeditation and deliberation; it appears clear that the correct rule was fixed in the minds of the jurors.

Am Jur 2d, Appeal and Error § 817; Trial §§ 1478-1481.

15. Homicide § 480 (NCI4th)— murder—instructions—use of deadly weapon—cowboy boots

The trial court did not err in a murder prosecution by giving a deadly weapon instruction to the jury where the evidence was that defendant had kicked or stomped the victim in the abdomen while wearing cowboy boots. Any article, instrument or substance likely to produce death or great bodily harm is a deadly weapon; thus, cowboy boots may be a deadly weapon when worn to kick or stomp an elderly man.

Am Jur 2d, Homicide § 506.

Kicking as aggravated assault or assault with dangerous or deadly weapon. 33 ALR3d 922.

16. Criminal Law § 1339 (NCI4th)— murder—aggravating circumstance—commission of sex offense—no error

There was no plain error in a murder prosecution where the court submitted the aggravating circumstance that the murder was committed while defendant was engaged in the commission of or while attempting to penetrate the anus with an object. Although defendant contended that the court failed to allege the aggravating circumstance in the statutory language of N.C.G.S. § 15A-2000(e)(5) or that the court omitted a necessary element of the crime of sexual offense in not using the phrase "by force and against the will of the deceased," defendant concedes that the court properly instructed the jury orally and the trial court has never been required to duplicate the exact statutory language of N.C.G.S. § 15A-2000(e) on the written list of Issues and Recommendations furnished to the jury. The trial court augmented the written instruction by twice instructing the jury on the form, at which they were looking. The additional or alternative written instructions suggested by defendant would have had no probable effect on the jury's response and thus the incomplete written issues sheet did not constitute plain error. Moreover, the evidence presented no issue as to defendant's use of force or the victim's lack

of consent, but called for a determination of the credibility of the State's witnesses versus defendant's witnesses. The jury's finding, even as worded on the written list of Issues and Recommendations, shows that it did not believe the defendant.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1341 (NCI4th)— murder—aggravating circumstance—pecuniary gain

The trial court did not err in a prosecution for the murder of a husband by a wife by instructing the jury on the aggravating circumstance of pecuniary gain. Although defendant contended that the phrase "stood to benefit" sweeps too broadly in that it directs the jury to find this aggravating circumstance on the mere fact that defendant would benefit financially from the death of her husband, even though incidental financial gain will accrue to the surviving spouse of virtually every marriage, the phrase is not overbroad when viewed in the context of the instructions as a whole. Moreover, there was substantial evidence that the murder was committed for pecuniary gain.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like-post-Gregg cases. 66 ALR4th 417.

18. Criminal Law § 1348 (NCI4th)— murder—mitigating circumstances—instruction on sympathy or mercy refused—no error

The trial court did not err in a first degree murder prosecution by denying defendant's request that it instruct the jury that "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." The trial court submitted the statutory catch-all mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), with the instructions recommended in *State v. Hill*, 331 N.C. 387.

Am Jur 2d, Criminal Law §§ 598-600.

Instructions to jury: Sympathy to accused as appropriate factor in jury consideration. 72 ALR3d 842.

19. Criminal Law § 1320 (NCI4th)— murder—sentencing phase—evidence from guilt phase—victim's character

The trial court did not err in the sentencing phase of a murder prosecution when it allowed consideration of evidence of the victim's good character introduced during the guilt phase or when it instructed the jury that it could consider all evidence heard at both the guilt and penalty phases. The character evidence was admissible and, pursuant to N.C.G.S. § 15A-2000(a)(3), competent for consideration by the jury during the penalty phase. The instruction that the jury could consider all evidence introduced at both phases was appropriate.

Am Jur 2d, Trial § 1441.

20. Criminal Law § 1344 (NCI4th)— murder—aggravating circumstances—especially heinous, atrocious, cruel—torture

The trial court did not err in a murder prosecution by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where defendant was convicted on the basis of torture and premeditation and deliberation and the evidence supported both theories.

Am Jur 2d, Criminal Law §§ 598, 599.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

21. Criminal Law §§ 1345, 1339 (NCI4th)— murder—aggravating circumstances—especially heinous, atrocious, cruel—sex offense—not based on same evidence

The trial court did not err in a murder prosecution by submitting the aggravating circumstances that the murder was especially heinous, atrocious, or cruel and that it was committed during a sex offense based on the same evidence where there was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed while attempting the penetration of the victim's anus with an object. While the trial court should have instructed the jury that it could

not use the same evidence as the basis for finding both circumstances, defendant did not object to the failure to do so and there was no plain error. N.C.G.S. § 15A-2000(e)(5); N.C.G.S. § 15A-2000(e)(9).

Am Jur 2d, Criminal Law § 598.

22. **Homicide § 487 (NCI4th)— first degree murder—torture—premeditation and deliberation—instructions**

The trial court did not err in a murder prosecution by instructing jurors that premeditation, deliberation, and intent to kill are not essential elements of first degree murder on the basis of torture.

Am Jur 2d, Homicide § 263.

Sufficiency of evidence, for purposes of death penalty to establish statutory aggravating circumstance that murder was heinous, cruel, depraved, or the like—post-Gregg cases. 63 ALR4th 478.

23. **Criminal Law § 1323 (NCI4th)— murder—sentencing—weighing of mitigating and aggravating circumstances**

The trial court did not err in a murder prosecution by directing the jury on Issue II to continue to Issue IV if the mitigating circumstances are of equal value and weight to the aggravating circumstances.

Am Jur 2d, Criminal Law § 578; Trial § 841.

24. **Constitutional Law § 370 (NCI4th)— murder—sentencing—aggravating circumstances—especially heinous, atrocious, or cruel**

The aggravating circumstance that a murder was especially heinous, atrocious or cruel was not unconstitutionally vague and overbroad as applied in North Carolina and in this case.

Am Jur 2d, Constitutional Law § 818; Criminal Law §§ 17, 598.

Validity of death penalty, under Federal Constitution, as affected by consideration of aggravating or mitigating circumstances. 111 L. Ed. 2d 947.

25. Constitutional Law § 370 (NCI4th)— death penalty—constitutional

The North Carolina death penalty statute is not unconstitutionally vague and overbroad, has not been imposed in a discretionary and discriminatory manner, and has not been imposed or withheld on the basis of arbitrary and capricious factors and in individual cases without proper guidance.

Am Jur 2d, Criminal Law §§ 625 et seq.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

26. Criminal Law § 1326 (NCI4th)— murder—sentencing—mitigating circumstances—burden of proof

The trial court did not err in a murder prosecution by instructing the jury that defendant had the burden of proving mitigating circumstances by a preponderance of the evidence.

Am Jur 2d, Trial § 1291.

27. Criminal Law § 1333 (NCI4th)— murder—aggravating circumstances—no bill of particulars

There was no error in a murder prosecution in the denial of defendant's motion for a bill of particulars from the State disclosing the statutory aggravating circumstances relied upon in seeking the death penalty.

Am Jur 2d, Pleading §§ 297, 298.

28. Criminal Law § 1373 (NCI4th)— murder—death penalty—not disproportionate

A sentence of death in a murder prosecution was not disproportionate or excessive where the record supports the jury's finding of the three aggravating circumstances submitted to it, nothing in the record suggests that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, and the case involved the murder of a frail and elderly husband by his healthy and much younger wife of less than three years; the murder was preceded by a period of physical and verbal abuse, during which defendant depleted her husband's financial resources; the final assault was prolonged and vicious; and defendant never exhibited any remorse for the crime or pity for her victim. The extent of

the brutality precludes the conclusion that the death sentence was excessive or disproportionate, considering both the crime and the defendant.

Am Jur 2d, Criminal Law §§ 609, 628.

Justice FRYE concurring in guilt-innocence phase and dissenting in sentencing phase.

Chief Justice EXUM joins in this concurring and dissenting opinion.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Butterfield, J., at the 8 October 1990 Criminal Session of Superior Court, Wilson County, upon a jury verdict finding defendant guilty of first-degree murder. Execution stayed 26 November 1990 pending defendant's appeal. Heard in the Supreme Court 13 February 1992.

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

James R. Parish for defendant-appellant.

WHICHARD, Justice.

Defendant was tried capitally on an indictment charging her with the first-degree murder of her eighty-year-old husband, William Henry Jennings (hereinafter "Jennings"). The jury returned a verdict finding defendant guilty upon the theories of (1) premeditation and deliberation and (2) torture. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended that defendant be sentenced to death. For the reasons discussed herein, we conclude that the jury selection, guilt and sentencing phases of defendant's trial were free from prejudicial error, and that the sentence of death is not disproportionate.

The State presented evidence that Jennings was beaten and tortured to death in a hotel room in Wilson, North Carolina on 19 September 1989. Defendant's evidence suggested that Jennings suffered from dementia and died from accidental or self-inflicted wounds.

Defendant was a nurse working at Westwood Manor Nursing Home in Wilson when she first met Jennings in June 1983. Jennings,

a retired businessman living in Wilson, was an active member of Alcoholics Anonymous and was called to the nursing home for a consultation about an alcoholic patient. Four years later, in February 1987, defendant and Jennings were married. She was forty-four years old; he was seventy-seven.

Shortly after their marriage in September 1987, defendant and Jennings visited George Henry, a financial consultant at Merrill Lynch and an acquaintance of Jennings for more than twenty years. The purpose, Henry testified, was to transfer half of Jennings' assets, which then totaled about $150,000, to defendant. An account was opened for defendant, and half of Jennings' assets were transferred to the new account.

The State presented several witnesses who testified that Jennings told them of ongoing abuse by defendant and that he was afraid defendant would kill him or have him committed to an institution. Among these was Superior Court Judge Knox Jenkins. In May 1989, Jenkins was practicing law in Smithfield. Jennings came to Jenkins' office to have a will drawn. According to Jenkins' testimony, Jennings said defendant had physically beaten him, dragged him across the room, and stomped him with her cowboy boots. Jennings told Jenkins defendant had threatened to stomp him to death with her cowboy boots. Jennings also told Jenkins defendant had tried to have him committed. Jenkins testified that Jennings was a frail man physically but was not confused and appeared well oriented. Jenkins had no reservations or doubts about Jennings' competency. Jennings never returned to Jenkins' office to sign the legal documents.

On 19 September 1989, defendant and Jennings were staying at the Hampton Inn in Wilson. About 9:30 p.m., defendant called the desk and said she had a "code blue." The hotel manager called 911, and emergency medical personnel arrived at 9:35 p.m. They found defendant performing CPR on Jennings, who was lying nude on the floor. Paramedic Larry Parnell testified that he asked defendant how long Jennings had been "down." Defendant, Parnell testified, said Jennings had been down five to ten minutes. When Parnell began doing CPR on Jennings, Jennings' skin appeared cool and his body seemed generally stiff. Paramedic Lee Fowler testified that when he arrived at the hotel room, defendant was wearing a black nightgown and brown cowboy boots.

Jennings was taken to Wilson Memorial Hospital where he was pronounced dead. Emergency room physician Dr. Andrew Duerr testified that in his opinion Jennings had been dead for at least several hours.

Dr. Andrew Price, a Wilson physician and local medical examiner, testified that he examined Jennings' body at the hospital around 10:30 the night of Jennings' death. In his opinion, based in part on the fact that Jennings' body temperature was 86.3 degrees, Jennings had been dead for six to eight hours.

Dr. Page Hudson, forensic pathologist and former Chief Medical Examiner for the State of North Carolina, testified that he performed an autopsy on Jennings on 20 September 1989. Dr. Hudson found multiple bruises and scrapes on various parts of Jennings' head, scalp, face, neck, legs, arms and hands. All the injuries appeared fresh. There was a large bruise in the mesentery of the abdominal cavity, the tissue which holds in and supports the intestines and contains blood vessels to the intestines. Dr. Hudson opined that a blunt force impact to the abdominal wall caused the tears in the mesentery, and that blood loss from these tears caused the victim's death. The injury to the abdomen was not consistent with a fall in the bathtub, Dr. Hudson testified, unless the victim fell from a height of at least twenty feet. The injury was, however, consistent with a kick or stomp to the abdomen.

Additionally, Dr. Hudson found tiny cracks or splits in the thin membrane that lines the anus around the sphincter. The surface of the membrane had been stretched to the point that it cracked. Dr. Hudson testified, further, that the pattern of injuries was not consistent with an injury caused by a rectal thermometer. Dr. Hudson also found injuries to the head of the penis in the form of sharply defined imprints. In his opinion, a pair of forceps found in the hotel room could have caused these wounds. Dr. Hudson examined the forceps and found a small piece of skin consistent with the type found on the underside of the eyelid or the head of the penis. Dr. Hudson also found a laceration on the shaft of the penis, scrapes at the base of the penis, and a scratch on the scrotum. In his opinion, most of Jennings' injuries were inflicted around the same time, and Jennings had been dead five to ten hours before his body arrived at the emergency room. Based on Jennings' injuries, Dr. Hudson opined that Jennings had been sexually assaulted and tortured.

Finally, Dr. Hudson testified that, after consultation with a neuropathologist, he found no evidence of any organic brain disorder, including Alzheimer's disease. Dr. Hudson also testified that deprivation of caring interaction can have a great effect on the personality of elderly people and can lead to mental alterations, confusion, and what appears to be dementia.[1]

Dr. Price, the local medical examiner, testified for the State on rebuttal that certain drugs can cause symptoms similar to those displayed by some persons with dementia. Tests showed high levels of one of these drugs, butalbital, in Jennings' body.

Detective Teresa Jo Adams of the Wilson Police Department investigated Jennings' death. She testified that she found a large bloodstain on the carpet of the hotel room, blood on the sheets, and a blood-stained adult's diaper[2] underneath a pillow. There was also a bloodstain on the underside of a pillowcase.

District Court Judge Allen Harrell, who had known Jennings for about thirty years, testified for the State on rebuttal that defendant called him the day after Jennings' death and asked how closely doctors could approximate the time of a person's death based on autopsy results.

Four expert witnesses testified for defendant that Jennings suffered from dementia. Two, family practitioner Dr. Donald Reece and neurologist Dr. Ashley Kent, examined Jennings prior to his death. Both opined, based on their examinations, that Jennings suffered from dementia. Two others, psychiatrist and attorney Dr. Thomas W. Brown and psychologist John F. Warren III, reviewed Jennings' medical records and concurred with Drs. Reece and Kent that Jennings suffered from dementia. Dr. Brown testified that this was a "clear case of dementia" and that it is not uncommon for demented patients to injure themselves. After reviewing photographs of Jennings' injuries, Dr. Brown testified that, in his opinion, all the injuries could have been self-inflicted.

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1. Dementia is an organic mental disorder due to any one of a number of conditions. It is marked by loss of intellectual capabilities, impairment of memory, faulty judgment, changes in personality, etc. 1 *Schmidt's Attorneys' Dictionary of Medicine* D-37 (1991).

2. Defendant testified that Jennings wore diapers to help his "problem," presumably incontinence.

Defendant testified in her own behalf. She said she loved her husband and did not kick, stomp, assault or hurt him in any way. Defendant testified that Jennings would get very depressed at times and would beat his testicles and pick his rectum. During these severe depressions he would "go into what I call, canine behavior . . . . [H]e would crawl around on the floor and make noises like a dog and would want to eat—he would put his food down on the floor and want to eat that way." On the day before his death, Jennings found out that a friend had died; this caused him to retreat into his "canine behavior." Defendant testified that Jennings beat his testicles with a shoe and, later that day, fell in the bathtub.

Defendant testified that the next day, 19 September, Jennings again fell hard in the bathtub. She also found him in the bathroom beating himself with a "huge piece of cheese that we'd been carrying around for a couple of weeks, and it was hard . . . . He had [the cheese] in [a] plastic bag, swinging and hitting himself with it." She also testified she saw Jennings picking his rectum. Later that evening she awoke and found him on the floor. She did not recall telling paramedic Parnell that Jennings had been down five to ten minutes; she did not recall asking Judge Harrell how closely doctors can estimate the time of death from autopsy results; and she denied that she was wearing cowboy boots when paramedics came to the hotel room the night of Jennings' death.

Defendant moved to dismiss at the close of the State's evidence and of all the evidence. The trial court denied the motions. The jury found defendant guilty of first-degree murder based on both torture and premeditation and deliberation.

At the capital sentencing hearing, Dr. Hudson, forensic pathologist and medical examiner, again testified for the State about the nature and extent of Jennings' injuries. George Henry, Merrill Lynch financial manager, testified again about the extent of Jennings' holdings, the transfers during the course of Jennings' marriage to defendant, and the value of the limited partnerships still in Jennings' account at the time of the trial. Henry also testified that defendant had visited him in October 1989 to talk about Jennings' intent to transfer the partnerships to her accounts, as evidenced by three letters sent more than a year before to Merrill Lynch. Defendant's daughter and son testified about their mother's qualities and achievements.

The jury found three aggravating circumstances—that the murder was committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object, that the murder was committed for pecuniary gain, and that the murder was especially heinous, atrocious, or cruel. The jury found four mitigating circumstances—that defendant has no record of criminal convictions, has been a peaceful person in the community in which she lives and has no prior record for violent crimes, and that her childhood history, background and record show no indication of a habitually violent nature.

Upon finding that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and that the aggravating circumstances were sufficiently substantial to call for the death penalty, the jury recommended a sentence of death.

JURY SELECTION ISSUE

[1] Defendant first contends that the trial court erred in excusing a prospective juror for cause because of her views about the death penalty, thereby depriving defendant of her rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, sections 19 and 27 of the North Carolina Constitution. Defendant contends that the prospective juror only voiced general objections to the death penalty, or only expressed conscientious or religious scruples against its infliction. We disagree.

The test for determining whether a prospective juror may be properly excused for cause for his views on the death penalty is whether those 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); *accord, e.g., State v. Davis*, 325 N.C. 607, 621-22, 386 S.E.2d 418, 425 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). However, a prospective juror's bias may not always be "provable with unmistakable clarity [and,] [i]n such cases, reviewing courts must defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Davis*, 325 N.C. at 624, 386 S.E.2d at 426. "[M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to ar-

ticulate . . . their true feelings." *Wainwright*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852.

Prospective juror Lamm was excused for cause on the motion of the prosecutor only after extensive questioning by the prosecutor, defense counsel, and the court. Pertinent questions and answers follow:

[PROSECUTOR]: [C]ould you return a sentence recommendation of death?

[JUROR LAMM]: I'd rather not.

[PROSECUTOR]: Are you saying then that you would automatically vote against imposing capital punishment without regard to the evidence as it develops?

[JUROR LAMM]: Yes, sir.

[PROSECUTOR]: I take it then you would not vote in favor of the death penalty under any facts or circumstances no matter how aggravating the case was and no matter what the facts were.

[JUROR LAMM]: I wouldn't like to vote death.

[PROSECUTOR]: Are you saying then that you would not vote for death, no matter how aggravating the case was or how or what the facts were, you could not return a sentence recommendation of death?

[JUROR LAMM]: No.

[PROSECUTOR]: If that's your conviction, I'm not trying to change that, I'm just asking you?

[JUROR LAMM]: Well, I wouldn't like to, no.

[PROSECUTOR]: You would not, are you saying that you would not be able to?

[JUROR LAMM]: No.

[PROSECUTOR]: Challenged for cause.

. . . .

THE COURT: . . . [D]o you feel that some persons convicted of first degree murder deserve the death penalty?

[JUROR LAMM]: Yes, if they did it.

THE COURT: Do you feel that there are some persons who are guilty of first degree murder who do not deserve the death penalty?

[JUROR LAMM]: (Pause) Well, yes.

. . . .

THE COURT: . . . [The] Legislature has set out very strict procedures that the jury must follow. . . . [W]ould you be willing to go through those procedures?

[JUROR LAMM]: Yes, sir.

THE COURT: And if you went through those procedures and if you were satisfied that death was the appropriate sentencing in the case, could you vote death, walk back into this Courtroom and announce your verdict?

[JUROR LAMM]: Yes, if I had to.

THE COURT: Do you feel that you would find yourself in a situation whereby you would be trying to find ways that you could not vote for the death penalty?

[JUROR LAMM]: I do feel like that.

THE COURT: That you would be trying to find ways to vote for life imprisonment over death?

[JUROR LAMM]: Yes.

. . . .

THE COURT: Alright, let me sum it up. Do you feel that if you served on this jury and if the trial got to the sentencing phase that you could listen to the evidence and could make your recommendation to me and it would be more than a recommendation, it would really be a sentence. I would simply put it into effect based on what the jury recommended to the Court. . . . [D]o you feel that you could recommend a sentence to the Court based on the evidence you heard and based on the law and that you would not be predisposed one way or the other in your deliberation? Or do you feel that you would be biased in some respect?

[JUROR LAMM]: Probably would.

THE COURT: Probably would what?

[JUROR LAMM]: Be biased in some way.

Lamm's contradictory and sometimes equivocal responses illustrate that "determinations of juror bias cannot always be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424, 83 L. Ed. 2d at 852. Lamm initially responded to both the prosecutor and the court that she did not have any moral or religious convictions against and could vote for the death penalty. However, she subsequently responded, upon further questioning by the prosecutor, that she would vote against the death penalty without regard to the evidence and notwithstanding the facts or circumstances. *See, e.g., State v. Quick*, 329 N.C. 1, 14, 405 S.E.2d 179, 187 (1991) (prospective juror who stated she could not consider the death penalty no matter how aggravated the case and regardless of the facts properly excused for cause). Upon further questioning by the court, Lamm was unable to affirmatively agree to follow the law and recommend a sentence based on the evidence and the law; rather, she felt that she would be trying to find ways she could vote against the death penalty and would be predisposed or biased in some respect. "A challenge for cause . . . may be made by any party on the ground that the juror . . . [a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (1988). Therefore, the trial court did not err in excusing prospective juror Lamm for cause. This assignment of error is overruled.

GUILT PHASE ISSUES

[2] Defendant next contends the trial court erred in allowing Dr. Hudson, forensic pathologist and former Chief Medical Examiner who performed the autopsy, to testify that, in his opinion, Jennings was "tortured." Defendant argues that because she was charged with first-degree murder on the basis of torture, it was error to admit the testimony because it constituted a relevant legal conclusion or standard. We find no error.

North Carolina Rule of Evidence 704 provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C.G.S. § 8C-1, Rule 704 (1992). Under Rules 701 and 702, opinions

must be helpful to the trier of fact. N.C.G.S. § 8C-1, Rules 701 and 702 (1992). Expert testimony as to a legal conclusion or standard is inadmissible, however, at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the expert witness. *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988) (medical expert could not testify that a defendant did or did not "premeditate and deliberate"; testimony embraced precise legal terms, definitions of which are not readily apparent to medical experts); *State v. Weeks*, 322 N.C. 152, 165-67, 367 S.E.2d 895, 903-04 (1988) (trial court did not err by refusing to admit testimony of medical experts that the defendant did not act in a "cool state of blood"; testimony embraced precise legal terms, definitions of which are not readily apparent to medical experts); *State v. Ledford*, 315 N.C. 599, 617-21, 340 S.E.2d 309, 320-22 (1986) (medical expert could not testify that injuries were the "proximate cause" of death); *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985) (medical witness could testify that injuries were caused by a male sex organ, an ultimate issue; witness "did not testify that [victim] had been raped, nor that the defendant raped her"). *Cf. State v. Crawford*, 329 N.C. 466, 478, 406 S.E.2d 579, 585-86 (1991) (medical expert could testify that a child had been "threatened" and "coerced" and would not "voluntarily" have drunk large quantities of water; these terms "have no specific technical legal meaning as they were used here and are not 'words of art.' "); *State v. Saunders*, 317 N.C. 308, 314, 345 S.E.2d 212, 216 (1986) (trial court did not err by allowing pathologist to testify that the victim's wound was not a self-defense-type wound; although an ultimate issue, pathologist clearly in a position to assist jury in understanding nature of victim's wounds and in determining whether defendant acted in self-defense).

Dr. Hudson was tendered by the State and accepted without objection as an expert in the field of forensic pathology. During redirect examination, the following exchange took place:

> [PROSECUTOR]: Dr. Hudson, are you familiar with the term torturous type injury?
>
> [DEFENSE COUNSEL]: Objection.
>
> . . . .
>
> [PROSECUTOR]: Dr. Hudson, considering all of the injuries that you observed on the body of William Henry Jennings, do you

have an opinion as to whether or not Mr. Jennings had been the victim of torturous activity?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. HUDSON]: I do.

[PROSECUTOR]: What is your opinion?

[DR. HUDSON]: In my opinion, he had been tortured.

Dr. Hudson did not testify that, in his opinion, defendant tortured Jennings; he gave his expert medical opinion about the pattern and types of injuries he observed during the autopsy. Dr. Hudson had previously testified, *inter alia*, that the bruises to the head, chest, and abdomen were caused by a blunt force, and that the blow to the head may have stunned Jennings. The blood loss occasioned by the blow to the abdomen would cause considerable pain, drowsiness, eventual unconsciousness and death, if unattended. The scrapes and bruises to Jennings' legs, arms, and buttocks were not received in a fall—there were no graze wounds, skid type marks, concrete or gravel burns. Dr. Hudson testified that in his opinion most of the wounds were fresh, recent, suffered "pretty close to time of death," and not self-inflicted. Finally, the amount of mucus collected in the lower part of Jennings' bronchial tubes was "common in persons who die slowly of multiple injuries." The challenged testimony summarized this pattern of injuries and constituted a medical conclusion which Dr. Hudson, forensic pathologist and Chief Medical Examiner, was fully qualified to reach.

However, to the extent that Dr. Hudson also addressed a legal conclusion or standard, the term "torture" is not a legal term of art which carries a specific meaning not readily apparent to the witness. "Torture" does not denote a criminal offense in North Carolina and therefore does not carry a precise legal definition, as "murder" and "rape" do, involving elements of intent as well as acts. Further, the commonly understood meaning of the term is approximately the same as the instructions the trial court gave the jurors—"inflict[ion of] pain or suffering upon the victim for the purpose of satisfying some untoward propensity." *Cf. Webster's Third New International Dictionary* 2414 (1976) (torture means the "infliction of intense pain . . . to punish or coerce someone"; "torment or agony induced to give sadistic pleasure to the torturer").

We hold that the trial court did not err by allowing this testimony. This assignment of error is therefore overruled.

[3] Defendant contends that the trial court also erred in allowing Dr. Hudson to testify that there was a "sexual assault" upon the victim. Again, she argues that Dr. Hudson expressed a legal conclusion or standard. Again, we disagree.

The following exchange took place during redirect examination:

[PROSECUTOR]: Dr. Hudson, the injuries that you've described for the jury, do you have an opinion as to whether or not they would have been inflicted at different times or if they are pretty much all the same age?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. HUDSON]: I do.

[PROSECUTOR]: And what is your opinion?

[DR. HUDSON]: The great bulk of the injuries in my opinion occurred about the same time. That is, they were all fairly fresh, fairly recent injuries. They were all pretty close to the time of death. The exceptions, I think, were few.

[PROSECUTOR]: [Is it] possible that these—that all of these injuries would have been sustained in a fall?

. . . .

[DR. HUDSON]: No, sir, my opinion is that these injuries were not received in a fall.

[PROSECUTOR]: Why do you say that, sir?

. . . .

[DR. HUDSON]: I've seen a wide variety of injuries in a wide variety of people over many years, and I don't recall any—any kind of fall that would even approach this pattern.

Because one has to consider not only the individual injuries in their size and shape and location but one has to consider them all together and this pattern simply does not fit with a—with a fall.

[PROSECUTOR]: What does this pattern indicate to you, sir?

. . . .

[DR. HUDSON]: In my opinion, this pattern of injuries fits with assault, attack.

[DEFENSE COUNSEL]: Move to strike.

THE COURT: Denied.

[PROSECUTOR]: What about the anal injuries, sir?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

[DR. HUDSON]: I'm considering all the anal injuries and the injuries to the genital area, rather all the injuries together as part of an assault. To me there's a sexual assault as well as a generalized assault.

Dr. Hudson had previously testified that in his opinion insertion of a blunt instrument caused the injuries to Jennings' anus, and that a forceps could have caused the injury to the head of the penis. The challenged testimony relates back to this pattern of injuries and constitutes a medical conclusion Dr. Hudson was fully qualified to render. Dr. Hudson used the term "sexual assault, attack" merely to describe the pattern of injuries. Again, and to the extent that Dr. Hudson stated a legal conclusion, "sexual assault or attack" is not a legal term of art which carries a specific meaning not readily apparent to the witness. Like "torture," "sexual assault" does not carry a precise legal definition involving elements of intent as well as acts, nor does it have a legal meaning that varies from the common understanding of the term. We thus hold that the trial court did not err by allowing this testimony to assist the jury in understanding the nature of Jennings' injuries. This assignment of error is overruled.

[4] Defendant next contends that the trial court erred by allowing into evidence otherwise non-admissible testimony under the guise of corroboration. Specifically, defendant contends that three witnesses—emergency room nurse Pearl Chandler, medical examiner Dr. Price, and Wilson police detective Adams—testified about statements made to them by three prior witnesses—paramedic Lee Fowler, nurse Frances Dineen, and Dr. Price, respectively. In each case, defendant argues, the witness' testimony contained

"entirely new evidence" and therefore was inadmissible to corroborate prior testimony. For example, nurse Chandler testified that paramedic Fowler stated, "something's not right, something's not right," as he wheeled the victim's body into the emergency room. Because Fowler, who testified prior to Chandler, did not testify that he made this statement, the trial court erred by allowing Chandler's testimony, according to defendant.

It is 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) (citation omitted) (emphasis added) (*quoting State v. Kennedy*, 320 N.C. 20, 35, 357 S.E.2d 359, 368 (1987)); *see also State v. McDowell*, 329 N.C. 363, 384-85, 407 S.E.2d 200, 212 (1991); *State v. Coffey*, 326 N.C. 268, 293, 389 S.E.2d 48, 63 (1990); *State v. Ramey*, 318 N.C. 457, 468-70, 349 S.E.2d 566, 573-74 (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)).

We agree with the State that the challenged testimony of each of the three witnesses was properly admitted because each tended to strengthen and add weight to the original witness and the testimony was not contradictory. For example, although paramedic Fowler did not testify that he said, "something's not right, something's not right," when he entered the emergency room, he did testify that he thought there were many "unusual" circumstances about this case. Indeed, Fowler testified that he reported his observations to the "charge nurse" in the emergency room, which is required in situations where a paramedic believes something is amiss. Nurse Chandler's testimony, therefore, like that of each of the challenged witnesses, was properly admitted to corroborate testimony of a prior witness. This assignment of error is overruled.

[5] Defendant next contends the trial court erred by allowing S.B.I. Agent Tim Thayer to comment on defendant's decision after her arrest to exercise her constitutional right to remain silent. During his cross-examination of Agent Thayer, defense counsel questioned Thayer as to the procedure used in obtaining a statement from defendant *prior* to her arrest. Defendant brings to our

attention the following colloquy between defense counsel and Thayer:

> [DEFENSE COUNSEL]: Was [defendant's] typewritten statement reviewed with Mrs. Jennings to determine whether or not that was exactly correct?
>
> [AGENT THAYER]: No, [by] the time it was returned to me, she had already been placed in jail and she refused to speak further with us[;] I couldn't go over anything with her.
>
> [DEFENSE COUNSEL]: When you say refused to speak, is that a police term for invoking her right not to make a statement?
>
> [AGENT THAYER]: That's correct.
>
> [DEFENSE COUNSEL]: That is, she declined to make a statement, isn't that correct?
>
> [AGENT THAYER]: Refused is the same thing, she would not talk to us.
>
> . . . .
>
> [DEFENSE COUNSEL]: Did you verify the statement with her and I'm talking about the typewritten statement?
>
> [AGENT THAYER]: As I explained to you just a minute ago, she at that point when the statement was typed, she was incarcerated and she refused to make any further statements.
>
> [DEFENSE COUNSEL]: Or she declined to make any further statements?
>
> [AGENT THAYER]: The same words mean the same basically.
>
> [DEFENSE COUNSEL]: But Mr. Thayer they are your words, aren't they?
>
> [AGENT THAYER]: Which words are those?
>
> [DEFENSE COUNSEL]: The words reviewed, the words claimed, the words—
>
> [AGENT THAYER]: She would not make a statement, refused, declined, she would not make a statement.
>
> [DEFENSE COUNSEL]: Is there any law against her making a statement or not making a statement?

> [AGENT THAYER]: It's her constitutional right, if you have nothing to hide, you make a statement generally.

The State responds that any error was invited by defendant, and hence she cannot complain on appeal. We agree.

The law is clear that a defendant cannot be penalized for exercising her constitutional right to remain silent. *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91 (1976); *Griffin v. California*, 380 U.S. 609, 14 L. Ed. 2d 106 (1965); *State v. Hoyle*, 325 N.C. 232, 382 S.E.2d 752 (1989); *State v. Lane*, 301 N.C. 382, 271 S.E.2d 273 (1980); *State v. Castor*, 285 N.C. 286, 204 S.E.2d 848 (1974). In *Castor*, we held that "[a]dverse comments on a defendant's failure to testify at trial are impermissible under North Carolina law, Constitution of North Carolina, Article I, Section 23, N.C.G.S. § 8-54, and under the Fifth and Fourteenth Amendments to the Constitution of the United States." *Id.* at 291, 204 S.E.2d at 852-53.

The law is equally clear, however, that "[a] defendant is not prejudiced . . . by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1988). *See, e.g., State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989) (defendant cannot invalidate trial by inviting error, eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991). Unlike in *Hoyle*, *Lane* and *Castor*, the challenged testimony here was elicited by the defense counsel, not the prosecutor. Further, here, unlike in those cases, the defense counsel did not object to the testimony or make a motion to strike. Defendant thus invited any error. Although defense counsel innocently broached the subject with Agent Thayer by asking whether defendant had reviewed her typewritten statement, he persistently continued along that path, repeatedly asking Thayer to explain his answers. Defendant cannot now complain about this evidence which she solicited. This assignment of error is overruled.

[6] Defendant next argues the trial court erred by allowing two police officers to testify that defendant refused to allow a search of her hotel room and car. The officers subsequently obtained a search warrant. Defendant argues that she should not be penalized for exercising her constitutional right to refuse a warrantless search. The State, at oral argument, candidly acknowledged that it was "not proper to allow this sort of evidence as evidence of guilt,"

drawing our attention to *United States v. Prescott*, 581 F.2d 1343 (9th Cir. 1978). In *Prescott*, the court, referring to the Fourth Amendment, stated that "[o]ne cannot be penalized for passively asserting this right, regardless of one's motivation"; to allow otherwise would mean that "future consents [to searches] would not be 'freely and voluntarily given.' " 581 F.2d at 1351 *(quoting Bumper v. North Carolina*, 391 U.S. 543, 548, 20 L. Ed. 2d 797, 802 (1968)).

While it was error to allow this testimony as evidence of guilt, we hold the testimony harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988). Defendant argues that this evidence attacked her credibility, implied her guilt, and denied her a fair trial. The record as a whole belies this conclusion. First, according to testimony from another police officer, defendant gave her verbal consent for Dr. Price, the medical examiner, to "go back to the motel room and look around." This suggested that defendant was not trying to hide anything from the authorities. Second, defendant did not unequivocally refuse the search. According to the testimony of both officers, defendant said she thought she should talk with Judge Harrell, a friend of hers, before giving an answer. The officers' request to search, according to testimony, came at 3:18 a.m., after defendant had given a detailed statement to police. Agent Thayer told defendant that the search was normal procedure when "we are investigating a suspicious death." Given this stressful situation, defendant's statement that she wanted to talk with someone before giving permission does not appear unreasonable; certainly, it does not seem so unreasonable as to destroy defendant's credibility in the eyes of the jury and deny her a fair trial. Finally, the challenged testimony was but a tiny fraction of the State's overall case. We hold, therefore, that any error in its admission was harmless beyond a reasonable doubt.

[7] Defendant next argues she is entitled to a new trial because, while testifying about how she obtained a search warrant, Detective Adams made the following statement:

> I asked [Magistrate] Doug Stewart to please give me a search warrant and I drew up an application for a search warrant . . . and at that time *Doug Stewart asked me if I wanted a warrant for murder, and I told him, no.*

Defendant argues that the italicized portion of the statement was inadmissible hearsay which expressed an opinion as to defendant's guilt. The State responds that the challenged statement is not

hearsay because it was not offered for the truth of the matter asserted. *See* N.C.G.S. § 8C-1, Rule 801(c) (1992). Additionally, the State contends that the fact that a magistrate issued an arrest warrant cannot be evidence of guilt because an arrest warrant is issued on a showing of mere probable cause. *See* N.C.G.S. § 15A-304(a) (1988).

Defendant failed to object to the statement and our review is therefore limited to consideration of whether its admission constituted plain error. Assuming error, *arguendo*, we are not convinced that, absent the error, the jury probably would have reached a different verdict. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986). This assignment of error is without merit.

[8] Defendant next contends that testimony from Merrill Lynch financial advisor George Henry, who disparaged her character, was unresponsive, irrelevant, and prejudicial, contrary to Rules 404, 405 and 608 of the North Carolina Rules of Evidence. For example, in response to questioning about a meeting between defendant, Jennings and Henry, Henry testified that defendant wanted part of Jennings' assets to be transferred to her immediately. When asked what defendant said, Henry testified:

> [HENRY]: And that is, and I can't remember the words so much as it was the way the words were delivered, and she was talking to him as if he was not even a human being.
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> [HENRY]: Her face, her eyes, her tone, was something like I had never seen before in my life.
>
> [DEFENSE COUNSEL]: Motion to strike.
>
> THE COURT: Denied.

Later, describing Jennings' reaction to defendant's demeanor at the meeting, Henry testified:

> Bill's face turned right white. I was shocked, it was not vulgar, it was not the loudness, I mean it was the—just absolutely no compassion whatsoever for her husband.

We hold that this and other similarly challenged testimony was admissible under Rule 701, which states:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C.G.S. § 8C-1, Rule 701. For example, the state of a person's health, the emotions he displayed on a given occasion, or other aspects of his physical appearance are proper subjects for lay opinion. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 129 at 572-76 (3d ed. 1988) [hereinafter 1 *Brandis on Evidence*]. This witness's "opinions or inferences" as to the emotions displayed by defendant toward her husband, and her husband's responses, manifested by a change in his physical aspect, were rationally based on the witness's perceptions and were helpful to a clear understanding of his testimony or the determination of a fact in issue. This assignment of error is overruled.

[9] Defendant next argues she was denied a fair trial because the prosecutor assumed facts not in evidence during his direct examination of Dr. Hudson. The prosecutor asked Dr. Hudson whether three wounds on the victim's body could have been made by a sharp object such as a hypodermic needle being moved around and rotated. Dr. Hudson, over objection, answered that they could have been. Defendant argues that this question assumed facts not in evidence. Prior to Dr. Hudson's testimony, however, Detective Adams testified that a hypodermic needle was found inside defendant's cosmetic bag at the hotel room. Defendant's argument thus is without merit.

[10] Defendant further contends that the prosecutor continually interrupted her during cross-examination and attempted to humiliate her by asking impertinent and insulting questions. The following exchange is typical:

> [PROSECUTION, MR. JOSEPHS]: No grass, grit, dirt, or other debris was on the body, was it?
>
> [DEFENDANT]: I don't know what those marks on his buttocks are. They look like gravel marks.
>
> [PROSECUTION]: You were in Court all last week, weren't you?
>
> [DEFENSE COUNSEL]: Objection, your Honor. We'll stipulate that we were in Court all last week and two weeks before

that, and we'll probably be here the rest of the week. Thank you.

THE COURT: Ask the next question, Mr. Josephs.

. . . .

[PROSECUTION]: Was that good grounds to abandon him and go sit in the car?

[DEFENDANT]: He wasn't abandoned. I was—

[PROSECUTION]: Did you call anybody?

. . . .

[PROSECUTION]: I'm asking you about one thing and one thing only, ma'am, the canine behavior.

[DEFENSE COUNSEL]: Objection, Your Honor. Your Honor, we object to the District Attorney directing his whatever you call it, animus or attitude at the witness. If he has any problems with the witness asking a question, we would ask the Court to instruct the witness appropriately and then let's move to the next question.

[PROSECUTION]: Your Honor, she's not answering my questions. I'm repeating the question.

THE COURT: All right. Let's take a deep breath and start over. Let me sit back down. Ask it again Mr. Josephs.

Counsel generally have wide latitude on cross-examination to test matters related by the witness on direct examination, subject to the discretion of the trial court and the requirement that the questions be asked in good faith. *See, e.g., State v. Warren*, 327 N.C. 364, 373, 395 S.E.2d 116, 121-22 (1990). Further, the questions asked by the State "are deemed proper unless the record discloses that the questions were asked in bad faith." *Id.; see also State v. Garner*, 330 N.C. 273, 291, 410 S.E.2d 861, 870 (1991). While the record discloses a vigorous cross-examination, it does not disclose that the prosecutor asked the questions in bad faith. We thus hold that the prosecutor's cross-examination did not deny defendant a fair trial. *Cf. State v. Britt*, 288 N.C. 699, 712-13, 220 S.E.2d 283, 292 (1975) (defendant denied a fair trial when the prosecutor placed before the jury "inadmissible and prejudicial matter," in-

cluding the fact that the defendant had received the death penalty in a prior trial of the case). This assignment of error is overruled.

[11] Defendant next contends that the trial court erred by allowing paramedic Fowler to testify that the deceased had been in cardiac arrest for "more than fifteen minutes" when Fowler arrived at the scene. Fowler, she argues, was not medically qualified to give this opinion, and this evidence was prejudicial because it directly contradicted her statement that she called the paramedics as soon as she discovered her husband on the floor.

Assuming, without deciding, that Fowler was not qualified to give this opinion, there is no reasonable possibility that improper admission of the opinion could have prejudiced defendant, in light of the similar, more damning testimony by Drs. Price and Hudson that the deceased had been dead for five to ten hours by the time Dr. Price examined the body at 10:30 p.m. Defendant does not dispute that Drs. Price and Hudson, the county medical examiner and the pathologist who performed the autopsy, respectively, were qualified to give this testimony or that their testimony was properly admitted. This assignment of error is overruled.

[12] Defendant next contends the trial court erred by allowing four witnesses to testify about Jennings' good character, contrary to North Carolina Rule of Evidence 404(a). Specifically, defendant complains about the following testimony: Ruthie Joan Roseboro, a nurse from the Veteran's Administration Hospital in Fayetteville, testified during the State's case-in-chief that she met Jennings when he was a patient at the hospital sometime during 1989; that he was a very nice patient, meek and humble, who did not cause any problems, exhibit any dangerous behavior, or act like he did not know what was going on. Garland Tucker testified during the State's case-in-chief that he had known Jennings for fifteen or more years, had met him at a Rotary Club meeting, saw him about once a week during those fifteen or so years, played golf with him once or twice a week in the spring and summer sometimes, and hunted with him. Jennings, said Tucker, was "quite a nice fellow," a "perfect gentleman," who spent most of his time trying to help people, especially after he retired, working with Alcoholics Anonymous. Judge Harrell, a district court judge, testified during the State's rebuttal that he had known Jennings for about thirty years, knew he had been an alcoholic before he met him, and knew that Jennings worked with alcoholics. Dr. Price, the medical ex-

aminer, testified during the State's rebuttal that Jennings was a member of the Elks Club, was an acknowledged alcoholic who had conquered alcoholism, and was dedicated "to helping others do the same through his work on the board of directors of Flynn Home and through his counseling."

Rule 404(a) states, in pertinent part:

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

N.C.G.S. § 8C-1, Rule 404(a) (1992). Under Rule 404(a)(2), the prosecution can introduce otherwise inadmissible evidence of a crime victim's character to rebut evidence of a pertinent trait of character offered by the defendant. *Quick*, 329 N.C. at 26, 405 S.E.2d at 194. However, the prosecution must wait until the defendant has introduced evidence before introducing evidence in rebuttal. *State v. Faison*, 330 N.C. 347, 355-56, 411 S.E.2d 143, 148 (1991).

We conclude that Nurse Roseboro's assessment of Jennings' behavior as a patient in 1989 was properly admitted under Rule 404(a)(2) to rebut prior evidence, elicited by defendant upon cross-examination of Drs. Hudson and Price, that Jennings suffered from dementia and that he displayed behavior characteristic of dementia. Both the prosecution and the defense questioned Dr. Hudson about dementia. Defendant asked Dr. Price further whether he had been told that Jennings was confused at times and would wander around naked—apparently not to impeach Dr. Price, but to introduce additional evidence that Jennings suffered from dementia and was, at times, dangerous to himself. Defendant maintained that the injuries Jennings sustained prior to death were accidental or self-inflicted.

As to the general good character evidence that Jennings was a nice old gentleman and a reformed alcoholic who helped everyone, we apply the rule of waiver and conclude that, assuming timely objections to all this evidence, defendant lost the benefit of these objections because similar evidence was theretofore and thereafter

admitted without objection. *See* 1 *Brandis on Evidence* § 30 at 144-45. Defendant herself testified that Jennings had been "a very good man" who had organized mental health programs for two counties, counseled for Alcoholics Anonymous, and served with her on the board of directors of Flynn Home. Dr. Brown, an attorney and forensic psychiatrist, testified for defendant that defendant had described Jennings as an intelligent, dedicated, loving, kind man who helped everyone. Dr. Warren, a forensic pathologist testifying for the defendant, concluded that Jennings suffered from progressive dementia, becoming at times argumentative, impulsive, incontinent, agitated and confused, dangerous to himself—especially self-mutilative—but who could have good days or even a good week when he did not show symptoms of dementia. For the foregoing reasons, this assignment of error is overruled.

[13] Defendant next contends the trial court erred by allowing the prosecutor to question both defendant and Judge Harrell about a conversation between them because that conversation was protected by the attorney-client privilege which only defendant could waive. Defendant also contends the trial court erred by refusing to allow her to testify on voir dire concerning the existence of an attorney-client relationship between herself and Judge Harrell.

Defendant was asked, over objection, whether she had asked Judge Harrell, "How close can they come in an autopsy to pinning down the time of death?" She replied that she did not remember asking this question. Judge Harrell testified for the State on rebuttal. He said he had known the deceased for close to thirty years and that he also knew defendant. Judge Harrell testified that on the day after Jennings' death, defendant telephoned him. After exchanging pleasantries, defendant told him about Jennings' death. Defendant then asked "how closely an autopsy—rather the doctors performing the autopsy, how closely they could come in determining how long a person had been dead." Judge Harrell testified that he did not give defendant legal advice: "[S]he didn't seem to be asking for legal advice, what I would have thought was medical advice of some kind."

A communication is covered by the attorney-client privilege if it has been "made in the course of seeking or giving legal advice for a proper purpose." 1 *Brandis on Evidence* § 62 at 302. The record establishes, and we can take judicial notice of the fact that, when the communication in question was made, Harrell was actively

serving as a judge of the district court for the seventh judicial district of North Carolina. He thus was prohibited by law from engaging in the private practice of law. N.C.G.S. § 84-2 (1985); *see also* N.C. Code of Judicial Conduct, Canon 5(F). Defendant thus cannot establish that she had an attorney-client relationship with Judge Harrell or that he was giving her legal advice for a proper purpose. Further, the trial court allowed extensive voir dire on the question of attorney-client privilege, during which defendant's attorneys argued that defendant believed the attorney-client relationship existed, and otherwise made and preserved objections on behalf of defendant. Notwithstanding the absence of defendant's testimony that she reasonably believed she was dealing with an "attorney," the record suffices to resolve the issue. We hold the trial court did not err by allowing this testimony.

[14] Defendant next contends the trial court erred by omitting, in its jury charge, one of the five essential elements of first-degree murder on the basis of malice, premeditation and deliberation. The State responds that the error was corrected prior to the beginning of jury deliberations and therefore defendant cannot show prejudice. We agree.

In its initial charge, the trial court overlooked three lines of the Pattern Jury Instructions and gave the definition of "deliberation" under the heading of "premeditation." At the conclusion of the charge, the court sent the jurors out to select a foreman, with specific instructions not to begin deliberations until the court sent in the verdict sheet. It then asked counsel for any requests for corrections to the charge, and counsel for defendant brought the error to the court's attention. Four minutes after the court sent the jurors out, it summoned them back to the courtroom and told them it had incorrectly instructed that the State must prove *four* things in order to convict for first-degree murder on the basis of malice, premeditation and deliberation; instead, the court said, the State must prove five things to convict. The court then instructed, correctly, on the five elements. Approximately two and one-half hours later, the jurors asked the court in writing to reinstruct them on the *five* elements of first-degree murder on the basis of malice, premeditation and deliberation: "What are the *five* points that the State has to prove for first-degree murder—premeditated, malice, deliberation?" The court thereupon recited the full charge on first-degree murder, tracking the North Carolina Pattern Jury Instructions. *See* N.C.P.I.—Crim. 206.10, at 4-6 (1989).

The initial instructions were clearly erroneous; the question is whether the subsequent instructions rendered the error harmless.

> Since a correct charge is a fundamental right of every accused, it must appear with reasonable certainty in any case—especially in one involving a capital offense—that the court's error . . . was corrected, its harmful effect entirely removed, and the correct rule clearly fixed in the minds of the jury in order for the conviction to stand.

State v. Orr, 260 N.C. 177, 181, 132 S.E.2d 334, 337 (1963). Here, the trial court immediately discovered its error, promptly and expressly retracted it, and recharged the jury on all five elements of first-degree murder, not just premeditation and deliberation. Further, the court subsequently restated all five elements when the jury requested clarification. Further still, the jurors requested that the court reinstruct on the *five* points and specifically mentioned premeditation and deliberation. It appears clear that the correct rule was fixed in the minds of the jurors. We are convinced that the prompt and complete correction of the erroneous instruction rendered that error harmless. *See id.* at 182, 132 S.E.2d at 338 ("Surely the trial court has power to correct an inadvertence, especially if the discovery is immediate and the correction prompt and complete."). This assignment of error is overruled.

[15] Defendant next argues that the trial court erred by giving the following "deadly weapon" instruction to the jury, over defendant's objection:

> [A] murder can occur with or without a deadly weapon. I instruct you that if the State proves beyond a reasonable doubt that the defendant killed the victim with a deadly weapon or intentionally inflicted a wound upon the deceased with a deadly weapon that proximately caused his death, you may infer: first, that the killing was unlawful, and second, that it was done with malice. But you are not required or compelled to make this inference, but you may if you find beyond a reasonable doubt that the murder occurred with a deadly weapon.
>
> A deadly weapon, ladies and gentlemen, is a weapon which is likely to cause death or serious injury. In determining whether any instrument involved was a deadly weapon, you should consider its nature, the manner in which it was used, the

> size, the strength or the age difference of the defendant as compared to the victim.

Defendant contends there was insufficient evidence that a deadly weapon was used, and that this instruction was therefore inappropriate.

The State responds that its theory of the case was that defendant kicked or stomped Jennings in the abdomen while wearing her cowboy boots. Superior Court Judge Knox Jenkins testified that Jennings had told him defendant had threatened to stomp him to death with her cowboy boots. Paramedic Fowler testified that defendant was wearing a nightgown and cowboy boots when the emergency team arrived at the motel room. These boots were introduced into evidence; the jurors could observe the shape and hardness of each toe and sole. Dr. Hudson, the forensic pathologist who performed the autopsy, testified that Jennings died as a result of blood loss from the tear in the mesentery due to blunt force injury to the abdomen "consistent with a kick or a stomp." Dr. Hudson's testimony tied the boots to Jennings' death.

We have stated:

> An instrument . . . may be deadly or not, according to the mode of using it, or the subject on which it is used. For example, in a fight between men, the fist or foot would not, generally, be regarded as endangering life or limb. But it is manifest, that a wilful blow with the fist of a strong man, on the head of an infant, or the stamping on its chest, producing death, would import malice from the nature of the injury, likely to ensue.

State v. West, 51 N.C. 505, 509 (1859). *See also State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981) ("any article, instrument or substance which is likely to produce death or great bodily harm" is a deadly weapon). Thus, cowboy boots, when worn to kick or stomp an elderly man, may be a deadly weapon. The evidence here was sufficient to support the "deadly weapon" instruction. This assignment of error is overruled.

In the guilt-innocence phase, we conclude that defendant received a fair trial, free from prejudicial error.

SENTENCING PHASE ISSUES

The trial court submitted three aggravating circumstances: that the murder was committed while the defendant was committing or attempting to commit a sex offense, N.C.G.S. § 15A-2000(e)(5) (1988) (phrased somewhat differently); that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (1988); and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1988). It submitted one statutory mitigating circumstance: that defendant had no record of criminal convictions, N.C.G.S. § 15A-2000(f)(1) (1988). It submitted twenty-one non-statutory mitigating circumstances, as follows: the defendant has been a peaceful person in the community in which she lived; the defendant has been a law-abiding citizen in the community in which she lived; the defendant is a recovering alcoholic; the defendant has successfully raised three children; the defendant is the grandmother of three grandchildren; the defendant's parents were victims of alcoholism; the defendant has endured a bilateral mastectomy requiring the removal of both her breasts; the defendant has been active in community volunteer organizations; the defendant has experienced the death of an infant daughter; the defendant saw the need to improve herself educationally; the defendant furthered her education by taking courses and being licensed as a cosmetologist, a licensed practical nurse, and a registered nurse; the defendant is currently a registered nurse who has worked at three hospitals; the defendant has useful work skills; the defendant has performed deeds of kindness during her lifetime; the defendant has held the leadership position of lead and charge nurse; the defendant suffered an automobile accident in 1973 and was in a cast; the defendant has no prior record for violent crimes; the defendant's childhood history, background and record show no indication of a habitually violent nature; the defendant has the support of her family; the defendant was gainfully employed as a nurse prior to her marriage to the decedent; and any other circumstance or circumstances arising from the evidence which the jury finds to have mitigating value.

[16] Defendant contends that the trial court committed plain error in submitting the aggravating circumstance that the murder was committed while defendant was engaged in the commission of or while attempting the penetration of the anus with an object, in that the court failed to allege the aggravating circumstance in the statutory language of N.C.G.S. § 15A-2000(e)(5); or the court omitted a necessary element of the crime of sexual offense on

the Issues and Recommendations form. Defendant contends that the court should have worded the aggravating circumstance using the statutory language in N.C.G.S. § 15A-2000(e)(5), or else should have added the phrase "by force and against the will of the deceased." Defendant concedes that the trial court properly instructed the jurors, orally, on the aggravating circumstance. She contends, notwithstanding, that the jurors may have followed the incorrect abbreviated written issues sheet, and found only that defendant had penetrated Jennings' anus with a blunt object, with his consent or without force, which act constitutes a crime against nature but not a sex offense.

Defendant failed to object to the wording of the written list and review is therefore limited to determining whether the omission constituted plain error. We discern no plain error.

N.C.G.S. § 15A-2000(e)(5) states, in pertinent part:

> (e) Aggravating circumstances which may be considered shall be limited to the following:
>
> . . . .
>
> (5) The capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit . . . a sex offense.

N.C.G.S. § 15A-2000(e)(5). The trial court gave the jury the following instructions on the law on this aggravating circumstance:

> The following are the aggravating circumstances which might be applicable to this case. All right, you may now refer to about middle way down the front page where it says, number one.
>
> One, was this murder committed by the defendant—let me read it from the verdict sheet. "Was the murder committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object?"
>
> That is, was it committed while the defendant was committing or attempting to commit a sexual offense.
>
> Now, ladies and gentlemen, a sexual offense involves the penetration of the victim's anus by force or by the threat of force and was sufficient to overcome any resistance which

> the victim might make, and that the victim did not consent, and it was against his will.
>
> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim the defendant had committed or had attempted to commit a sexual act with the victim and that she did so by force or threat of force, and was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against his will, you would find this aggravating circumstance . . . .

The trial court, however, furnished the jury with a written list that asked simply, "Was the murder committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object?" Apparently, the trial court abstracted the statutory language of only the *sexual act* and not the *sexual offense* onto the written list. *See* N.C.G.S. § 14-27.5(a) (1986) ("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"); N.C.G.S. § 14-27.1(4) (1986) (A sexual act means "the penetration, however slight, by any object into the genital or anal opening of another person's body [except] for accepted medical purposes.").

Defendant notes, correctly, that we have never required that the trial court duplicate the exact statutory language of N.C.G.S. § 15A-2000(e) on the written list of Issues and Recommendations furnished the jury. N.C.G.S. § 15A-2000(b), in pertinent part, states that

> the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues *relating to such aggravating or mitigating circumstance or circumstances.*

N.C.G.S. § 15A-2000(b) (1988) (emphasis added). Defendant contends that the oversight caused the jurors to follow the incorrect abbreviated law transcribed to the written list furnished them.

We are convinced, however, that the additional or alternative written instructions now suggested by defendant would have had

no probable effect on the jury's response to the issue, and thus that the incomplete written issues sheet did not constitute plain error. *See, e.g., Walker*, 316 N.C. at 39, 403 S.E.2d at 83 ("Before deciding that an error by the trial court amounts to 'plain error,' the appellate court must be convinced that absent the error the jury probably would have reached a different verdict."); N.C. R. App. P. 10(c)(4) (1993). Defendant conceded at oral argument that the trial court properly instructed the jury, orally, on the aggravating circumstance. Just prior to giving these instructions, the trial court gave each juror a copy of the written list of Issues and Recommendations and referred them to the location of the circumstance on the list. The court stated:

> To enable you to follow me more easily the bailiff will now give each of you a copy of this form . . . which you will take with you when you retire to deliberate. . . . [D]o not read ahead on this form, but simply refer to this form as I instruct you on the law.

The trial court then twice instructed the jury that to affirmatively answer the question on the form—at which they were looking—they must find that the defendant penetrated Jennings' anus "by force or threat of force, . . . sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against his will." We are convinced that the trial court, augmenting thus the written instructions, fixed the correct law in the minds of the jurors. *Orr*, 260 N.C. at 181, 132 S.E.2d at 337 ("Since a correct charge is a fundamental right of every accused, it must appear with reasonable certainty in any case . . . that the court's error . . . was corrected, its harmful effect entirely removed, and the correct rule clearly fixed in the minds of the jury . . . ."). We presume "that jurors . . . attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *Francis v. Franklin*, 471 U.S. 307, 324 n.9, 85 L. Ed. 2d 344, 360 n.9 (1985).

The evidence tends to show that Jennings suffered multiple scrapes, cuts and bruises to his head, scalp, face, arms, hands, legs, chest, buttocks and genitalia, as well as to his anus, all in the day before his death. Dr. Hudson, the pathologist who performed the autopsy, opined that the splits in the thin membrane that lined the anus around Jennings' sphincter were caused by

insertion of a blunt object into the anus that stretched the surface of the membrane to the point it split. The splits were not caused by insertion of a rectal thermometer, or picking or scratching by fingernails, or constipation. Jennings, Dr. Hudson opined, would have suffered pain, notwithstanding the quantity of analgesic in his body.

Defendant did not attempt to establish that she penetrated Jennings' anus with his consent. Rather, her defense, presented by her own testimony and testimony of her experts, was innocence. Jennings, defendant testified, had been depressed and had remained in his motel room the day before his death; she had watched him and cared for him. However, she had found him in the bathroom beating himself with a shoe and a piece of old cheese. Jennings had also been constipated and had picked and scratched at his rectum, and had, in fact, bled profusely from his rectum the day of his death. Dr. Brown, a psychiatrist and an attorney, testified that it is not uncommon for demented patients to injure themselves. After viewing photographs of the injuries, he opined that the injuries could have been self-inflicted.

The evidence thus presented no issue as to defendant's use of force or the victim's lack of consent, but called for a determination as to the credibility of the State's witnesses versus that of defendant's witnesses. The jury's finding of the aggravating circumstance, even as worded on the written list of Issues and Recommendations, shows that it did not believe the defendant.

For these reasons, we hold that the trial court did not commit plain error in failing to furnish the jury with the additional or alternative written material that defense counsel did not request at trial.

Within this same assignment of error, defendant contends that the evidence did not support the existence of this aggravating circumstance. We conclude that the evidence set forth above, and reasonable inferences therefrom, support a finding that the defendant committed the murder while she was engaged in the commission of, or while attempting the penetration of, Jennings' anus with an object by force and against his will. *See generally State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141 (1993) ("In determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled

to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State."). This assignment of error is overruled.

[17] Defendant's next assignment of error involves the trial court's instructions on the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6). Defendant filed a written objection to the use of this aggravating circumstance, arguing, in part, that it was "unconstitutional[ly] vague and overbroad . . . as applied in this case."

The trial court instructed the jury as follows:

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for having committed the crime, or as a result of the death of the victim.
>
> If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, *the defendant stood to benefit from the remaining partnership accounts at the Merrill Lynch in the name of the decedent*, you would find this aggravating circumstance, and would so indicate by having your foreman write, "Yes", in the space after this aggravating circumstance on the form. If you do not so find or have reasonable doubt as to one or more of these things, you will not find this aggravating circumstance and will so indicate by having your foreman write, "No", in that space.

(Emphasis added). *See* N.C.P.I.—Crim. 150.10, at 14-15 (1992).

Defendant contends that the italicized language renders the aggravating circumstance constitutionally defective because it does not "narrow the class of murderers subject to capital punishment" in that incidental financial gain will accrue to the surviving spouse of virtually every marriage. *See Gregg v. Georgia*, 428 U.S. 153, 187 & 196, 49 L. Ed. 2d 859, 882 & 887-88 (1976) (the death penalty is an "extreme sanction, suitable to the most extreme of crimes"; a state can act to "narrow the class of murderers subject to capital punishment by specifying aggravating circumstances which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed."). The instruction, she argues, does not require that defendant kill the victim for the purpose of obtaining money; rather, it allows the jury to find the aggravating circumstance if defendant stood to gain financially by her husband's

death, even if this financial gain were merely incidental to his death.

Defendant claims, essentially, that the instruction is ambiguous and therefore subject to an erroneous interpretation. In reviewing such an instruction, we inquire " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. ---, ---, 116 L. Ed. 2d 385, 399 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990)). To satisfy this "reasonable likelihood" standard, a defendant must show more than a "possibility" that the jury applied the instruction in an unconstitutional manner, but need not establish that the jury was "more likely than not" to have misapplied the instruction. *Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329.

> [A] capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" jury could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. at 380-81, 108 L. Ed. 2d at 329.

The gravamen of the pecuniary gain aggravating circumstance is that "the killing was for the purpose of getting money or something of value." *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985); *see also State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981) ("[t]he hope of pecuniary gain provided the impetus for the murder"). This financial motivation or impetus "aggravates" the murder, distinguishing the murder from other murders as being more

egregious and therefore more worthy of the extreme sanction of death. Defendant contends that the underlined language of the second paragraph of the instructions, especially the phrase "stood to benefit," sweeps too broadly in that it directs the jury to find this aggravating circumstance on the mere fact that defendant would benefit financially from the death of her husband through his will leaving all his property to her. Some incidental financial gain, defendant notes, will accrue to the surviving spouse of virtually every marriage.

The State responds that when read in conjunction with the first paragraph, and in the context of the trial record, the instruction is not constitutionally infirm. *See Estelle v. McGuire*, 502 U.S. at ---, 116 L. Ed. 2d at 399 (the instruction must be considered, not in "artificial isolation," but in the context of the instructions as a whole and the trial record) (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 38 L. Ed. 2d 368, 373 (1973)); *see also State v. McNeil*, 327 N.C. 388, 392, 395 S.E.2d 106, 109 (1990) (single instruction "must be viewed in the context of the overall charge"), *cert. denied*, 499 U.S. ---, 113 L. Ed. 2d 459 (1991). We agree.

"Stands," as in "stands to benefit," means "to be in a position to gain or lose *because of an action taken* or commitment made." *Webster's Third New International Dictionary* 2223 (1976) (emphasis added). The first paragraph of the instruction requires the jury to find that at the time *when defendant committed the murder*, she intended or expected to obtain money or something of value as a result:

> A murder is committed for pecuniary gain if the defendant, *when he commits it*, has obtained, or *intends or expects to obtain*, money or some other thing which can be valued in money, either as compensation for having committed the crime, or *as a result of the death of the victim*.

(Emphasis added). We conclude that the language of the second paragraph, including the phrase "stood to benefit," viewed in the context of the instructions as a whole, is not unconstitutionally vague or overbroad.

There was, moreover, substantial evidence before the jury tending to show that the murder of the aged and vulnerable Jennings was committed for the purpose of pecuniary gain. Jennings, who was almost eighty years old at the time of his death, was thirty-three

years older than the defendant. Shortly after their marriage, defendant arranged for a sizeable portion of the victim's financial assets to be transferred to her own bank account. George Henry, the Merrill Lynch financial advisor working with the victim's money, testified that defendant exhibited a demeanor that showed "no compassion whatsoever for her husband." "Her face, her eyes, her tone, was something like I had never seen before in my life."

At the beginning of September 1987, Jennings' account with Merrill Lynch contained approximately $170,000. During that month, $20,000 was withdrawn from the account, with the checks written to defendant. In addition, certificates of deposit in the amounts of $2,000 and $1,000 were transferred to defendant around that time. Thus, by the time defendant and the victim met with Merrill Lynch advisor George Henry in September 1987, Jennings' assets amounted to only $150,000. As a result of that meeting, almost one-half of that amount was transferred to defendant's account. One month later, Jennings' account was depleted by approximately $17,000 for a car for defendant. Credit card charges for motel bills and other expenses further depleted Jennings' account. Defendant's account during this period was dormant.

Two months later, Jennings informed Henry that his wife had abandoned him with no money at a hotel and that he wished to cease transferring funds to her account. Shortly thereafter, the couple reconciled, and the defendant succeeded in having Jennings give her power of attorney. Two weeks later Jennings, with the assistance of an attorney, rescinded the power of attorney because defendant "was taking everything that he had." One year after their marriage, only $37,000 remained in Jennings' account with Merrill Lynch. At the time of his death, Jennings had only $21,000 in his account. Henry testified that he had received three letters purportedly signed by Jennings requesting that the remaining assets be transferred to defendant. The assets were not transferred because Merrill Lynch refused to transfer any more funds from Jennings to defendant. Defendant claimed that she did not have to kill Jennings because she had power of attorney and could have effected the transfer at any time before Jennings' death; she did not have to rely on the transfer of all his property to her under his will. However, Henry testified that Merrill Lynch had informed defendant that it would make transfers only if (1) Jennings wrote a letter requesting that the accounts be transferred to his new broker, or (2) Jennings completed a form requesting that the accounts, mostly

limited partnerships, be liquidated, or (3) their new broker wrote Merrill Lynch saying he would accept the accounts. Finally, many witnesses testified that Jennings frequently complained that defendant was draining him of money to the point of destitution and that she physically abused and intimidated him.

Within this same assignment of error, defendant contends that the evidence did not support the existence of this aggravating circumstance. We conclude that the evidence noted above, and reasonable inferences therefrom, support a finding that the defendant committed the murder for pecuniary gain. *Cf., e.g., State v. Barfield*, 298 N.C. 306, 311-12, 259 S.E.2d 510, 519-20 (1979) (record supported jury's finding that defendant poisoned her boyfriend for pecuniary gain where defendant was afraid he would turn her in for forging checks to his account in the amounts of $100, $300 and $95), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 65 L. Ed. 2d 1181 (1980). This assignment of error is overruled.

[18] Defendant next contends that the trial court erred by denying her request that it instruct the jury "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case," thereby depriving her of rights under the Eighth and Fourteenth Amendments of the United States Constitution. We have recently addressed and rejected the same argument in *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684, *reh'g denied*, --- U.S. ---, --- L. Ed. 2d ---, 61 U.S.L.W. 3714 (1993). We stated:

> We believe that trial courts should not refer to "sympathy." Instead, when instructing the jury to consider the statutory catch-all mitigating circumstance of "*[a]ny other circumstance arising from the evidence* which the jury deems to have mitigating value," trial courts should emphasize that the jury must weigh all mitigating considerations whatsoever which it finds supported by evidence. N.C.G.S. § 15A-2000(f)(9) (1988) (emphasis added). We believe that this course will lead the jury to consider all of the mitigating evidence introduced as required by *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed. 2d 973 (1978), without the risk of encouraging the jury to exercise unbridled, and thus unconstitutional, discretion.

Hill, 331 N.C. at 421, 417 S.E.2d at 783.

Here, the trial court submitted the statutory catch-all mitigating circumstance, N.C.G.S. § 15A-2000(f)(9), with the instructions recommended in *Hill*; therefore, it did not err in this regard. For these reasons, this assignment of error is overruled.

[19] Defendant next contends that the trial court erroneously allowed evidence of the victim's good character introduced during the guilt phase to be considered at the penalty phase, thus violating the North Carolina capital punishment statute. Defendant concedes that the United States Supreme Court has foreclosed her argument that her Eighth Amendment rights were violated. *Payne v. Tennessee*, 501 U.S. ---, 115 L. Ed. 2d 720 (1991) (Eighth Amendment does not prohibit either admission of evidence of, or prosecutorial argument about, the murder victim's personal characteristics).

She argues, however, that during his argument in the penalty phase, the prosecutor improperly referenced evidence of the victim's character adduced at the guilt phase: "But then Bill Jennings' good name wasn't good enough for her either, was it? . . . [He was a] fine man, who [the defendant's] own son even testified was a fine man. . . . All of these things that have no basis whatsoever just to smear that good man's reputation." She argues further that the trial court improperly instructed the jury at the penalty phase that it could consider all evidence heard at both the guilt and penalty phases.

We have already concluded that the character evidence was admissible to rebut defendant's evidence that her victim was a mentally confused, demented man who often acted bizarrely. Pursuant to N.C.G.S. § 15A-2000(a)(3), that evidence is competent for consideration by the jury during the penalty phase, and therefore the prosecutor's references to that evidence during his penalty phase argument were not improper. *See, e.g., State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989) (counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts not included in evidence), *vacated on other grounds*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. ---, 113 L. Ed. 2d 459 (1991). Further, the trial court's instruction that the jury could consider all evidence introduced

at both phases was appropriate under N.C.G.S. § 15A-2000(a)(3). *See, e.g., Syriani*, 333 N.C. at 396, 428 S.E.2d at 143. For these reasons, we hold that the court did not err in allowing evidence of the victim's good character introduced during the guilt phase to be considered at the penalty phase. This assignment of error is overruled.

[20] Defendant next contends that the trial court erred in submitting the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," in that defendant was convicted of first-degree murder on the basis of torture, and we have interpreted our "especially heinous, atrocious, or cruel" aggravating circumstance as directed at "the conscienceless or pitiless crime which is *unnecessarily torturous* to the victim." *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979) (emphasis added). The State responds that the circumstance was properly considered in that defendant was convicted on the bases of both torture and premeditation and deliberation. We agree.

We have held that "when a defendant is convicted of first degree murder under the felony murder rule, the trial judge shall not submit [the underlying felony] to the jury . . . [as one of] the aggravating circumstance[s]" enumerated in N.C.G.S. § 15A-2000(e)(5). *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). We concluded that "the possibility that a defendant convicted of a felony murder will be sentenced to death is disproportionately higher than the possibility that a defendant convicted of a premeditated killing will be sentenced to death due to the 'automatic' aggravating circumstance dealing with the underlying felony." *Id.* "[The] underlying felony may not be considered as an aggravating circumstance in the penalty phase, because it has merged with and become a part of the murder conviction as an essential element thereof." *State v. Silhan*, 302 N.C. 223, 263, 275 S.E.2d 450, 478 (1981). However, "when a jury specifies that it finds a defendant guilty upon both theories [*i.e.*, premeditation and deliberation and felony murder] and *both* are supported by the evidence, the underlying felony may properly be submitted as an aggravating circumstance." *Id.* at 262, 275 S.E.2d at 478.

The situation here is analogous. Assuming without deciding that it is error to submit the "especially heinous, atrocious, or cruel" aggravating circumstance when a defendant is convicted

of first-degree murder solely on the theory of torture, where, as here, the jury finds a defendant guilty upon the theories of both torture and premeditation and deliberation, and both are supported by the evidence, the aggravating circumstance may properly be submitted.

[21] Within this assignment of error, defendant further contends that the trial court erred in submitting two aggravating circumstances based on the same evidence, *i.e.*, the penetration of Jennings' anus with a blunt object by force or against his will. The two aggravating circumstances were: (1) that the murder was committed during a sex offense, N.C.G.S. § 15A-2000(e)(5); and (2) the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). Defendant contends that the evidence of the sex offense was necessary to a finding that the murder was especially heinous, atrocious, or cruel. We disagree. There was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed "while attempting the penetration of the anus with an object."

The evidence tends to show that defendant savagely beat her elderly victim. He sustained multiple bruises and cuts to his head, scalp, face, neck, and legs; several bruises on his arms and hands suggested he tried to defend himself or ward off blows. Jennings endured bruises, scrapes and cuts to his penis—there was skin consistent with the type of skin found on the underside of the head of a penis on a forceps found in the motel room. Severe kicks or stomps to the abdomen tore the victim's mesentery, causing internal hemorrhaging. These blows did not cause immediate death. The quantity of mucus collected in his bronchial tubes showed that Jennings died slowly of multiple injuries. The blow to his head may have stunned him, and a large amount of analgesic in his bloodstream notwithstanding, the internal hemorrhaging would have caused him considerable pain, drowsiness, eventual unconsciousness and death. There was blood in the motel room, splattered on the furniture, ceiling, walls, floor, and back of the mirror. There was evidence that defendant had cleaned up blood in the bathroom. There was blood on the bedsheets and pillowcase and on towels in the bathtub.

This evidence and reasonable inferences therefrom, apart from the evidence of attempted penetration of the victim's anus, support

a finding that the killing was excessively brutal and physically agonizing, conscienceless, pitiless and unnecessarily torturous to the victim. *See, e.g., Syriani*, 333 N.C. at 392-93, 428 S.E.2d at 141 (evidence of twenty-eight stab wounds, all but one superficial, several defensive, and that the victim was conscious at least upon admission to hospital, sufficient to support "especially heinous, atrocious, or cruel"); *State v. Huffstetler*, 312 N.C. 92, 115-16, 322 S.E.2d 110, 124-25 (1984) (severity and brutality of numerous blows with cast iron skillet supported submission of aggravating circumstance, notwithstanding that there was no evidence as to whether the victim was alive or conscious during assault), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). This case thus is distinguishable from *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) and *State v. Quesinberry*, 319 N.C. 228, 354 S.E.2d 446 (1987), where this Court found a complete overlap of evidence supporting two aggravating circumstances. We therefore reject defendant's contention that it was error to submit both aggravating circumstances. While the trial court should have instructed the jury that it could not use the same evidence as the basis for finding both circumstances, defendant did not object to its failure to do so. We do not believe the failure to so instruct had a probable impact on the jury's finding of these circumstances; we thus decline to find plain error in the failure to so instruct. This assignment of error is overruled.

PRESERVATION ISSUES

[22-27] Defendant raises six additional issues which she concedes this Court has decided against her position: (1) the trial court erred by instructing jurors that premeditation, deliberation and intent to kill are not essential elements of first-degree murder on the basis of torture; (2) the Issue III instruction, directing the jury to continue to Issue IV if the mitigating circumstances are of equal value and weight to the aggravating circumstances, is unconstitutional; (3) the trial court erred by submitting the aggravating circumstance that the murder was especially heinous, atrocious or cruel, because that aggravating circumstance is unconstitutionally vague and overbroad as applied in North Carolina and in this case; (4) the North Carolina death penalty statute, and consequently the death sentence in this case, is unconstitutionally vague and overbroad, has been imposed in a discretionary and discriminatory manner, has been imposed or withheld on the basis of arbitrary and capricious factors and in individual cases without proper guidance; (5) the trial court erred in instructing the jury that the defendant

had the burden of proving mitigating circumstances by a preponderance of the evidence; and (6) the trial court erred in denying the defendant's motion for a bill of particulars from the State disclosing the statutory aggravating circumstances relied upon in seeking the death penalty.

We have considered defendant's arguments on these issues, and we find no compelling reason to depart from our prior holdings. These assignments of error are overruled.

PROPORTIONALITY REVIEW

[28] Having found no error in the guilt and sentencing phases, we are required by statute to review the record and determine (1) whether the record supports the jury's finding of the aggravating circumstances upon which the sentencing court based its sentence of death, (2) whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, and (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315 (1987), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

We have held that the record supports the jury's finding of the three aggravating circumstances submitted to it: that the murder was committed while the defendant was engaged in the commission of or an attempt to commit a sex offense, N.C.G.S. § 15A-2000(e)(5); that the murder was committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); and that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). We further conclude that nothing in the record suggests that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor. We thus turn to our final statutory duty of proportionality review and "determine whether the death sentence in this case is excessive or disproportionate to the penalty imposed in similar cases, considering the crime and the defendant." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 829 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, *State v. Vandiver*, 321 N.C. 570, 354 S.E.2d 373 (1988). We compare this case to cases found to be free of error in both phases of the trial, *State v. Jackson*, 309 N.C. 26, 45, 305 S.E.2d 703, 717 (1983), in a pool consisting of

> *all cases* arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by this Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

State v. Williams, 308 N.C. 47, 79, 301 S.E.2d 335, 355, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 1004, 78 L. Ed. 2d 704 (1983). We consider only those cases "roughly similar with regard to the crime and the defendant . . . ." *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

> If, after making such a comparison, we find that juries have consistently been returning death sentences in the similar cases, then we will have a strong basis for concluding that a death sentence in the case under review is not excessive or disproportionate. On the other hand if we find that juries have consistently been returning life sentences in the similar cases, we will have a strong basis for concluding that a death sentence in the case under review is excessive or disproportionate.

Id.

This case involves the murder of a frail and elderly husband by his healthy and much younger wife of less than three years. Features distinguishing the case include that (1) the murder was preceded by a period of physical and verbal abuse, during which defendant depleted her husband's financial resources; (2) the final assault on her husband was prolonged—occurring over two days—and vicious; (3) the victim, her husband, suffered great physical pain before death; and (4) the defendant never exhibited any remorse for the crime or pity for her victim. The jury found three aggravating circumstances: that the murder was committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object; that the murder was committed for pecuniary gain; and that the murder was "especially heinous, atrocious, or cruel." The jury found only one statutory mitigating circumstance, that defendant had no record of criminal convictions, and three non-statutory mitigating circumstances: that defendant had been a peaceful person in the community in which she lives; that she had no prior record for violent crimes; and

that her childhood history, background and record showed no indication of a habitually violent nature.

Defendant relies on six cases in which this Court has found the death penalty disproportionate. Two involved the "especially heinous, atrocious, or cruel" aggravating circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). Three were robbery-murders and involved the pecuniary gain aggravating circumstance. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). One involved the course of conduct aggravating circumstance. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds, State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). None is similar to the present case.

In *Stokes*, the defendant and two others planned to rob the victim's warehouse. During the robbery one of the trio severely beat the victim about the head, killing him. *Stokes*, 319 N.C. at 3, 352 S.E.2d at 654. This Court adjudged it important that the defendant was only seventeen. There was evidence that he suffered from an impaired capacity to appreciate the criminality of his conduct and was under the influence of mental or emotional disturbance at the time of the murder. Further, this was a robbery-murder. The defendant was convicted on the theory of felony murder; there was virtually no evidence of premeditation and deliberation, and no evidence that the defendant was the ringleader or deserved a death sentence any more than an older confederate who received a life sentence. *Id.* at 21 & 24, 352 S.E.2d at 664 & 666. We find the manifest dissimilarities with the present case significant.

In *Bondurant*, the defendant pointed the gun at the victim, a traveling companion, taunted him for two or three minutes, and shot him. *Bondurant*, 309 N.C. at 677, 309 S.E.2d at 173. The Court "deem[ed] it important in amelioration of defendant's senseless act that immediately after he shot the victim, he exhibited a concern for [the victim's] life and remorse for his action by directing the driver of the automobile to the hospital." *Id.* at 694, 309 S.E.2d at 182. Defendant then entered the hospital to seek medical assistance for the victim. Further, the defendant spoke with police at the hospital, confessing that he fired the shot that killed the victim. *Id.* In the present case, by contrast, the defendant, a nurse by

training, made no effort to secure medical treatment for her victim, even though the hospital was directly across the street from the motel. There was evidence that her victim had been dead more than four hours before defendant telephoned for emergency medical assistance.

In *Benson*, the defendant accosted the victim and demanded his moneybag. The victim hesitated and defendant fired his shotgun, striking the victim in the upper portion of both legs; the victim died later in the hospital of cardiac arrest occasioned by loss of blood from the gunshot wounds. *Benson*, 323 N.C. at 321, 372 S.E.2d at 518. This Court found the death penalty disproportionate because the defendant was convicted solely on the theory of felony murder; the evidence that he fired at the victim's legs tended to show that he intended only to rob the victim. The jury found only the pecuniary gain aggravating circumstance, but found, as mitigating circumstances, that defendant was under the influence of mental or emotional disturbance, as well as, as in the present case, that defendant had no significant history of prior criminal activity. *Id.* at 328, 372 S.E.2d at 522. Further, the defendant confessed and cooperated upon arrest, voluntarily consented to a search of his motel room, car and home, and pleaded guilty during the trial and acknowledged his wrongdoing before the jury, *id.* at 328-29, 372 S.E.2d at 522-23, in contrast to the actions of the defendant in the present case.

The murders in *Young*, *Jackson* and *Rogers* are simply not characterized by the viciousness and cruelty of the murder in the present case.

There are four similar cases in the pool in which the jury recommended a sentence of death after finding as an aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." *Syriani*, 333 N.C. 350, 428 S.E.2d 118; *Huffstetler*, 312 N.C. 92, 322 S.E.2d 110; *Williams*, 308 N.C. 47, 301 S.E.2d 335; *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983).

In *Syriani*, the defendant accosted his estranged wife and stabbed her to death. Following the assault, the defendant walked calmly back to his van and drove to a nearby fire station, where he told a fireman he needed medical attention because he had

been in a fight. *Syriani*, 333 N.C. at 359 & 364, 428 S.E.2d at 121-22 & 124. The jury found as the single aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." The jury also found one statutory mitigating circumstance, that the crime was committed while the defendant was under the influence of mental or emotional disturbance. It found five non-statutory mitigating circumstances: that defendant understood the severity of his conduct; that he had, since his incarceration, demonstrated an ability to abide by lawful authority; that he had a history of good work habits; that he had a history of being a good family provider; and that he had been a person of good character or reputation in the community in which he lived. It found two circumstances under the catchall: that the defendant was raised in a different culture and that he was aggravated by events following the issuance of the *ex parte* domestic violence order. *Id.* at 401, 428 S.E.2d at 146. This Court concluded that the sentence of death was not disproportionate, based on evidence similar to that in the present case, including the prior threats and abuse, the brutal nature of the killing, the lack of remorse or pity shown by the defendant, and the defendant's cool actions after the murder. *Id.* at 401-06, 428 S.E.2d at 146-49.

In *Huffstetler*, the defendant beat his mother-in-law to death with a cast iron skillet. He fractured her jaw, neck, spine and collarbone. After the beating, the defendant went home to change his bloody clothes, returned to the scene to remove the skillet, and left to spend the night with a woman friend. *Huffstetler*, 312 N.C. at 98-100, 322 S.E.2d at 115-16. The jury in *Huffstetler* found as the single aggravating circumstance that the murder was "especially heinous, atrocious, or cruel." The jury also found three mitigating circumstances: that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired; that the killing occurred contemporaneously with an argument and by means of an instrument acquired at the scene and not taken there; and that the defendant did not have a history of violent conduct. *Id.* at 100, 322 S.E.2d at 116. This Court found the sentence of death not disproportionate, emphasizing the exceptionally brutal, prolonged and unprovoked nature of the assault and the defendant's cool actions afterwards. *Id.* at 118, 322 S.E.2d at 126.

In *Smith*, the defendant kidnapped and raped a cheerleader, then beat her to death and threw her body in a pond. *Smith*,

305 N.C. at 693-96, 292 S.E.2d at 266-68. The jury found as aggravating circumstances that the murder was committed while the defendant was engaged in the commission of rape, robbery and kidnapping, and that the murder was "especially heinous, atrocious, or cruel." The jury found as a mitigating circumstance that the defendant was under the influence of mental or emotional disturbance. *Id.* at 707-08, 292 S.E.2d at 274-75. This Court upheld the sentence of death.

In *Williams*, the defendant battered an elderly woman and sexually assaulted her with a mop handle, leaving her to die. *Williams*, 308 N.C. at 51-54, 301 S.E.2d at 339-40. The jury found four aggravating circumstances: that the murder was committed while the defendant was engaged in the commission of first-degree burglary; that the murder was committed while he was engaged in a sexual offense; that the murder was committed for pecuniary gain; and that the murder was "especially heinous, atrocious, or cruel." The jury found no mitigating circumstances. *Id.* at 57-58, 301 S.E.2d at 342. In upholding the sentence of death, this Court emphasized that the assault had been vicious and prolonged and that the victim was defenseless. *Id.* at 82, 301 S.E.2d at 357.

Defendant also relies on one case as being similar to the present case, *State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988), in which the jury recommended a life sentence. In *Allen*, the defendant was convicted of the first-degree murder of her infant son. She admitted that she poured alcohol on the infant's feet and legs as he slept in his crib and then set fire to the crib. She watched the fire burn for about a minute and then left her apartment, taking her older daughter to a neighbor's where she stayed for thirty minutes. She said she wanted to kill her child and had been thinking about burning the child for days. She had tried to smother her daughter with a pillow some years earlier. *Id.* at 181, 367 S.E.2d at 628-29. There was evidence, however, that defendant was mildly retarded and suffered from paranoid schizophrenia. The court-appointed psychiatrist testified that, at the time of the fire, defendant lacked the capability of knowing the nature and quality of her behavior. *Id.* at 182, 367 S.E.2d at 629. These dissimilarities are significant and distinguish this case from the present case.

There are four cases of murder by a spouse in which the jury recommended a life sentence: *State v. Woods*, 307 N.C. 213, 297 S.E.2d 574 (1982); *State v. Hinson*, 310 N.C. 245, 311 S.E.2d

256, *cert. denied*, 469 U.S. 839, 83 L. Ed. 2d 78 (1984); *State v. Myers*, 299 N.C. 671, 263 S.E.2d 768 (1980); *State v. Colvin*, 297 N.C. 691, 256 S.E.2d 689 (1979). None are similar to the present case. In each of these marital killings, the killings were by gunshot and there was not the evidence of excessive brutality or suffering that there is in the present case. In *Woods*, the defendant hired her lover to kill her husband and was present when he shot her husband as he walked out the front door to go to work. The defendant was convicted as an accessory before the fact. *Woods*, 307 N.C. at 215-16, 297 S.E.2d at 576. In *Hinson*, the defendant and her lover, who pretended to be a law enforcement officer in an unmarked car, pulled the husband over; the defendant's lover shot her husband. *Hinson*, 310 N.C. at 247-49, 311 S.E.2d at 259. In *Myers*, there was evidence that the defendant had physically and verbally abused his wife and had threatened to kill her. *Myers*, 299 N.C. at 674-76, 263 S.E.2d at 770-72. On the day of the killing, the defendant confronted his wife and forced her to drive while he held a gun to her head. The victim grabbed the gun and pointed it away, but the defendant regained control of the gun and fired, killing her. *Id.* at 678, 263 S.E.2d at 773. In *Colvin*, the defendant said he would kill his wife before he would allow her to take his children away. He got a rifle, pointed it at his wife, and pulled the trigger, killing her. *Colvin*, 297 N.C. at 692, 256 S.E.2d at 690.

There are two cases of murder perpetrated by means of torture in which the jury recommended a life sentence. *State v. Crawford*, 329 N.C. 466, 406 S.E.2d 579 (1991); *State v. Phillips*, 328 N.C. 1, 399 S.E.2d 293, *cert. denied*, --- U.S. ---, 115 L. Ed. 2d 977 (1991).

In *Crawford*, the defendant coerced his girlfriend's six-year-old son to drink large quantities of water. *Crawford*, 329 N.C. at 470, 406 S.E.2d at 581. The swelling of the brain resulting from the ingestion of water caused a tremendous headache, culminating in a scream and followed by blindness; the fluid filling the child's lungs would have created a sensation of suffocation. *Id.* at 482, 406 S.E.2d at 588. The defendant maintained that the killing was accidental and that he was disciplining the child for disobeying house rules, or that he was administering a home remedy for food poisoning. *Id.* at 470-71, 406 S.E.2d at 581. The jury, as in the present case, found defendant guilty of first-degree murder based on both premeditation and deliberation, and torture. However, the

jury declined to find the only submitted aggravating circumstance, that the murder was "especially heinous, atrocious, or cruel." *Id.* at 475, 406 S.E.2d at 584.

In *Phillips*, the defendants, husband and wife, battered a foster daughter to death. *Phillips*, 328 N.C. at 7-9, 399 S.E.2d at 295-96. The record shows that the jury found the two submitted aggravating circumstances, that the murder was "especially heinous, atrocious, or cruel," and that the murder was part of a course of conduct including the commission of other crimes of violence against other persons. The jury also found both defendants guilty of felony child abuse of another foster child. It found the statutory mitigating circumstance, for both defendants, that the defendant had no significant history of prior criminal activity. It found ten non-statutory mitigating circumstances for each defendant, as well as the catchall, including the circumstances that defendants had been good parents and foster parents prior to the offenses charged and that they made efforts to revive the victim and save her life.

In the present case, by contrast, the defendant systematically abused her frail and elderly husband; she gave him drugs that confused him, and had, on at least one occasion, beaten him, dragged him across the room and stomped him with her cowboy boots. Jennings had told several friends he was afraid defendant would kill him or have him committed to an institution. Defendant waited five to ten hours before she reported the death and requested emergency medical personnel, but when they arrived, she was performing CPR on Jennings, who was, by that time, cold and stiff.

These circumstances distinguish this case from the cases discussed above. We find that *Syriani*, *Huffstetler*, *Williams* and *Smith* are the cases in the pool most comparable to this case. The extent of the brutality involved here, as in those cases, precludes our concluding that the death sentence in this case was excessive or disproportionate, considering both the crime and the defendant.

We hold that the defendant received a fair trial and sentencing hearing, free of prejudicial error. In comparing this case to similar cases in which the death penalty was imposed, and in considering both the crime and the defendant, we cannot hold as a matter of law that the death penalty was disproportionate or excessive. *Robbins*, 319 N.C. at 529, 356 S.E.2d at 317.

NO ERROR.

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

Justice FRYE concurring in guilt-innocence phase and dissenting in sentencing phase.

I agree with the majority that, in the guilt-innocence phase of her trial, defendant received a fair trial, free from prejudicial error. Accordingly, I vote to uphold the jury's verdict finding defendant guilty of the first-degree murder of her husband. I cannot agree, however, with the majority's conclusion that defendant's capital sentencing proceeding was free of prejudicial error. Accordingly, I vote for a new capital sentencing proceeding. In the penalty phase of the trial, three aggravating circumstances were submitted to the jury. As they appeared on the verdict sheet,[1] the aggravating circumstances were: (1) Was the murder committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object? (2) Was the murder committed for pecuniary gain? and (3) Was the murder especially heinous, atrocious or cruel? The jury answered "yes" to each aggravating circumstance.

The jury found four mitigating circumstances: (1) Defendant has no record of criminal convictions;[2] (2) Defendant has been a peaceful person in the community in which she lives; (3) Defendant has no prior record for violent crimes; and (4) Defendant's childhood history, background and record show no indication of a habitually violent nature. After weighing the aggravating circumstances against the mitigating circumstances, the jury concluded that the mitigating circumstances were insufficient to outweigh the aggravating circumstances, and that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

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1. The verdict sheet is the piece of paper jurors take with them to the jury room. Printed on the verdict sheet are the issues which the jurors must decide. In the sentencing phase of a capital trial, jurors write "yes" or "no" beside each issue. For example, in this case, jurors wrote "yes" after the question: "Was the murder committed while the defendant was engaged in the commission of or while attempting the penetration of the anus with an object?"

2. Although submitted to the jury as a statutory mitigating circumstance (N.C.G.S. § 15A-2000(f)(1) (1988)), the submitted circumstance is nonstatutory since it relates to *convictions* while the statute relates to "no significant history of prior criminal activity."

The jury recommended, and the trial court imposed, a sentence of death.

Defendant argues that each of twelve alleged errors in the penalty phase of her trial entitles her to a new capital sentencing proceeding. I need not decide whether any one error, standing alone, warrants a new sentencing proceeding. As Justice Meyer said for a unanimous Court in a recent case involving trial error:

> Although neither of the trial court's errors, when considered in isolation, might have been sufficiently prejudicial to warrant a new trial, we are of the opinion that cumulatively they are sufficiently prejudicial that we are unable to say that defendant received a fair trial, and therefore a new trial is required.

State v. White, 331 N.C. 604, 610-11, 419 S.E.2d 557, 561 (1992). Likewise, I conclude that cumulative errors in the sentencing phase of defendant's capital trial were sufficiently prejudicial to require a new capital sentencing proceeding.

I first consider defendant's assignment of error as it relates to the trial judge's instructions for the pecuniary gain aggravating circumstance, N.C.G.S. § 15A-2000(e)(6) (1988). Defendant filed a written objection to the use of this aggravating circumstance, arguing, in part, that it was "unconstitutional[ly] vague and overbroad . . . as applied in this case."

Nevertheless, the trial judge instructed the jury as follows:

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for having committed the crime, or as a result of the death of the victim.
>
> If you find from the evidence beyond a reasonable doubt that **when the defendant killed the victim, the defendant stood to benefit from the remaining partnership accounts at the Merrill-Lynch in the name of the decedent, you would find this aggravating circumstance, and would so indicate by having your foreman write, 'Yes,' in the space after this aggravating circumstance on the form.** If you do not so find or have a reasonable doubt as to one or more of these things, you will

not find this aggravating circumstance and will so indicate by having your foreman write, 'No,' in that space.

See N.C.P.I.—Crim. 150.10 (1990).

Defendant argues that the underlined portion of the instruction is constitutionally defective because it does not require that defendant kill the victim *for the purpose* of obtaining money. The instruction allows the jury to find this aggravating circumstance if defendant stood to gain financially by her husband's death, even if this financial gain were merely incidental to his death, defendant argues. The State argues that this instruction is not constitutionally defective and should be upheld. I agree with defendant.

In reviewing the constitutionality of jury instructions in a capital case, the critical question is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, --- U.S. ---, ---, 116 L. Ed. 2d 385, 399 (1991) (quoting *Boyde v. California*, 494 U.S. 370, 380, 108 L. Ed. 2d 316, 329 (1990)). To satisfy this "reasonable likelihood" standard, a defendant must show more than a "possibility" that the jury applied the instruction in an unconstitutional manner, but a defendant need not establish that the jury was "more likely than not" to have misapplied the instruction. *See Boyde*, 494 U.S. at 380, 108 L. Ed. 2d at 329.

The gravamen of the pecuniary gain aggravating circumstance is that "the killing was *for the purpose* of getting money or something of value." *State v. Gardner*, 311 N.C. 489, 513, 319 S.E.2d 591, 606 (1984) (emphasis added); *State v. Oliver*, 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981). It is this financial motivation which "aggravates" the murder, that is, which sets this type of murder apart from other murders as being more egregious and therefore more worthy of the ultimate penalty of death. Certainly, as implicitly recognized by the State, the underlined portion of the instructions sweeps too far in that it directs the jury to find this aggravating circumstance on the mere fact that defendant "stood to benefit" financially from the death of her husband. As noted by defendant at oral argument, the surviving spouse of virtually every marriage will have some incidental financial gain from the death of his or her spouse. The contested language ignores the essence of the pecuniary gain aggravating circumstance: that the defendant killed the victim *for the purpose* of financial gain.

The State argues, however, that when read in conjunction with the first paragraph, the instruction in this case is not constitutionally defective. I disagree. The first paragraph of the instruction states:

> A murder is committed for pecuniary gain if the defendant, when he commits it, **has obtained, or intends or expects to obtain, money** or some other thing which can be valued in money, **either** as compensation for having committed the crime, **or as a result of the death of the victim.**

(Emphases added.)

In this case, the State argues, the pecuniary gain aggravating circumstance was properly submitted to the jury because there was evidence from which the jury could find that this killing *was motivated*, at least in part, by defendant's desire to collect the remaining $21,000 in her husband's Merrill Lynch account. The majority notes that there was substantial evidence tending to show that the murder was committed for the purpose of pecuniary gain. I view the question—not as one of sufficiency of the evidence to support the aggravating circumstance—but whether, given the conflicting evidence, the jury was properly instructed on the law to be applied in reaching its decision. There was no evidence that defendant was "compensated" for the death of her husband, as in a killing-for-hire situation; nor was there evidence that defendant actually took money or other things of value from the person or presence of her dead husband, as in an armed robbery situation. Thus, jurors were asked to decide under this first paragraph whether defendant intended or *expected* to receive money as a result of her husband's death. When read in conjunction with the second paragraph, I conclude there is a "reasonable likelihood" that the jury applied this instruction in an unconstitutional manner, that is, in a manner which allowed it to find this aggravating circumstance without regard to whether defendant killed the victim *for the purpose* of obtaining the money. The pecuniary gain instructions were therefore unconstitutionally vague and overbroad as applied in this case.

In another assignment of error, defendant argues that the first aggravating circumstance as it appeared on the verdict sheet—"Was the murder committed while the defendant was engaged in the commission of or while attempting the penetration of the

anus with an object?"—was improperly submitted to the jury because it is not one of the eleven aggravating circumstances enumerated in N.C.G.S. § 15A-2000(e). I agree.

Before turning to the merits of this argument, I note that the State argued in its brief and at oral argument that defendant did not object to the submission of this aggravating circumstance at trial and therefore has not preserved her right to appellate review on this issue. *See* N.C. R. App. P. 10(b). The State is correct that defendant made no objection at trial. Because this error is so fundamental to the proper functioning of our capital sentencing scheme, however, we should address it as though defendant objected at trial. *See* N.C. R. App. P. 2; *see also State v. Fowler*, 270 N.C. 468, 472, 155 S.E.2d 83, 86 (1967) (when considering a capital case, this Court may review "any errors that appear in the record, whether excepted to and assigned or not").

The only aggravating circumstances upon which the State may rely when seeking the death penalty are those enumerated in N.C.G.S. § 15A-2000(e). N.C.G.S. § 15A-2000(e) (1988). ("Aggravating circumstances which may be considered *shall be limited to the following* . . . .") (emphasis added); *State v. Taylor*, 304 N.C. 249, 257, 283 S.E.2d 761, 768 (1981), *cert. denied*, 463 U.S. 1213, 77 L. Ed. 2d 1398 (1983). The aggravating circumstance at issue here, as it appeared on the verdict sheet, is not among the eleven enumerated in N.C.G.S. § 15A-2000(e). Therefore, submission of this aggravating circumstance as a basis for the death penalty was error.

Judging from the *oral instructions*, it is obvious that the trial judge was relying on N.C.G.S. § 15A-2000(e)(5), which reads, in pertinent part:

> (5) The capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit . . . a sex offense.

The crime of sexual offense is divided into first-degree and second-degree sexual offense. *See* N.C.G.S. §§ 14-27.4 -.5. Again, judging from the oral instructions, it is clear that the trial judge was relying on N.C.G.S. § 14-27.5(a)(1), second-degree sexual offense, which reads, in pertinent part:

> (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 . . . .

"Sexual act" is defined in N.C.G.S. § 14-27.1(4), in pertinent part, as "penetration, however slight, by any object into the genital or anal opening of another person's body."

In his oral instructions to the jury, Judge Butterfield correctly explained this aggravating circumstance as follows:

> Now, ladies and gentlemen, a sexual offense involves the penetration of the victim's anus by force or by threat of force and was sufficient to overcome any resistance which the victim might make, and that the victim did not consent, and it was against his will.

The aggravating circumstance, as it appears on the verdict sheet, however, does not require the penetration of the victim's anus be by force or against the victim's will; instead, only penetration is required. What appears on the verdict sheet as an aggravating circumstance does not constitute the crime of sexual offense, and is therefore not one of the eleven exclusive aggravating circumstances set out in N.C.G.S. § 15A-2000(e). Although sexual offense was correctly defined during oral instructions, we have no way of knowing whether jurors based their decision on what they heard from the judge, or instead, whether they based their decision on the erroneous, nonstatutory aggravating circumstance appearing on the verdict sheet.

In another assignment of error, defendant argues that the trial court erred by submitting both of the following aggravating circumstances: (1) the capital felony was committed during a sex offense, N.C.G.S. § 15A-2000(e)(5) (1988); and (2) the capital felony was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (1988). Defendant argues that it was error to submit both of these aggravating circumstances because the evidence of the sex offense was included in the evidence of especially heinous, atrocious, or cruel. Although I disagree with defendant that it was error to submit both of these aggravating circumstances, I believe that the trial judge erred by failing to instruct the jury that it could not use the same evidence to find both aggravating circumstances.

It is improper for the trial court to submit two aggravating circumstances supported by the same evidence. *State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987) (murder committed for pecuniary gain and murder committed while defendant engaged in commission of a robbery); *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979) (murder committed to disrupt or hinder lawful exercise of governmental function or enforcement of laws and murder committed for purpose of avoiding or preventing lawful arrest or effecting escape from custody). The submission of two aggravating circumstances based on the same evidence is improper because it "amount[s] to an unnecessary duplication of the circumstances enumerated in the statute, resulting in an automatic cumulation of aggravating circumstances against the defendant." *Goodman*, 298 N.C. at 29, 257 S.E.2d at 587.

I find this case distinguishable from *Quesinberry* and *Goodman*. Unlike those cases, there was not a complete overlap of evidence between the two aggravating circumstances in this case. Furthermore, I agree with the State that there was evidence *other than the sexual offense* which would have supported the proper submission of the aggravating circumstance of especially heinous, atrocious, or cruel. I therefore reject defendant's argument that it was error to submit both of these aggravating circumstances.

However, I agree with defendant that there is a reasonable likelihood that a jury would find the sexual offense alleged, the forced penetration of the anus with an object against the will of the deceased, to be also especially heinous, atrocious, or cruel. This would result in the "cumulation of aggravating circumstances against the defendant." *Id.* To avoid this cumulation, the trial court, at a new sentencing proceeding, should instruct the jury in such a way as to ensure that jurors will not use the same evidence to find both aggravating circumstances.

I recognize that, judged in light of the State's evidence, this was a particularly brutal and senseless murder. However, whenever the State seeks to impose society's ultimate punishment, it is the responsibility and duty of this Court to ensure that a defendant, no matter how horrific the crime, is afforded a fair sentencing proceeding in accord with our capital sentencing procedures as set forth in N.C.G.S. § 15A-2000. Given the three errors outlined above, errors touching upon each of the three aggravating circumstances found by the jury as a basis for recommending a sen-

tence of death, I cannot say that defendant received such a fair proceeding. Accordingly, while upholding the jury verdict of guilty of the crime charged, I would vacate defendant's death sentence and remand this case to Superior Court, Wilson County, for a new capital sentencing proceeding consistent with N.C.G.S. § 15A-2000.

Chief Justice EXUM joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIAM RANNELS, A/K/A BILLY REYNOLDS, A/K/A WILLIAM TENT

No. 26A91

(Filed 4 June 1993)

1. **Constitutional Law § 344 (NCI4th)— excusal of prospective jurors—unrecorded bench conferences before trial—no constitutional violation**

Defendant's unwaivable right to be present at all stages of his capital trial was not violated by the trial court's excusal of jury pool members after private, unrecorded bench conferences where these prospective jurors were excused on the beginning day of the session before any case had been called for trial.

Am Jur 2d, Criminal Law §§ 695, 696.

2. **Jury §§ 150, 223 (NCI4th)— death penalty views—ambiguous answers—excusal for cause—refusal to permit rehabilitation—life sentence—harmless error**

Assuming that it was error for the trial court not to permit the defendant in a capital trial to attempt to rehabilitate a juror who was excused for cause because of his views on capital punishment after having given ambiguous responses to *voir dire* questioning about the death penalty, this error was harmless because defendant received a life sentence. The improper excusal of a juror in violation of the principles of *Witherspoon v. Illinois*, 391 U.S. 510, and *Wainwright v. Witt*, 469 U.S. 412, affects only the sentencing proceeding and not

the determination of defendant's guilt, and any error relating to such an excusal is harmless unless defendant receives a death sentence which, absent the error, would be sustained on appeal.

Am Jur 2d, Jury § 290.

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

3. Jury § 79 (NCI4th)— requiring excused juror to observe trial—no denial of impartial jury

Defendant was not denied a fair and impartial jury when the trial court excused a prospective juror but required him to sit on the front row as a spectator during the trial after the juror expressed reservations about jury duty because of his concern that the trial might interfere with his plans to begin nursing school at the end of the month; the district attorney assured the juror that the trial would not go to the end of the month; and the juror nevertheless doubted that he could give the case the attention it deserved because his plans to attend school would "still [be] in the back of my mind." Defendant's contention that the trial court's treatment of this juror "chilled" the honest responses of other members of the venire was not substantiated by the record and constitutes mere speculation.

Am Jur 2d, Jury §§ 195 et seq.

4. Evidence and Witnesses § 294 (NCI4th)— other crimes, wrongs or acts—driving while impaired—refusal of breathalyzer—admissibility on voluntariness of confession

In a prosecution for first degree murder and armed robbery, testimony by Virginia police officers involved in defendant's apprehension that defendant was charged with driving while impaired and that defendant refused a breathalyzer test tended ultimately to show the circumstances under which defendant's confession was made and was thus relevant and admissible under Evidence Rule 404(b) on the issues of the voluntariness and credibility of the confession. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 333.

5. Evidence and Witnesses §§ 294, 368 (NCI4th)— other crimes, wrongs or acts—theft of vehicle and gun—striking of girlfriend—admissibility to show guilt

In a prosecution for first degree murder and armed robbery, testimony by Virginia police officers involved in defendant's apprehension that defendant stole the vehicle in which he was riding, that defendant struck his girlfriend when she told him she had left her purse in the victim's truck, and that defendant stole the .22 caliber pistol with which he shot the victim was admissible under Evidence Rule 404(b) to prove defendant's guilt of the crimes charged. Defendant's theft of the car and beating of his girlfriend for leaving her purse in the victim's truck both bear on defendant's consciousness of guilt, and defendant's theft of the murder weapon tends to prove not only that he possessed it but the circumstances under which he acquired it.

Am Jur 2d, Burglary § 63; Evidence § 333.

Admissibility in robbery prosecution of evidence of other robberies. 42 ALR2d 854.

6. Conspiracy § 33 (NCI4th)— conspiracy to rob—sufficiency of evidence

The evidence was sufficient to establish a criminal conspiracy on the part of defendant and his girlfriend to rob the victim where an officer testified that defendant told him that he and his girlfriend went to a bar "to set this guy up . . . so they could rob him"; a second officer testified that defendant told him that he and his girlfriend planned on robbing a man at a bar, they went to the bar and met the man, after a while the girlfriend and the man left the bar, and defendant followed them as they drove off; and another witness testified that he observed defendant and his girlfriend engage the victim in conversation at a lounge and leave the lounge with the victim.

Am Jur 2d, Conspiracy §§ 45-48.

7. Robbery § 4.3 (NCI3d)— armed robbery—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of armed robbery of a murder victim, although defendant's confession contained no mention of the robbery of the victim, where the confession did not deny that defendant robbed the

victim but was merely silent on the subject; according to defendant's confession, he and his girlfriend lured the victim from a lounge for the purpose of robbing him, and defendant later shot the victim to death with a .22 caliber pistol at a secluded spot where he had been led by either defendant or his girlfriend; and there was evidence that the victim habitually carried large amounts of currency in his billfold and pockets but was found dead with no billfold on his person, with one of his front pockets turned inside out and his back left pocket "loose," and with only a wristwatch on his wrist and a few coins in his right front pants pocket.

Am Jur 2d, Robbery §§ 62 et seq.

8. **Homicide § 256 (NCI4th) — first degree murder — premeditation and deliberation — sufficiency of evidence contradicting defendant's confession**

The State's evidence was sufficient to support defendant's conviction of first degree murder on the theory of premeditation and deliberation, although defendant stated in his confession offered into evidence by the State that he shot the victim in a fit of anger because the victim fondled defendant's girlfriend, where the State presented evidence tending to show that defendant and his girlfriend planned to rob the victim after the girlfriend lured the victim to a secluded spot presumably with the promise of sexual favors; in preparation for the robbery, defendant loaded a .22 caliber pistol and placed it where it would be available at the time of the robbery; the victim's dead body was found underneath the steering wheel of his truck with a glass between his legs and a burned down cigarette between two fingers of his left hand; the fatal wound to the victim's left temple was fired from a distance of two to three inches; when defendant learned his girlfriend had left her purse in the victim's truck, he beat her and left her; and when defendant was told after his arrest that his girlfriend was in jail, his attitude was cavalier, and he expressed a total lack of concern or affection for her. The State's evidence belies defendant's pretrial version of how the murder occurred and constitutes evidence that the killing was not suddenly provoked but was carefully planned and executed.

Am Jur 2d, Homicide §§ 437 et seq.

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 fact of killing. 86 ALR2d 656.

9. **Homicide § 488 (NCI4th) — first degree murder — when intent to kill formed — instructions**

The trial court in a first degree murder prosecution did not err in refusing to give defendant's requested instruction that "the intent to kill cannot occur simultaneously with the killing" where the court's charge distinguished an intent to kill formed "under the influence of some suddenly aroused violent passion" from the intent to kill formed after premeditation and deliberation and thus conformed in substance with that requested by defendant.

Am Jur 2d, Homicide §§ 500, 501.

10. **Homicide § 727 (NCI4th) — first degree murder — felony murder and premeditation specified — separate punishment for underlying felony**

Where the jury specified in its verdict that it found defendant guilty of first degree murder on theories of both felony murder and premeditation and deliberation, and the jury also found defendant guilty of the underlying felony of armed robbery, the merger rule did not apply, and it was proper for the trial court to sentence defendant on both the murder conviction and the armed robbery conviction.

Am Jur 2d, Homicide § 542.

11. **Criminal Law § 964 (NCI4th) — motion for appropriate relief — jurisdiction of trial court**

Defendant's motion for appropriate relief must first be determined in the superior court where the motion was filed in the trial court on 30 August 1989 after the judgments against defendant were entered and his notice of appeal was given on 22 August 1989; the jurisdiction of the trial court had not been divested under N.C.G.S. § 15A-1448(a)(3) at the time the motion was filed; and the motion was thus not cognizable in the appellate division under N.C.G.S. § 15A-1418.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 53 et seq.

Application of civil or criminal procedural rules in federal court proceeding on motion in nature of writ of error coram nobis.

Justices MEYER and PARKER did not participate in the consideration or decision of this case.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Brown, J., at the 14 August 1990 Criminal Session of Superior Court, Pitt County, upon defendant's conviction by a jury of murder in the first degree. Defendant's motion to bypass the Court of Appeals as to convictions and sentences on lesser charges was allowed pursuant to N.C.G.S. § 7A-31(b). Heard in the Supreme Court 10 February 1992.

Lacy H. Thornburg, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

John M. Savage for defendant-appellant.

EXUM, Chief Justice.

Defendant was properly indicted for murder in the first degree, armed robbery, and conspiracy to commit armed robbery. The jury found defendant guilty as charged. His conviction of murder in the first degree was based upon theories of both felony murder and premeditation and deliberation. After the capital sentencing phase of the trial, because the jury was unable to reach a unanimous verdict as to punishment, the trial court, pursuant to N.C.G.S. § 15A-2000(b), sentenced defendant to life imprisonment. We find no error in defendant's trial.

I.

Evidence presented by the State, which included two voluntary, *Mirandized* pretrial statements given by defendant to investigating officers, tended to show the following: Defendant and his girlfriend, Linda Lopez, planned on 9 June 1989 to rob a man at a lounge in the Ramada Inn on Greenville Boulevard in Greenville, North Carolina. The plans involved "setting up" the man, apparently by using Lopez to entice him away from the lounge.

Defendant loaded a .22 caliber pistol and put it in Lopez's purse. Both defendant and Lopez then went to the lounge and met the man, Richard M. Gaddy, Sr., whom they intended to rob. Lopez began talking to Gaddy. She enticed him to leave with her in his truck. Defendant, according to one of his statements, followed in his car. According to the other statement, Lopez and the victim followed defendant.

Alfred Melofsky, food and beverage manager for the Ramada Inn, observed defendant, Lopez and Gaddy in the lounge during the evening of 9 June 1989 between 9 and 10 p.m. They were talking loudly. Melofsky observed all three leave the lounge around 10 p.m. Lopez was hanging on Gaddy's right arm and defendant walked on Gaddy's left side. Gaddy was carrying a glass he had taken from the lounge.

Both vehicles went to a secluded spot near the bar. According to defendant's statements, he got out of his car and went to the truck. He saw Gaddy fondling his girlfriend, became angry and reached for Gaddy. Gaddy tried to defend himself and "struck at" defendant with his left elbow. This angered defendant further. Defendant then got the .22 pistol out of Lopez's purse and shot Gaddy to death.

According to defendant's statements, he and Lopez then returned to the motel where they were staying. Lopez remembered that she had left her purse in Gaddy's truck. Defendant became angry again and told investigators that he "beat the hell out of the bitch." Defendant drove away, leaving Lopez. When told by investigators after his arrest in Virginia on 29 June 1989 that Lopez was in jail, defendant replied, "F---k her, I'll get another [vulgarity omitted], it's no problem."

A Greenville Police Sergeant, C. E. Weatherington, responding to a call on 10 June 1989, went to the location where Gaddy's truck had been discovered by others. Gaddy was in the truck, apparently dead, with a bullet wound in his left temple, sitting under the steering wheel and lying "over to the right." Gaddy had a glass between his legs and a burned-down cigarette between two fingers of his left hand. His front left pants pocket was turned inside out, and a dime was on the pavement under the driver's door. A woman's purse was under his head.

Autopsy revealed that Gaddy died from the gunshot wound to his left temple. Noting gray-black, sooty material and stippling around the wound, Dr. Page Hudson, a forensic pathologist who performed the autopsy, believed the pistol was fired "just a few inches away" from Gaddy's head.

After the autopsy, Gaddy's clothes were given to Police Officer John Baker, who was assisting in the investigation. Baker found no wallet or money in the clothes. Baker had found no wallet in the truck when he searched it earlier. According to Gaddy's son, Gaddy "always carried right much money on him, mostly cash money. He did not deal a whole lot with checks. He kept his billfold in his left back pocket, and he also kept money in his pockets. He always had money on him. He always had his wallet. And he had to have his wallet because he kept his DuPont pass in it, and in order to get in DuPont you have to show them your pass and . . . he carried it daily."

Fingerprints lifted from the truck matched those of Lopez. In the purse found in the truck under the victim's head, officers found a motel receipt for a room at the Cricket Inn in Greenville and Lopez's identification card. When they searched this room they discovered a beer can bearing a latent fingerprint matching fingerprint impressions later taken from defendant.

Defendant was arrested in Virginia on 29 June 1989 after a Virginia police officer stopped to investigate an apparent collision between the car defendant was driving and a median guard rail. The officer noticed a rag wrapped around the steering column, indicating to him that the car was possibly stolen. He also noticed the odor of alcohol. When the officer asked defendant to cut the engine, defendant replied, "F--k you." When the officer asked defendant to get out of the vehicle, defendant attempted to bolt. The officer caught defendant, pinned him against the car hood, and radioed for assistance. A license plate check subsequently revealed the car had been stolen in North Carolina. The officer said to defendant, "Sir, you are under arrest for auto theft." Defendant replied, "Okay, if you want to know, I stole the f----g car." In a subsequent search of the car officers found a red shoulder bag containing ammunition, including some .9 millimeter and .22 caliber shells.

The arresting officer, Ronald Smith, Sr., read the *Miranda* warnings to defendant and asked for defendant's name. Defendant

gave his name as William Tent. When Officer Smith and defendant arrived at the Public Safety Building for Henrico County, Officer Smith read Virginia's "implied consent law" to determine whether defendant would submit to a breathalyzer test. Defendant said he would take no tests whatsoever.

While waiting for a magistrate to arrive to process defendant's refusal to take the breathalyzer, defendant divulged that he was wanted for murder in North Carolina. Officer Smith again read defendant the *Miranda* warnings and told defendant that a name check through the National Criminal Investigations Service did not reveal that defendant was wanted. Defendant then gave his name as William Rannels. Another name check under this name confirmed that defendant was wanted in Greenville, North Carolina, for murder.

Defendant then gave Officer Smith a statement describing the "set-up" and his killing of Mr. Gaddy. He gave another similar statement to Virginia Police Officer Francis Curran, III, who remained with defendant while Officer Smith left the room temporarily. Both statements were recounted to the jury.

II.

[1] Defendant first contends his constitutional rights were abrogated when the trial court held private, unrecorded, side-bar conferences with a number of jury pool members. Because these conferences took place prior to the commencement of defendant's trial, we conclude no error, constitutional or otherwise, was committed.

The record reflects the trial court on 14 August 1990 first announced the commencement of the criminal session and welcomed the pool of potential jurors. The court then acknowledged the names of five potential jurors who had requested to speak with the court about their jury service. The court held unrecorded bench conferences with the five jurors and excused three of the five. At this point the trial court authorized the clerk to administer the oath to the jury pool. The court then authorized that the calendar for the session be called. After the calendar, which included defendant's case, was called, the court was advised that defendant's case would be called for trial and a jury would be needed.

The Confrontation Clause in Article I, Section 23 of North Carolina's Constitution "guarantees the right of . . . defendant to be present at *every stage* of the trial." *State v. Smith*, 326

N.C. 792, 794, 392 S.E.2d 362, 363 (1990). In a capital trial this right is not waivable. *Id.*

> The process of selecting and impaneling the jury is a stage of the trial at which the defendant has a right to be present. Therefore, it was error for the trial court to exclude the defendant, counsel, and the court reporter from its private communications with the prospective jurors at the bench prior to excusing them.

Id.; accord State v. Boyd, 332 N.C. 101, 418 S.E.2d 471 (1992); *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992); *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992); *State v. McCarver*, 329 N.C. 259, 404 S.E.2d 821 (1991).

Defendant's constitutional right to be present at all stages of the trial is by definition a right pertaining to the trial itself. It does not arise before the trial begins. *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716.

In *Cole* the trial court opened the session of court on Monday, 17 July 1989, and began selection of the grand jury. Considering requests for juror excusals, the court held off-the-record bench conferences with a number of prospective jurors called for duty during that session of court. Some of these jurors were excused or deferred from service. The grand jury was selected and the remaining jurors were given the oath and dismissed until the following morning. On Tuesday, 18 July 1989, defendant's case was called for trial and jury selection began for that case. During the jury selection process on Wednesday, 19 July 1989, the trial court again conducted unrecorded bench conferences with individual jurors who had been newly called for service on that day. Neither defendant nor his counsel were present at these conferences. Some of these jurors were excused for reasons which the record did not reveal. The court, while finding reversible error in the excusal of the jurors on Wednesday, held that

> it was not error for the court to excuse prospective jurors after the unrecorded bench conferences on [Monday,] 17 July 1989. The defendant's trial had not commenced at that time. The jurors were not excused at a stage of the defendant's trial and the defendant did not have a right to be present at the conferences.

Id. at 275, 415 S.E.2d at 717.

Here, as in *Cole*, defendant's trial had not begun when the complained of unrecorded bench conferences with prospective jurors took place. They occurred, again as in *Cole*, on Monday, the beginning day of the session, before any case had been called for trial. *Cole* controls this assignment of error adversely to defendant's position; the assignment is therefore overruled.

III.

[2] Defendant next contends the trial court erred by prohibiting defendant's rehabilitation of four prospective jurors who were excused for cause because of their views on capital punishment. Defendant concedes that three of these jurors expressed their unequivocal opposition to the death penalty and that the trial court's discretion was not abused in disallowing defense attempts to elicit different answers. *See State v. Smith*, 328 N.C. 99, 129, 400 S.E.2d 712, 729 (1991). Defendant argues that the trial court erred in not permitting further examination by defendant of a fourth juror whose responses to *voir dire* questioning about the death penalty were ambiguous:

> MR. HAIGWOOD: [D]o you have an opinion one way or the other about what ought to happen to the person who did whatever it was that happened?
>
> JUROR: Yes and no.
>
> MR. HAIGWOOD: Yes and no?
>
> JUROR: Yes and no.
>
> MR. HAIGWOOD: Okay. So in part you have an opinion about what punishment ought to be imposed and in part you do not have an opinion; is that what you are saying?
>
> JUROR: Yes, that is what I am saying.
>
> MR. HAIGWOOD: Is that an opinion that you can set aside—let me ask you—let me see if—have you expressed that opinion to anyone?
>
> JUROR: My family.
>
> MR. HAIGWOOD: Your family?
>
> JUROR: My family.
>
> MR. HAIGWOOD: And do you hold that opinion at this point?

JUROR: Yes.

MR. HAIGWOOD: That is you hold to an opinion as to what ought to happen to a person—at least in part as to what ought to happen to the person who did whatever happened?

JUROR: Not so much as to what should happen but maybe what should not happen.

MR. HAIGWOOD: As far as punishment?

JUROR: Yes.

MR. HAIGWOOD: Does that relate—and I'm not asking you what your opinion is, but does that relate to the imposition of the death penalty or life imprisonment?

JUROR: The death penalty—

MR. HAIGWOOD: Excuse me. It does relate to that?

JUROR: Yes, it does.

MR. HAIGWOOD: Would you be able to set that opinion aside at this point and—well, you have such an opinion at this point?

JUROR: Yes, I do.

MR. HAIGWOOD: Your Honor, we would challenge for cause.

THE COURT: All right. You can stand aside.

Assuming that it was error for the trial court not to permit defendant to attempt to rehabilitate this juror, because defendant received a life sentence, the error is harmless. Essentially defendant argues that this juror was improperly excused for cause because of the juror's views on the death penalty and that had defendant been permitted to question the juror, he could have demonstrated that the juror was not disqualified because of these views. Even so, because the improper excusal of a juror in violation of the principles of *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968), and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841 (1985), affects only the sentencing proceeding and not the determination of defendant's guilt, any error relating to such an excusal is harmless unless defendant receives a death sentence which, absent the error, would be sustained on appeal. *State v. Robinson*, 327 N.C. 346, 395 S.E.2d 402 (1990); *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981);

State v. Montgomery, 291 N.C. 235, 229 S.E.2d 904 (1976); *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976); *State v. Cook*, 280 N.C. 642, 187 S.E.2d 104 (1972); *State v. Williams*, 275 N.C. 77, 165 S.E.2d 481 (1969). There is, therefore, no merit to this assignment of error.

IV.

[3] Defendant also contends the trial court committed reversible error in its handling of a potential juror who expressed reservations about jury duty because of his concern that the trial might interfere with future personal plans.

Asked by the district attorney whether any members of the jury pool had any "pressing personal or business engagements" on their minds such that they could not give the case their full attention, one potential juror responded that he was due to start nursing school at the end of the month, that he was on a scholarship, and that he was concerned the trial would overlap with the beginning of school. Assured by the district attorney that the trial would not go to the end of the month, the juror nevertheless doubted he could give the case the attention it deserved because his plans to attend school would "still [be] in the back of my mind." The trial court, apparently perturbed by this reaction, instructed the juror as follows:

> Well, you are going to sit here through the trial of the case, but I'm not going to require you to sit on this case. So when the other jurors are excused, you are to remain in the courtroom. . . . I want you to sit on the front row, sir, so you can hear what's going on.

Defendant contends the trial court's treatment of this juror "chilled" the honest responses of other members of the venire, jeopardizing defendant's ability to obtain a fair and impartial jury. Defendant points to nothing in the record relating to the examination of other jurors that substantiates this contention. It could just as well be argued that the court's reaction to the juror's response reinforced among the other prospective jurors the need to be forthright and honest in their answers. Defendant's argument, therefore, relies on mere speculation and must, for that reason, be rejected.

V.

Defendant next contends the trial court committed reversible error in permitting the Virginia police officers involved in defendant's apprehension to testify about other crimes and wrongful acts committed by defendant. Defendant moved before trial to suppress this evidence, and the trial court denied the motion.

The complained of testimony was: (1) The arresting officer, Ronald Smith, charged defendant with driving while impaired and defendant refused to submit to a breathalyzer test. (2) Defendant stole the vehicle in which he was riding. (3) Defendant struck his girlfriend when she told him she had left her purse in the victim's truck. (4) Defendant stole the .22 caliber pistol with which he shot the victim.

Defendant argues this testimony should have been excluded because its only purpose was to prove defendant's bad character and that he acted in conformity therewith in violation of Evidence Rule 404(b). The rule provides:

> Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1988).

The complained of evidence was clearly admissible under Rule 404(b). The rule states "a clear, general rule of *inclusion* of relevant evidence of other crimes, wrongs, or acts." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). Under the rule, "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986). Only when the evidence of other crimes or wrongs has no other probative value than to show the bad character of the accused in order to prove his "propensity or disposition to commit an offense of the nature of the crime charged" should the evidence be excluded. *State v. Coffey*, 326 N.C. at 279, 389 S.E.2d at 54.

[4] The complained of evidence was clearly relevant to issues in the case other than defendant's character. Defendant's having been charged with driving while impaired explains circumstances under which he was taken into custody by Officer Smith. Defendant's refusal to take a breathalyzer test, if a wrongful act at all, explained the circumstances under which defendant was kept waiting in the Virginia Public Safety Center. It was during this time that defendant confessed to the crimes for which he was on trial. All of this evidence tended ultimately to show the circumstances under which that confession was made. It was thus relevant on the issues of the confession's voluntariness and credibility. The evidence cast more light on these important questions than it did on defendant's character. Its probative value, therefore, outweighed its prejudicial effect under Evidence Rule 403.

[5] The other evidence related directly to the question of defendant's guilt of the crimes charged. That he had stolen the vehicle which he wrecked in Virginia and that he beat his girlfriend when he learned she had left her purse in the victim's truck both bear on defendant's consciousness of guilt. His theft of the car tends to show that he was, indeed, desperate to flee from the area of the crime—so desperate that he resorted to stealing to acquire his mode of transportation. His beating of his girlfriend for leaving her purse in the victim's truck shows that defendant was angry because he felt that her purse would lead to the discovery of his crimes. That defendant stole the murder weapon tends to prove not only that he possessed it but the circumstances under which he acquired it. This kind of evidence is generally admissible in a homicide prosecution as tending to prove the guilt of the accused. *See State v. Garner*, 331 N.C. 491, 417 S.E.2d 502 (1992); *State v. Williams*, 292 N.C. 391, 233 S.E.2d 507 (1977); *State v. Van Landingham*, 283 N.C. 589, 197 S.E.2d 539 (1973).

VI.

Defendant next argues that the trial court erroneously denied his motion to dismiss all charges for insufficiency of the evidence. We conclude the evidence is sufficient to be submitted to the jury on all charges.

"On a motion to dismiss, the 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." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). The question for

the court is whether substantial evidence—direct, circumstantial, or both—supports each element of the offense charged and defendant's perpetration of that offense. *See id.* at 358, 368 S.E.2d at 383; *State v. Bates*, 309 N.C. 528, 533-34, 308 S.E.2d 258, 261 (1983). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981).

[6] The evidence was sufficient to support a conviction for conspiracy to commit robbery. A criminal conspiracy is "an agreement between two or more persons to do an unlawful act or do a lawful act in an unlawful way or by unlawful means." *State v. Abernathy*, 295 N.C. 147, 164, 244 S.E.2d 373, 384 (1978); *accord State v. Le Duc*, 306 N.C. 62, 75, 291 S.E.2d 607, 615 (1982). In order to be guilty as a conspirator, it must "be established by competent evidence that [defendant] entered into an unlawful confederation for the criminal purposes alleged." *State v. Andrews*, 216 N.C. 574, 577, 6 S.E.2d 35, 37 (1939). The conspiracy "may be . . . established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).

The following evidence supports the charge of defendant's conspiracy to commit robbery: Officer Smith, who arrested defendant in Virginia, testified that defendant told him that he and Linda Lopez went to the bar "to set this guy up . . . so they could rob him." Officer Curran, called in to sit with defendant when Smith left the room in which defendant was being detained, testified that defendant told him

> that he and his girlfriend, Linda Lopez, had planned on robbing a man at a bar, and that he and Linda went to this bar and met this man. Linda talked to the man, and after awhile that Linda Lopez and the man left the bar, and that he followed them; and the man and Linda Lopez got into a truck; he followed them as they drove off.

The witness Melofsky, Ramada Inn's food and beverage director, testified that he observed defendant and Lopez engage the victim in conversation and leave the lounge with the victim with defendant walking on the victim's left side and Lopez "hanging on Mr. Gaddy's arm on the right side." This is ample evidence tending to establish

a criminal conspiracy on the part of defendant and Lopez to rob the victim.

[7] The evidence is also sufficient to support defendant's conviction of the armed robbery of the victim. Defendant contends that since his confession contains no mention of the robbery of Gaddy and the State is bound by the confession which it offered in evidence, this charge should not have gone to the jury.

We disagree. First, the confession does not deny that defendant robbed the victim; it is merely silent on the subject. The confession, therefore, is not evidence that defendant did not rob the victim. Second, there is plenary other evidence in the case from which the jury could infer beyond a reasonable doubt that defendant did commit the armed robbery. Defendant's confession expressed his intent to rob. According to his confession he and Lopez lured Gaddy from the lounge for the purpose of robbing him, and defendant later shot Gaddy to death at a secluded spot where he had been led by either defendant or Lopez. Gaddy habitually carried "right much money on him, mostly cash money" and "kept his billfold in his left back pocket, and he also kept paper money in his pockets . . . ." Gaddy was found dead with no wallet, or billfold, on his person, with one of his front pockets turned inside out and his back left pocket "loose." This back pocket appeared to have "held some item or some item had been removed from the pocket." The pathologist found only Gaddy's wristwatch on his wrist and a few coins in the right side pants pocket.

While, as defendant insists, it is possible that Gaddy could have been robbed by someone else between the time defendant killed him and his body was discovered, the evidence is more than sufficient for a jury to infer to the contrary and to conclude beyond a reasonable doubt that defendant carried out his plan to rob Gaddy of his money and did so with the use or threatened use of the .22 caliber pistol.

[8] Defendant argues that the evidence was insufficient to support his conviction of first-degree murder on a theory of premeditation and deliberation. Defendant again contends that his pretrial confession shows that he shot Gaddy in a fit of anger because Gaddy fondled Lopez and the State, having offered this confession in evidence, is bound by it. Defendant relies on familiar principles of law defining the concepts of premeditation and deliberation: "If . . . the purpose to kill is formed simultaneously with the killing,

then there is no premeditation and deliberation." *State v. Faust*, 254 N.C. 101, 109-10, 118 S.E.2d 769, 774, *cert. denied*, 368 U.S. 851, 7 L. Ed. 2d 49 (1961).

> Premeditation means that the act was thought out beforehand for some length of time, however short, but no particular amount of time is necessary for the mental process of premeditation. . . . Deliberation means an intent to kill carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.

State v. Brown, 315 N.C. 40, 58, 337 S.E.2d 808, 822 (1989), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986) (citations omitted).

> Although there may have been time for deliberation, if the purpose to kill was formed and immediately executed in a passion, especially if the passion was aroused by a recent provocation or by mutual combat, the murder is not deliberate and premeditated. However, passion does not always reduce the crime since a man may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that defendant was in a passion or excited when the design was carried into effect.

State v. Faust, 254 N.C. at 108, 118 S.E.2d at 773 (quoting 40 C.J.S., *Homicide*, § 33(d), at 889-90 (1944)). We again disagree.

Even if defendant's confession, taken at face value, shows that his shooting of Gaddy was the result of "a violent passion, suddenly aroused by lawful or just cause or legal provocation" and not premeditation and deliberation as these concepts have been defined, the State is not bound by these aspects of the confession.

> "When the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements. . . . When the State's evidence and that of the defendant are to the same effect and tend only to exculpate the defendant, motion for nonsuit should

> be allowed. *State v. Carter*, 254 N.C. 475, 119 S.E.2d 461." *State v. Johnson*, 261 N.C. 727, 730, 136 S.E.2d 84, 86 (1964).
>
> . . . .
>
> [T]he State is not bound by the exculpatory portions of a confession which it introduces, if there is "other evidence tending to throw a different light on the circumstances of the homicide." *State v. Bright*, 237 N.C. 475, 477, 75 S.E.2d 407, 408 (1953); *see also State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972), and *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968).

State v. Hankerson, 288 N.C. 632, 637, 220 S.E.2d 575, 580 (1975), *judgment rev'd on other grounds*, 432 U.S. 233, 53 L. Ed. 2d 306 (1977).

Here there is other evidence tending to throw a different light on the homicide than that contained in defendant's confession—evidence, indeed, which tends to contradict defendant's confession and which would permit the jury reasonably to conclude that defendant murdered the victim with premeditation and deliberation. There is, as we have shown, evidence that defendant and Lopez planned to rob the victim. In preparation for the robbery, defendant loaded the .22 caliber pistol and placed it where it would be available at the time of the robbery. Gaddy's dead body was found underneath the steering wheel with a glass between his legs and a burned down cigarette between two fingers of his left hand. The fatal wound was to Gaddy's left temple and fired from a distance of two to three inches. When defendant learned Lopez had left her purse in the truck, he beat her and left her. When defendant after his arrest was told that Lopez was in jail, his attitude was cavalier, and he expressed a total lack of concern or affection for her.

The foregoing evidence belies defendant's pretrial version of how his murder of Gaddy occurred. That Gaddy was found dead with a glass between his legs and a cigarette in his hand makes it unlikely the shooting was preceded by some physical scuffle between Gaddy and defendant. Defendant's beating and abandonment of Lopez shortly after the murder when he learned she had left her purse and his cavalier attitude toward Lopez upon being informed of her arrest cast doubt on his statement that he became angered by her being fondled by Gaddy as does the very plan concocted by defendant and Lopez, a plan grounded in Lopez's ability to lure Gaddy to a secluded spot presumably with the promise of sexual favors. The position of Gaddy's body in the truck—

slumped under the steering wheel—the wound to his left temple fired at close range, the cigarette in his left hand and the glass between his legs constitutes some evidence that the killing was not suddenly provoked but was carefully planned and executed.

On this state of the evidence the jury could reasonably infer that defendant's pretrial statement regarding how the killing occurred was not true and was made by defendant solely for the purpose of mitigating his true culpability in the homicide. From the evidence just recounted the jury could reasonably conclude that defendant methodically planned to kill his robbery victim when he loaded the pistol and took steps to make sure it was available at the scene of the robbery and that he methodically carried out these plans when he, Lopez and Gaddy arrived at the secluded spot where the robbery and murder took place.

For these reasons, we hold the evidence was sufficient to support all defendant's convictions, including first-degree murder on theories of both premeditation and deliberation and felony murder.

VII.

[9] Next defendant argues the trial court committed reversible error by not complying with defendant's request to instruct the jury that "the intent to kill cannot occur simultaneously with the killing." This request came after the trial court had given its instructions but before the jury retired to begin its deliberations. The request was timely, N.C. R. App. P. 10(b)(2); but the trial court denied it.

Although defendant's request is a correct statement of law, *e.g.*, *State v. Cummings*, 323 N.C. 181, 188, 372 S.E.2d 541, 547 (1988), *judgment vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 602 (1990), we find no error in its being denied because the trial court had already given the instruction in substance. The trial court charged the jury that in order for it to find defendant guilty of first-degree murder based on premeditation and deliberation, the State must prove

> that the defendant acted after premeditation. That is, that he formed the intent to kill the victim over some period of time, however short, before he acted.
>
> And . . . that the defendant acted with deliberation, which means that he acted while he was in a cool state of mind.

> This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

The trial court is not required to give requested instructions verbatim; it suffices if the instructions are in substantial conformity with those requested. *See State v. Faust*, 254 N.C. at 109, 118 S.E.2d at 774. Here the trial court's charge to the jury distinguished an intent to kill formed "under the influence of some suddenly aroused violent passion," from the intent to kill formed after premeditation and deliberation. This charge conforms in substance with that requested by defendant.

VIII.

[10] Defendant next asserts the trial court erred in refusing to arrest judgment on defendant's armed robbery conviction. He concedes that our precedents are against him on this issue, but he requests that we reexamine them.

Our precedents are quite clear and we decline to overturn them.

> [W]hen the jury's verdict *specifies both* theories in its verdict of murder in the first degree, it is the court's decision, not that of the jury, to select the theory on which the sentence for the homicide is to be based. And where the sentence for homicide rests upon the premeditated and deliberate murder conviction, the merger rule does not apply.

State v. Fields, 315 N.C. 191, 206-07, 337 S.E.2d 518, 527-28 (1985). When both theories of felony murder and premeditation and deliberation are submitted but the jury does not specify the basis for its verdict of first-degree murder, the verdict is treated as one based on felony murder and the merger rule applies. *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450; *State v. Tatum*, 291 N.C. 73, 229 S.E.2d 562 (1976).

Here the jury specified in its verdict that it found defendant guilty of first-degree murder on theories of *both* felony murder and premeditation and deliberation. The underlying felony submitted to the jury on the felony murder theory was armed robbery.

The jury also returned verdicts finding defendant guilty of armed robbery and conspiracy to commit robbery. As to the murder and armed robbery conviction, therefore, the merger rule has no application; and it was proper for the trial court to sentence defendant on both the murder conviction and the armed robbery conviction. *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518.

IX.

[11] Finally defendant asks us to allow a motion for appropriate relief by which he seeks a new sentencing hearing in the armed robbery case. We conclude this motion must first be determined in the Superior Court where it was filed when that court still had jurisdiction over the case.

Defendant's motion for appropriate relief was filed in the trial court on 30 August 1989 after his notice of appeal was given on 22 August 1989. The judgments against defendant in all cases were also entered on 22 August 1989. On 15 October 1990 Judge Frank R. Brown ordered that a hearing be held in Superior Court, Pitt County on defendant's motion.

It is only when a case is pending in the appellate division that a motion for appropriate relief is cognizable here. N.C.G.S. § 15A-1418(a). A case is deemed to be pending in the appellate division "when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for writ of certiorari has been granted." *Id.* Section 15A-1448 of the North Carolina General Statutes provides:

(a) Time for Entry of Appeal; Jurisdiction over the case.—

(1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.

(2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.

(3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.

At the time defendant's motion for appropriate relief was filed in the trial court the jurisdiction of the trial court had not been divested under N.C.G.S. § 15A-1448(a)(3). The case, therefore, was not then pending in the appellate division as provided by N.C.G.S. § 15A-1418. Since the case was not then pending in the appellate division, the motion is not properly cognizable here. It must first be determined in the trial court which had jurisdiction over it when it was filed and as Judge Brown recognized when he ordered that it be heard in the Superior Court.

The result is:

NO ERROR.

Justices MEYER and PARKER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. RONNIE DEAN BARNES AND CHARLES LEE LEMONS

No. 540A90

(Filed 4 June 1993)

1. Searches and Seizures § 21 (NCI3d)— affidavit for search warrant—failure to show deliberate falsehoods or reckless disregard for truth

Defendants did not show that an affidavit filed to support the issuance of a search warrant contained deliberate falsehoods or exhibited a reckless disregard for the truth or that the affiant was not acting in good faith so as to require suppression of the evidence seized pursuant to the warrant where defendants contended that the officer who applied for the warrant alleged (1) that an informant told another officer that she had seen a small, black four-door subcompact when she told him she had seen a black Mustang, (2) that the informant gave the officer a description of two men in the vehicle which was "very favorable" to defendants when she actually told him the two men were clean shaven and defendants had facial hair, and (3) that the informant told him the two men had a plastic container in their possession when she actually said

that they were carrying a white gas can. A "small, black four-door subcompact" could be a description of a "black Ford Mustang," a plastic container could be a description of a "white gas can," and the officer could conclude that the description given by the informant was "very favorable" to defendants although she said they were clean shaven when they had facial hair. N.C.G.S. § 15A-978.

Am Jur 2d, Searches and Seizures §§ 65, 79.

Propriety of considering hearsay or other incompetent evidence in establishing probable cause for issuance of search warrant. 10 ALR3d 359.

2. Arson and Other Burnings § 13 (NCI4th)— attempted first degree arson—occupancy of dwelling not required

Indictments charged defendants with attempted first degree arson in violation of N.C.G.S. § 14-67 although they incorrectly recited that the charges were brought pursuant to N.C.G.S. § 14-58. Since it is unnecessary to prove that a dwelling house was occupied to support a conviction of attempted first degree arson under N.C.G.S. § 14-67, the evidence was sufficient to support defendants' conviction of attempted first degree arson even though it failed to show that a murder victim found in the dwelling was alive at the time of the attempted burning.

Am Jur 2d, Arson and Related Offenses § 15.

3. Evidence and Witnesses § 1694 (NCI4th)— photographs of victim's body—relevancy to prove premeditation and deliberation

A photograph showing the location of a murder victim's body when found and an autopsy photograph depicting a five-inch wound to the victim's neck were properly admitted in this first degree murder prosecution, notwithstanding defendant did not contest the identity or cause of death of the victim, since the photographs were relevant and material to prove premeditation and deliberation.

Am Jur 2d, Homicide §§ 417 et seq.

4. Criminal Law § 105 (NCI4th)— discovery—unavailability of blood samples for testing by defendants—admissibility of grouping tests

The results of blood grouping tests performed on samples taken from the interior of an automobile were not required to be excluded from evidence because all the blood taken from the automobile was consumed by the State's testing and none was left for testing by defendants since N.C.G.S. § 15A-903(e) only required the prosecution to furnish real evidence to the defense if it was available, none was available in this case, and there was no evidence of bad faith on the part of the State.

Am Jur 2d, Depositions and Discovery § 449.

5. Evidence and Witnesses § 2209 (NCI4th)— blood grouping tests—reliability of procedures—waiver of right to voir dire

Defendant waived any right he may have had to a *voir dire* hearing to establish the reliability of blood grouping procedures used by a forensic serologist where the serologist had been accepted by defendant as an expert and had already testified without objection about the experiments she had conducted to determine blood types when defendant objected to her testimony that the blood type of samples taken from a car were the same as decedent's blood type and asked for a *voir dire.*

Am Jur 2d, Expert and Opinion Evidence § 300.

6. Evidence and Witnesses § 2209 (NCI4th)— blood grouping tests—effect of limited samples

The inability of a serologist to perform additional testing due to the limited amounts of blood samples went to the weight and not the admissibility of her testimony as to the results of blood grouping tests.

Am Jur 2d, Expert and Opinion Evidence § 300.

7. Criminal Law § 468 (NCI4th)— jury argument—blood testing—effect of limited samples—no impropriety

The prosecutor's argument to the jury that the small amount of blood recovered from a car had nothing to do with the accuracy of the tests performed on the blood samples but only limited the number of tests that could be performed merely rebutted defendant's contention that the blood tests

were inaccurate due to the limited amount of blood and was not improper.

Am Jur 2d, Trial §§ 307 et seq.

8. **Arson and Other Burnings § 29 (NCI4th); Burglary and Unlawful Breakings § 59 (NCI4th); Homicide § 232 (NCI4th)— murder, burglary, and attempted arson—acting in concert—sufficient evidence of defendant's guilt**

The evidence was sufficient to support defendant's conviction of first degree murder, first degree burglary and attempted first degree arson under the theory of acting in concert where it tended to show that defendant was driving an automobile accompanied by the codefendant on the night in question; defendant and the codefendant bought gasoline and placed it in a container for which they paid a deposit; the container was not returned to the owner; a witness saw the automobile, which defendant was driving that night, parked in the neighborhood of the victims' house and saw defendant and the codefendant leave the automobile and walk toward that house; thirty minutes before this time, there was nothing awry at the house; one hour later the front and back doors of the house had been vandalized, a safe and seventeen guns had been removed from the house, the murder victim had been shot and stabbed while in the house, gasoline had been poured around the house, and an attempt had been made to start a fire; a gasoline container similar to the one defendant and the codefendant were carrying was found in the house; and blood of the same type as that of the victim was found in the automobile occupied by defendant and the codefendant on the night of the crimes.

Am Jur 2d, Arson and Related Offenses § 55; Burglary §§ 44 et seq.; Homicide §§ 425 et seq.

9. **Homicide § 552 (NCI4th)— first degree murder—second degree murder instruction not required**

The trial court in a first degree murder case did not err in refusing to instruct the jury on second degree murder as to defendant Lemons where the evidence tended to show that each of the defendants either did all the acts necessary to be guilty of first degree murder or acted in concert or as an aider and abettor in doing such acts, and defendant

Lemons relied on an alibi and did not otherwise contest the State's evidence.

Am Jur 2d, Homicide § 526.

10. Indigent Persons § 27 (NCI4th)— denial of funds for private investigator—no error

The trial court did not err in the denial of defendant's motion for funds to hire a private investigator in a first degree murder case where defendant alleged that the prosecutor furnished him with information that there were a number of suspects at the initial investigation of the case, and defendant introduced at the hearing a police report that an automobile which was not the vehicle defendant was driving was seen speeding away from the crime scene, since this evidence constituted only a mere hope or suspicion that favorable evidence was available.

Am Jur 2d, Criminal Law §§ 733, 750.

11. Homicide § 489 (NCI4th)— premeditation and deliberation—lack of provocation—instruction supported by evidence

There was sufficient evidence of lack of provocation in a first degree murder case to support the trial court's instruction that evidence of lack of provocation by the decedent could be considered in determining whether there was premeditation and deliberation by defendants where the jury could have found from the evidence that decedent was asleep in his bed when defendants broke into his home, and decedent was shot and stabbed by defendants as he came down the steps.

Am Jur 2d, Homicide § 500.

12. Evidence and Witnesses § 3174 (NCI4th)— opinion as to consistency of statements

The trial court did not err in allowing an officer to testify that statements made by a witness prior to trial were consistent with her trial testimony where the purpose of the officer's testimony was to show why the State had made a plea bargain with the witness and not to corroborate her testimony.

Am Jur 2d, Witnesses §§ 641 et seq.

13. Evidence and Witnesses § 632 (NCI4th)— in-court identification—motion for voir dire too late

The trial court did not err in the denial of defendant's motion for a *voir dire* hearing on a witness's in-court identification of defendant where the motion was made after the witness had already identified defendant before the jury.

Am Jur 2d, Motions, Rules, and Orders §§ 22-26.

14. Evidence and Witnesses § 403 (NCI4th)— in-court identification—opportunity, attention and certainty

A witness had the opportunity, attention and certainty required at the time of her initial viewing of defendants to support her in-court identification of one defendant where she testified that she was standing at the front fender of a car when defendants got out of the car; she noticed a white jug in one defendant's hand, and she conversed with defendants from only a few feet away; a street light was nearby and nothing blocked her view; and the witness did not hesitate in identifying defendants in the courtroom.

Am Jur 2d, Evidence § 367.

15. Criminal Law § 1156 (NCI4th)— burglary—aggravating factor—armed with deadly weapon

The trial court did not err in finding as an aggravating factor for first degree burglary that defendant was armed with a deadly weapon where there was evidence that defendant or a person with whom he was acting in concert used both a gun and a knife during the crime.

Am Jur 2d, Criminal Law §§ 598, 599.

16. Criminal Law § 1102 (NCI4th)— attempted arson—aggravating factor—commission to cover up murder—sufficiency of evidence

The evidence was sufficient to support the trial court's finding as a nonstatutory aggravating factor for attempted arson that such crime was committed to cover up a murder where the evidence tended to show that a house was burglarized, an occupant of the house was shot and stabbed to death, and the house was ransacked; the den floor was saturated with gasoline and a struck match was found on the floor; a plastic container was found in the den; and defendants bought

gasoline and placed it in a similar plastic container shortly before the murder.

Am Jur 2d, Criminal Law §§ 598, 599.

17. Criminal Law § 1126 (NCI4th) — attempted arson — aggravating factor — commission to cover up burglary and murder — convictions of joined offenses not used

The rule that a sentence for one offense may not be aggravated by defendant's acts which form the gravamen of contemporaneous convictions of joined offenses was not violated by the trial court's finding as an aggravating factor for attempted arson that such crime was committed to cover up a first degree burglary and a first degree murder for which defendants were also convicted since the aggravating factor was based upon the motivation for the attempted arson and not upon any element or aspect of the burglary or the murder.

Am Jur 2d, Criminal Law §§ 598, 599.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Rousseau, J., at the 26 February 1990 Criminal Session of Superior Court, Forsyth County, upon jury verdicts of guilty of first degree murder. The defendants' motions to bypass the Court of Appeals as to additional judgments were allowed 10 April 1991. Heard in the Supreme Court 9 December 1991.

The two defendants were tried for their lives for first degree murder. They were also tried for first degree burglary and attempted first degree arson.

The evidence in the light most favorable to the State showed that on 26 December 1988, Bobby Douglas Winn, Jr. was living with his father in Winston-Salem. The elder Winn owned and operated Bobby Sue's Lounge, and he was at the lounge at approximately 6:30 p.m. on that date. He saw his son and the defendant Barnes at the lounge. The younger Winn left the lounge between 8:30 and 9:00 p.m. to go to his father's home to go to bed. Approximately thirty minutes later the two defendants left the lounge together.

At approximately 10:00 p.m., Mr. Winn discovered two tires on his truck had been punctured. He sent James Overby to the Winn residence to get an air compressor to inflate the tires. When Mr. Overby arrived at the Winn residence, he saw the truck of the younger Winn parked in the driveway. He knocked on the door but received no answer. He then went to Mr. Winn's workshop, which was located on the premises, and retrieved the air compressor. Mr. Overby testified he did not notice anything wrong when he was at the Winn home.

As Mr. Winn and Mr. Overby were working on the car, they observed the two defendants in a black four door Plymouth Horizon with a confederate flag on the front. Lemons was driving. Mr. Winn then returned with Eddie Brewer to the Winn residence sometime between 10:30 and 11:00 p.m. to get two spare tires. Mr. Overby noticed the two defendants following Mr. Winn and Mr. Brewer in the Plymouth Horizon. Mr. Winn and Mr. Brewer saw nothing awry at the Winn residence at this time. Mr. Winn and Mr. Brewer returned to the lounge approximately thirty minutes after they had left it.

Kenneth Lee Willard testified he was working at the Parkway Texaco Station on 26 December 1988, and he sold gasoline to the defendant Barnes between 9:30 p.m. and 10:00 p.m. on that date. He lent the defendant Barnes a container for the gasoline and required him to make a deposit for the container. Barnes did not return the container to Mr. Willard for the refund of the deposit. Mr. Willard testified that the container was similar to State's exhibit #5.

Brenda Kay Baker testified that at approximately 11:00 p.m. on 26 December 1988, she was walking on Bryant Street close to the Winn residence when she saw a small black automobile with a confederate flag on the front. She saw the two defendants leave the vehicle and walk toward the Winn residence. One of them was carrying a container which was similar to State's exhibit #5.

At approximately 12:15 a.m. on 27 December 1988, the elder Winn and his wife left Bobby Sue's Lounge and went to their home, arriving at approximately 12:30 a.m. Mr. Winn noticed that the door to his workshop was open. He started to close it and discovered the lock and the door were damaged. He then discovered that his wife's automobile had been damaged. When he entered

the house, the odor of gasoline "about knocked him down." He found the body of his son lying face down. He had been shot once and had been stabbed twenty-three times.

Mr. Winn found a gasoline container in his den which was introduced into evidence as State's exhibit #5. The door to Mr. Winn's office and the front door had been badly damaged. His safe was found in the front yard. Seventeen guns had been taken from the house.

Each defendant was found guilty of the three crimes for which he was tried. The jury recommended that each defendant be sentenced to life in prison for the first degree murder convictions, which was done. Each defendant was sentenced to forty years in prison for first degree burglary and ten years for attempted first degree arson. All sentences are to be served consecutively.

Lacy H. Thornburg, Attorney General, by G. Patrick Murphy, Assistant Attorney General, for the State.

David F. Tamer for defendant-appellant Ronnie Dean Barnes; Malcolm Ray Hunter, Jr., Appellate Defender, by Mark D. Montgomery, Assistant Appellate Defender, for defendant-appellant Charles Lee Lemons.

WEBB, Justice.

Both defendants assign error to the admission into evidence of the results of a test conducted on blood samples taken from the automobile which was occupied by the defendants on the night of the murder. The officers searched the vehicle pursuant to a search warrant. Each of the defendants made motions to suppress the evidence gathered as a result of the search and a hearing was held on these motions prior to trial.

The evidence at the hearing on the motions to suppress showed that the 1987 Plymouth Horizon was purchased in April 1987. The title certificate showed Pamela Rene Alderson and Robert Moyer Wilkes were the owners. These two persons were living together at the time. In July 1988, Ms. Alderson and Mr. Wilkes stopped living together and Ms. Alderson kept the automobile, but Mr. Wilkes refused to endorse the title to her. Ms. Alderson and the defendant Lemons commenced living together. Ms. Alderson allowed Lemons to drive the automobile to his workplace and Mr. Lemons left the key in the vehicle in order for the defendant

Barnes to drive it when needed. The defendant Lemons kept tools in the backseat of the car.

In the application for the search warrant, a detective filed an affidavit in which, among other things, he said an informant had told another detective that she had seen a black four door subcompact vehicle parked approximately one block from the Winn residence. The detective also said in the affidavit that the informant had told the other detective she saw two men with a plastic container leave the vehicle. The detective said the description of the two men given him by the informant was "very favorable" to the defendants. The evidence at the hearing showed that the informant told the detective that she had seen a black Mustang. She also told him that two clean shaven white men left the car carrying a gas can. The defendants argue that this evidence showed that the detective changed the evidence in making the affidavit and if he had not done so, a search warrant would not have been issued.

At the end of the hearing, the court found facts consistent with the evidence as to the ownership and possession of the automobile. The court held that neither of the defendants had an expectation of privacy in the automobile and that they had no standing to contest the search.

The court found that if the defendants had standing to contest the search there was not a showing that the search warrant was falsely made by intentionally and knowingly misapplying the facts. The court overruled the defendants' motion to suppress the evidence.

[1] The first question raised by this assignment of error is whether the defendants have standing to contest the search of the vehicle. In order to have standing to contest a search, a defendant must have a legitimate expectation of privacy in the thing to be searched. *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387 (1978). It is hard to say the defendants had an expectation of privacy in the 1987 Plymouth Horizon. It was owned by the defendant Lemons' girlfriend and another man. Lemons' girlfriend allowed him to drive the automobile to work but the title was never in his name. The defendant Barnes had even less interest in the vehicle. He was allowed to drive it at times by Lemons. Nevertheless, we do not decide this question on this point. Assuming both defendants had a legitimate expectation of privacy in the automobile, we find no error in the issuance of the search warrant.

The defendants, relying on *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667 (1978), contend that it was error not to grant them a hearing on the validity of the search warrant after they had shown three different instances in which the officer who applied for the search warrant had falsified the affidavit. They say he said (1) the informant told another officer she had seen a black four door subcompact when she told him she had seen a black Mustang, (2) the informant gave the officer a description of the two men which was "very favorable" to the defendants when she actually told him the two men were clean shaven and the defendants had facial hair, and (3) the informant told him the two men had in their possession a plastic container when she had actually said they were carrying a gas can.

Franks holds that when a defendant makes allegations that an affidavit to support the issuance of a search warrant contains deliberate falsehood or reckless disregard for the truth and the affidavit would not be sufficient to support the issuance of a search warrant without the false or reckless statements, the defendant is entitled to a hearing on his allegations. If he is successful in proving the charges, the evidence seized pursuant to the search warrant must be suppressed. N.C.G.S. § 15A-978(a) provides for a hearing to test the good faith of an affiant in furnishing testimony for the issuance of a search warrant. *State v. Kramer*, 45 N.C. App. 291, 262 S.E.2d 693, *disc. rev. denied*, 300 N.C. 200, 269 S.E.2d 627 (1980).

We hold that the evidence at the hearing did not show that the allegations in the affidavit rose to the level of a deliberate falsehood or a reckless disregard of the truth. It also does not show the detective was not acting in good faith as defined in N.C.G.S. § 15A-978(a). A "small, black four-door subcompact vehicle" as described in the affidavit could be a description of a "black Ford Mustang" as described by the informant. A "plastic container" could be a description of a "white gas can." The detective could conclude that the description given by the informant of the men driving the vehicle was "very favorable" to the defendants although she said they were clean shaven when they had facial hair. We hold that the defendants have not shown that the affidavit filed to support the issuance of a search warrant contains deliberate falsehoods or shows a reckless disregard for the truth. This assignment of error is overruled.

The defendant Barnes assigned error to the taking of his blood pursuant to a search warrant, which warrant he says was not supported by probable cause. No reason or argument is made in support of this assignment of error and no authority is cited in its support. It is deemed abandoned. N.C. R. App. P. 28(b)(5). *State v. Brothers*, 33 N.C. App. 233, 234 S.E.2d 652, *disc. rev. denied*, 293 N.C. 160, 236 S.E.2d 704 (1977).

[2] Both defendants assign error to the failure of the court to dismiss the charge of attempted first degree arson for the insufficiency of the evidence to support a conviction. They say that an essential element of first degree arson is that the house be occupied at the time of the burning and there was no evidence that Bobby Douglas Winn, Jr. was alive at the time of the burning.

The common law definition of arson, which is in force in this State, is "the willful and malicious burning of the dwelling house of another person." *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 636 (1988). *See also State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992). In order to give more protection when a dwelling house is occupied by a person at the time of the burning, the General Assembly adopted N.C.G.S. § 14-58 which 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.

The indictments charged the defendants with violating N.C.G.S. § 14-58 by attempting to burn a dwelling house inhabited by Bobby Douglas Winn, Sr. and occupied by Bobby Douglas Winn, Jr. Although the indictments recited that the charges were brought pursuant to N.C.G.S. § 14-58, they actually charged a violation of N.C.G.S. § 14-67 which prohibits attempted arson. This mistake in the citation of the statute does not affect the validity of the trial. N.C.G.S. § 15A-924(a)(6) (1988). We held in *State v. Arnold*, 285 N.C. 751, 208 S.E.2d 646 (1974), that attempted arson under N.C.G.S. § 14-67 is a lesser included offense of first degree arson. It is not necessary to prove a dwelling house is occupied to support a conviction of attempted first degree arson under N.C.G.S. § 14-67. If the evidence does not show that the dwelling house was occupied at the time of the attempted burning it is not helpful to the defendants in

this case. If the defendants had been charged with first degree arson, they could have nevertheless been tried for attempted first degree arson because attempted first degree arson is a lesser included offense of first degree arson. N.C.G.S. § 15-170 (1983); *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970).

We are aware that in *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1983), we said it was not necessary to prove a dwelling house was occupied in order to convict a defendant of first degree arson. Insofar as *Vickers* is inconsistent with this case, it is no longer authoritative.

This assignment of error is overruled.

[3] Under his next assignment of error, the defendant Barnes contends it was error to admit into evidence two photographs of the victim. The defendant contends that since no dispute existed as to the identity of the victim or the cause of death, the photographs serve no relevant purpose other than to inflame the jury. We disagree and hold that the photographs were properly admitted.

As long as a photograph is relevant and material, the fact that it is gory or gruesome, or otherwise tends to arouse prejudice, will not alone render it inadmissible. *See* 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 34 (3d ed. 1988); *see also State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986); *State v. Hannah*, 312 N.C. 286, 322 S.E.2d 148 (1984); *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). Of the two photographs admitted in this case, one was introduced to show the location of the victim's body when found, and the other photograph, apparently an autopsy photograph, depicted an approximately five inch wound to the victim's neck. Although the defendant did not contest the identity of the victim, nor the cause of death, these photographs were relevant for other purposes.

Generally, photographs taken during an autopsy are admissible. *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990). Additionally, the defendant Barnes contested his guilt of first degree murder by premeditation and deliberation. Since premeditation and deliberation in most cases can only be proved by circumstantial evidence, *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975), premeditation and deliberation may be inferred from the nature and number of lethal blows after the deceased has been felled and rendered helpless, thus evidencing that the killing was done

in a brutal manner. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). In this case, the victim was stabbed twenty-three times. The location of his body at the bottom of the stairs suggests that the victim may have been surprised by his killer(s) as he was coming downstairs to investigate, thus negating any provocation on his part. Moreover, the photograph of the five inch cut to his neck demonstrates the brutality of the crime and tends to support premeditation and deliberation. The two photographs were relevant and material to prove premeditation and deliberation. This assignment of error is overruled.

[4] The defendant Barnes next assigns error to the denial of his motion *in limine* to exclude from evidence the results of a blood grouping test performed on blood recovered from the interior of the 1987 Plymouth Horizon. The results of the test showed that the blood type of the samples taken from the automobile was similar to the blood type of the decedent. All the blood taken from the automobile was consumed in conducting the test by the State and there was none left to deliver to the defendants for testing.

The defendant Barnes contends that he was entitled to be furnished for testing a sample of the blood and for the failure to furnish such a sample, the State's evidence as to the results of the test should have been excluded from evidence. N.C.G.S. § 15A-903(e) provides in part:

> In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

This statute requires that the prosecution furnish real evidence to the defendant if it is available. In this case there was none available. The defendant concedes there was no evidence of bad faith on the part of the State. This assignment of error is overruled.

[5] The defendant Barnes next assigns error to the refusal of the court to hold a *voir dire* hearing to establish the reliability of the blood analysis conducted by Lucy Milkes, a forensic serologist. Ms. Milkes was called by the State as a witness and was accepted

by the defendant as an expert in forensic serology. She testified without objection as to the experiments she had conducted to determine blood types. As she was testifying that the blood type found in the automobile was the same as the blood type of the decedent, Barnes' counsel objected and asked for a *voir dire* to establish reliability. The court overruled this objection.

The defendant Barnes, relying on N.C.G.S. § 8C-1, Rule 103(c) and Rule 104(a), says it was the duty of the judge to determine the preliminary questions upon which admissibility depends and the failure of the court to allow him to question the witness outside of the presence of the jury effectively prevented him from challenging the reliability of this witness.

At the time this objection was made, the witness had been accepted by the defendant as an expert and testified without objection about the experiments she had conducted. The defendant waived any right he may have had to a *voir dire* before the witness testified. N.C.G.S. § 15A-1446(b) (1988). *State v. Blackwell*, 276 N.C. 714, 174 S.E.2d 534, *cert. denied*, 400 U.S. 946, 27 L. Ed. 2d 252 (1970). The defendant retained the right to cross-examine this witness. This assignment of error is overruled.

The defendant Barnes' next assignment of error is that the trial court erred in denying his motion to strike the testimony of serologist Lucy Milkes. The defendant based his motion on the lack of opportunity for independent analysis of the blood samples to which she testified, and the inability of the serologist to perform additional testing due to the limited sample.

The defendant's contention that the lack of a sample for independent testing required suppression of the evidence has already been addressed in this opinion. By this assignment of error, the defendant has not advanced any additional reasons why the trial court's ruling was in error.

[6] The defendant's second argument supporting his motion to strike the serologist's testimony is likewise without merit. The inability to perform additional testing on the blood samples goes to the weight of the evidence, not its admissibility. This Court has long recognized the admissibility of the results of blood group testing. *State v. Fulton*, 299 N.C. 491, 263 S.E.2d 608 (1980); *State v. Gray*, 292 N.C. 270, 233 S.E.2d 905 (1977). This assignment of error is overruled.

[7] The defendant Barnes' final assignment of error is that the trial court erred in overruling the objection of the defendant to improper argument made by the prosecution. During his closing argument, the Assistant District Attorney argued the following:

> Look at that blood evidence. Isn't it amazing that blood was found in that car? I mean, you know, doesn't that strike you as amazing, based on what they told you about Brenda Baker and that you can't believe a single thing she said? Doesn't the fact that blood was found in there lead [sic] credence to what she had to tell you? That the car that she described here had blood in it at all? That should convince you of her credibility?
>
> And they, you know, lawyers didn't like the number of tests that we did. You know, and what did Miss Milkes tell you? She said the number of tests don't affect the accuracy. Her results were accurate. It's just that the more tests you can do, the more of these percentages would be reduced.
>
> Well, you know, I guess—you know, and the quantity was only sufficient to do those tests. I guess what these lawyers are telling you is we need to have our murderers gut our victims more and get more blood.

The defendant contends that the prosecution's argument was beyond the scope of propriety and was calculated to inflame the jury. We disagree.

The control of the argument of the prosecutor and counsel is left to the discretion of the trial judge, and his rulings thereon will not be disturbed in the absence of abuse of discretion. *State v. Riddle*, 311 N.C. 734, 319 S.E.2d 250 (1984); *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982). Wide latitude is allowed to counsel in their arguments to the jury. Here, the prosecutor was within the scope of proper argument. In context, the prosecutor merely rebutted the defendant's contention that the blood tests were inaccurate due to the limited amount of blood recovered from the car. The prosecutor argued to the jury that the small amount of blood had nothing to do with the accuracy of the tests performed, but merely limited the number of tests which could be performed. This assignment of error is overruled.

[8] The defendant Lemons assigns error to the overruling of his motion to dismiss all the charges against him. He does not argue

under this assignment of error that the evidence does not show the crimes were committed. He contends the evidence does not show he did them. We hold there was substantial evidence that the defendant committed the crimes.

The evidence showed that the defendant Lemons was driving an automobile accompanied by the defendant Barnes on the night in question. They bought gasoline and placed it in a container for which the defendants made a deposit. The defendants did not return the container to its owner. The container was similar to the container found in the Winn residence. A witness testified that at approximately 11:00 p.m. she saw the automobile, which the defendant Lemons was driving that night, parked in the neighborhood of the Winn residence. She saw the two defendants leave the automobile and walk toward the Winn residence carrying a container similar to the one found in the Winn residence. Approximately thirty minutes before the defendants were seen walking toward the Winn residence, there was nothing awry about the premises. Approximately one hour after the defendants were seen walking toward the residence, the front and back doors had been broken, the younger Winn's truck had been vandalized, the safe had been removed from the house, seventeen guns had been stolen, and the younger Winn had been killed. A gas container similar to the container the defendants were carrying was found in the house. Blood of the same type as the deceased's blood was found in the defendants' automobile.

The jury could find from this evidence that the defendants, acting in concert, broke into the house and committed the murder. Considering the evidence in the light most favorable to the State, as we are required to do when determining whether the motion to dismiss was correctly denied, *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986), the jury could conclude that the two defendants were walking toward the Winn residence a short time before the murder occurred carrying a gas container that was found in the house approximately one hour later. It is a reasonable inference that they carried the container into the house. This assignment of error is overruled.

[9] The defendant Lemons next assigns error to the refusal of the court to charge on second degree murder. When a defendant is tried for first degree murder based on premeditation and deliberation and the evidence is sufficient to fully satisfy the State's burden

to prove all the elements of the offense and there is no evidence to negate these elements other than the denial by the defendant that he committed the offense, second degree murder should not be submitted to the jury. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled in part on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986).

In this case, there was evidence from the State to prove all the elements of first degree murder. The defendant relied on an alibi and did not otherwise contest the State's evidence. The defendant Lemons, relying on *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989) and *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985), contends the evidence against him was weak and ambiguous. The strength and ambiguity of the evidence were for the jury to determine. We have held it was sufficient for the jury to find all the elements of first degree murder. In *Thomas* and *Peacock*, the defendants introduced evidence which if believed would prove the defendants committed lesser offenses. That distinguishes them from this case.

The defendant Lemons, relying on *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987), says the evidence does not show which of the two defendants did the shooting and stabbing and if the jury found Barnes had done these acts, there was no evidence that Lemons had the requisite *mens rea* of premeditation and deliberation to be guilty of first degree murder. In *Reese*, we held the evidence did not support a conviction of first degree murder based on premeditation and deliberation or any lesser included offense of that crime. We did not deal with the question of submitting second degree murder as a lesser included offense.

In this case, the jury could have found that each of the defendants either did all the acts necessary to be guilty of first degree murder or acted in concert or as an aider and abettor in doing such acts. If the jury did not so find as to either defendant, then the defendant should have been found not guilty. He should not have been found guilty of second degree murder. This assignment of error is overruled.

[10] The defendant Lemons next assigns error to the denial of his motion to provide funds for a private investigator. This motion was heard and denied before the trial. A private investigator should be provided for an indigent defendant only upon a showing that there is a reasonable likelihood that it will materially assist him

in the preparation of his defense or that without such help it is probable that he will not receive a fair trial. *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); N.C.G.S. § 7A-450(b) (1989).

In his motion for the hiring of a private investigator, the defendant alleged that the district attorney furnished him with information that there appeared to be a number of suspects in the initial investigation of this case. At the hearing, the defendant Lemons introduced a police report that an automobile which was not the vehicle he was driving was seen "speeding away" from the crime scene. This evidence arises only to the level of mere hope or suspicion that favorable evidence is available. "[T]he State is not required by law to finance a fishing expedition for defendant in the vain hope that 'something' will turn up." *State v. Alford*, 298 N.C. 465, 259 S.E.2d 242 (1979). This assignment of error is overruled.

[11] The defendant Lemons next contends there was plain error in the charge to the jury because the court instructed the jury that evidence of lack of provocation by the decedent could be considered in determining whether there was premeditation and deliberation by the defendants. We hold there was sufficient evidence to support this charge. The jury could have found from the evidence that Bobby Douglas Winn, Jr. was at home asleep in his bed when the defendants broke into his home. As Mr. Winn came down the steps, he was shot and stabbed by the defendants. This was evidence from which the jury could have found lack of provocation by Mr. Winn. This assignment of error is overruled.

[12] The defendant Lemons' next assignment of error deals with the testimony of one of the officers. The officer was allowed to testify that he took a statement from Ms. Baker and it was substantially the same as her testimony. The defendant Lemons says that it was error not to require the witness to testify as to what Ms. Baker told him and let the jury determine how it compared with her testimony.

We believe the question raised by this assignment of error is governed by *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986), which held that it was not error to allow an officer to testify that statements made by a witness prior to trial were consistent when the testimony was not elicited to corroborate the testimony of a witness, but to show why the State had made a plea bargain

with the witness. In this case, Ms. Baker was cross-examined in regard to a plea bargain she had made with the State. The officer was asked about what Ms. Baker had told him to show why the State had made a plea bargain with her. It was not introduced to corroborate her testimony. This assignment of error is overruled.

[13] The defendant Lemons next assigns as error the trial court's denial of his motion for a *voir dire* hearing on Brenda Baker's in-court identification of the defendant. The following interchange took place when Baker was asked to identify in court the two men she saw on the night of the murder:

> Q: And do you see those two men in the courtroom here today, Miss Baker?
>
> A: Right there. (Pointing toward the defendants.)
>
> Q: Now, when you say right there, are you speaking of the two men seated behind these three lawyers right here?
>
> A: Yes.
>
> Q: Can you—for the record, can you describe—
>
> MR. BEDSWORTH: Your Honor, I think at this time for us to object ask for a voir dire on her identification.
>
> THE COURT: Overruled.

After Baker's testimony, the trial court explained that it denied the defendant's motion for a *voir dire* because it came after Baker's in-court identification. The defendant contends that the denial of his motion was prejudicial error because the trial court should hold a *voir dire* examination in accordance with *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

As discussed above, timely objection is required in order to preserve alleged errors for appellate review. The defendant Lemons' request for *voir dire* came after Baker had already identified him in front of the jury. It was not error for the court to deny the motion. *See State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977); *State v. Blackwell*, 276 N.C. 714, 174 S.E.2d 534 (1970).

[14] The record reveals a sufficient basis for Baker's identification. Applying the factors in *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773, Baker had the opportunity, attention and certainty required at the time of the initial viewing of the subjects to support the

admittance of her in-court identification. For example, she testified that she was standing at the front fender of the car when both defendants got out of the car. She noticed a white jug in one of the defendant's hands, and she conversed with them from only a few feet away. A street light was nearby and nothing blocked her view. Baker did not hesitate in identifying the defendant in the courtroom. This assignment of error is overruled.

[15] The defendant Lemons next assigns error to the court's finding as an aggravating factor to enhance the sentence on the burglary charge that he was armed with a deadly weapon. Guns and knives have been held to be deadly weapons. *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982) (gun); *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981) (knife). There was evidence that the defendant or a person with whom he was acting in concert used both of them. This assignment of error is overruled.

The defendant Lemons' final assignment of error is that the trial court erred by aggravating his sentence for attempted arson by finding as a non-statutory aggravating factor that the attempted arson was committed to cover up the murder. The defendant contends first that the non-statutory aggravating factor was not supported by the evidence. Second, the defendant argues that because the murder, attempted arson and burglary offenses were joined for trial, it would violate double jeopardy to use the murder conviction to aggravate the arson charge. We disagree.

[16] First, we hold that the evidence was sufficient to support the aggravating factor that the defendant committed the attempted arson in order to cover up the murder and burglary. The evidence showed that the two defendants were in possession of a plastic container similar to the one found in the den of the victim's residence shortly before the murder. The den floor was saturated with gasoline and a struck match was on the floor nearby. It is reasonable to infer that the house was first burglarized and ransacked while the victim suffered from the mortal wounds, then on their way out, the defendants threw a match towards the gasoline in order to destroy any evidence they may have left behind to link them to the crimes. This logical inference from the facts supports the aggravating factor.

[17] The defendant contends, however, that even if the evidence supports the aggravating factor, enhancing his sentence based thereon violates protections against double jeopardy and the rules

set forth in *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985). Under *Westmoreland*, a conviction for which the defendant is being sentenced may not be aggravated by the defendant's acts which form the gravamen of contemporaneous convictions of joined offenses. *Westmoreland*, 314 N.C. at 449, 334 S.E.2d at 227; *see also State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984). Therefore, says the defendant Lemons, the attempted arson conviction may not be aggravated by acts forming the gravamen of the first degree murder or burglary convictions. Clearly, the rule in *Westmoreland* was not violated in this case for none of Lemons' acts forming the gravamen of the murder and burglary charges were used to aggravate his punishment on the attempted arson charge. The trial court merely reasoned that since the attempted arson was committed to assist the defendants in avoiding detection for the murder and burglary, the potential impact of the offense was more serious in this than other attempted arson cases where this factor did not motivate the criminal act. The gravamen, therefore, was the intent which motivated the criminal act, not some element or aspect of the criminal offense, the detection for which the defendant is attempting to avoid. This assignment of error is overruled.

For the reasons stated in this opinion, we find no error in either phase of the trial.

NO ERROR.

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

STATE OF NORTH CAROLINA v. EDWIN LEE KYLE

No. 146A92

(Filed 4 June 1993)

1. Kidnapping and Felonious Restraint § 20 (NCI4th)—kidnapping—purpose of facilitating murder, burglary and flight—evidence sufficient

The trial court did not err by not dismissing a kidnapping charge where the indictment charged that defendant confined, restrained, and removed Valerie Kyle for the purpose of

facilitating the commission of the felonies of murder and burglary and facilitating defendant's flight following the murder and burglary; the evidence showed that defendant broke into and entered the occupied dwelling house of Valerie Kyle in the nighttime without her consent and with the formed intent to commit murder; once defendant entered the apartment, he waved a gun around and backed Valerie Kyle and her son, Saul, up against a side wall in the living room; defendant was standing between Valerie and the door to the apartment; restraining Valerie and Saul in this manner made the burglary easier by enabling defendant to carry out his intent, in that he may not have completed his intent to kill Valerie if he had not restrained her; there was evidence supporting an inference that defendant removed Valerie for the purpose of murder in that defendant dragged Valerie amd Saul from her apartment after shooting her and while she was still living; Saul testified that Valerie called defendant's name as they drove and defendant shot her; and defendant subsequently stopped the car and dragged Valerie's body from the car into a ditch, where he covered the body with leaves.

Am Jur 2d, Abduction and kidnapping § 32.

2. **Jury § 140 (NCI4th)— murder—jury selection—questions concerning death penalty and drinking—objections sustained—no prejudice**

There was no prejudice in a prosecution for murder, kidnapping and burglary in sustaining the prosecutor's objections to questions to two prospective jurors regarding the death penalty and drinking where defendant did not receive the death penalty.

Am Jur 2d, Jury § 202.

3. **Evidence and Witnesses §§ 339, 672 (NCI4th)— murder—evidence of prior assault on victim—admissible to show identity and malice**

There was no error in a murder prosecution in the admission of evidence of a prior assault on the victim by defendant where, at the time the evidence was offered, defendant had not conceded his guilt of second degree murder. Moreover, defendant did not object to an account of the same incident by a defense witness, elicited upon cross-examination, and this

failure to object is deemed to waive any benefit of the prior objection.

Am Jur 2d, Evidence § 324; Homicide §§ 310, 312; Trial §§ 173, 174, 176.

4. Criminal Law § 775 (NCI4th)— kidnapping and burglary—voluntary intoxication

There was harmless error in a prosecution for murder, burglary, and kidnapping where the defendant requested that the trial court instruct on the defense of voluntary intoxication, the court agreed, and the court then limited its instruction on voluntary intoxication to the murder charge. Defendant was entitled upon his request to have the trial court instruct the jury on the law regarding voluntary intoxication as it applied to the offenses of burglary and kidnapping; however, the error was harmless because the jury returned a verdict of first-degree murder based on premeditation and deliberation and the felony murder rule after being instructed on voluntary intoxication. The jury's first-degree murder conviction based on premeditation and deliberation indicates that it considered defendant capable of forming specific intent and there is no reasonable possibility that a different result would have been reached had the instruction also been given on the burglary and kidnapping charges.

Am Jur 2d, Trial § 743.

Automatism or unconsciousness as defense to criminal charge. 27 ALR4th 1067.

5. Jury § 42 (NCI4th)— jury—motion for special venire—pretrial publicity and racially imbalanced county—denied—no error

The trial court did not abuse its discretion in a prosecution for murder, kidnapping and burglary by denying defendant's motion for a venire from another county on the grounds of pretrial publicity and that the county was racially unbalanced. The trial court inquired at the beginning of jury selection whether any of the prospective jurors knew of or had heard about the case before coming to court; the court further inquired of prospective jurors as to whether they had formed opinions that would interfere with their ability to give defendant a fair and impartial trial and whether anything they had read or heard would affect their decision in the case; the jurors

were questioned thereafter through the standard selection procedure; the trial court excused seven prospective jurors for cause due to their previously formed opinions as to guilt and their resulting inability to give defendant a fair trial; and the record indicates that all of the jurors selected to hear the case stated unequivocally that they had formed no opinions about the matter and would base their decision solely on the evidence presented.

Am Jur 2d, Jury §§ 153, 159 et seq.

6. **Evidence and Witnesses § 1697 (NCI4th)— murder—autopsy photographs of victim—admissible to illustrate testimony of pathologist**

The trial court did not err in a prosecution for murder, kidnapping, and burglary by admitting eight autopsy photographs of the victim where the photographs were necessary to illustrate the testimony of the pathologist and were not excessive or repetitive.

Am Jur 2d, Homicide § 419.

7. **Kidnapping and Felonious Restraint § 26 (NCI4th)— kidnapping—instructions—refusal to instruct on false imprisonment**

The trial court did not err in a prosecution for kidnapping by denying defendant's request to instruct the jury on the lesser included offense of false imprisonment. There was no evidence presented at trial from which the jury could reasonably have found that defendant was guilty merely of the lesser included offense of false imprisonment.

Am Jur 2d, Abduction and kidnapping §§ 1 et seq.

False imprisonment as included offense within charge of kidnapping. 68 ALR3d 828.

8. **Criminal Law § 1100 (NCI4th)— kidnapping and burglary—sentencing—aggravating factors—use of deadly weapon to support two factors**

The trial court erred when sentencing defendant for kidnapping and burglary by finding as aggravating factors that

defendant was armed with a deadly weapon and that he used a deadly weapon to commit the offenses.

Am Jur 2d, Criminal Law §§ 598, 599.

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 Freeman, J., at the 22 July 1991 Criminal Session of Superior Court, Ashe County. Defendant's motion to bypass the Court of Appeals, pursuant to N.C.G.S. § 7A-31, as to his burglary and kidnapping convictions was allowed by this Court on 24 August 1992. Heard in the Supreme Court 16 February 1993.

Michael F. Easley, Attorney General, by Charles M. Hensey, Special Deputy Attorney General, for the State.

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

MEYER, Justice.

On 18 March 1991, defendant was indicted by an Ashe County grand jury for the first-degree murder and first-degree kidnapping of Valerie Ann Goldman Kyle, the first-degree kidnapping of Saul Garcia, and first-degree burglary. Defendant was tried capitally in Superior Court, Ashe County, in July 1991, and the jury returned verdicts of guilty on all charges. Following a sentencing proceeding conducted pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment for the first-degree murder conviction. In accordance with the jury's recommendation, the trial court sentenced defendant to life imprisonment for the murder, as well as to a consecutive fifty-year sentence for the burglary, and two consecutive forty-year sentences for the kidnapping convictions.

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 in the guilt phase. However, for reversible error in the trial court's sentencing proceeding on the burglary and kidnapping convictions, we remand for a new sentencing hearing on the first-degree burglary conviction and on the two first-degree kidnapping convictions.

The evidence presented at trial tended to show the following facts and circumstances. Defendant, Edwin Lee Kyle, married the victim, Valerie Kyle, in June of 1990. Defendant lived with the victim and her son, Saul Garcia, in a mobile home until October of 1990, when defendant struck the victim in the back of the head with a pole and threatened to cut her throat with a butcher knife. On 12 October 1990, defendant was convicted of assault with a deadly weapon on the victim. The victim and her son, Saul, moved from the mobile home into an apartment located on Greensboro Manufacturing Road near the intersection of U.S. Highway 221 and N.C. Highway 16.

Early in the morning of 14 November 1990, defendant received a ride from some neighbors to a location on Highway 16 less than a mile from the victim's apartment. Between 4:00 and 5:00 a.m., Saul Garcia was awakened by a loud knocking on the front door and defendant's voice calling his mother's name. The victim told defendant to go away. Defendant then broke the glass part of the front door with his hand and entered the apartment with a gun. The victim tried to stop defendant from entering by pushing the door closed, but defendant pushed her aside. The victim and Saul backed away from defendant as he waved the pistol around. The victim asked defendant for a cigarette, and defendant allowed the victim to get a cigarette from a pack lying near a television. Saul began talking to the victim about the shape of some of the broken glass on the floor, and the victim, who was standing against the side wall in the living room, laughed. Defendant then shot the victim in the chest. Defendant then asked Saul, "You want to be shot, too?" Saul went over to the victim, who had fallen down on the floor.

Defendant dragged the victim out of the apartment and to her red automobile that was parked outside. Defendant placed the victim in the front seat of the vehicle and told Saul to get some water to clear off the windshield. Defendant put the gun in his pocket, ordered Saul to get in the back seat of the car, and drove the three of them toward Virginia on U.S. Highway 221. The victim was still alive and called defendant's name as they drove. Defendant stopped the car 2.6 miles north of the victim's apartment, near the intersection of Shatley Springs Road and U.S. Highway 221, at a sign that said: "New River General Store three miles." This area is located within Ashe County. Defendant said to the victim, "I'll . . . make you shut up." Defendant shot the victim in the

left side of her head behind the ear. Saul knew that the victim was dead because she made no other sounds after that and her eyes rolled to the back of her head. Defendant continued to drive the car toward Virginia and ordered Saul to stop trying to wave at passing cars for help.

Defendant drove the car into Virginia and stopped on a dirt road near Cracker's Neck, at an old mill near a steel bridge over the New River. Defendant dragged the victim's body out of the car into a ditch, placed some leaves over the victim's body, and made Saul do the same. Defendant ordered Saul to get back in the car, and defendant continued driving. Defendant said to Saul, "I'm going to have to shoot you." Defendant stopped the car and ordered Saul to get out. Saul got out of the car and ran. Defendant fired at least one shot at Saul and then returned to the car and drove away. A man driving a truck through the area observed Saul waving his arms near the road and stopped to help him.

Defendant was arrested in Virginia at 11:10 a.m. when he came out of his aunt's home, which was located two to three miles from where the victim's body was found. At the time of his arrest, defendant smelled of alcohol and appeared intoxicated to a degree. Defendant's aunt gave the Virginia police officers permission to search her home, where they discovered a .22-caliber revolver. The bullets removed from the victim's body were fired from this revolver.

Additional facts will be discussed as necessary for the proper disposition of the issues raised by defendant.

[1] Defendant first argues that the trial court erred in failing to dismiss the kidnapping charge with regard to victim Valerie Kyle because the evidence was insufficient to support any theory of kidnapping alleged in the indictment. The indictment charged that defendant confined, restrained, and removed Valerie Kyle "for the purpose of facilitating the commission of the felonies of murder and burglary, and facilitating the flight of Edwin Lee Kyle following his participation in the commission of the felonies of burglary and murder." The trial court instructed the jury in pertinent part as follows:

> So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the Defendant removed Valerie Kyle from one place to another and

> that she did not consent to this removal, and that it was done for the purpose of facilitating the Defendant's commission of a murder or a burglary, and that this removal was a separate, complete act, independent of and apart from the murder or the burglary, and that the person removed was not released by the Defendant in a safe place, it would be your duty to return a verdict of guilty of first degree kidnapping.

Defendant argues that the evidence presented at defendant's trial failed to establish that he restrained or removed the victim either for the purpose of burglarizing her home or for the purpose of murdering her. We disagree.

N.C.G.S. § 14-39 provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony[.]

N.C.G.S. § 14-39 (Supp. 1992). The word facilitate has been defined as "to make easier." *Webster's Ninth New Collegiate Dictionary* 444 (1988). In considering the sufficiency of the evidence to survive a motion to dismiss, "the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom." *State v. Covington*, 315 N.C. 352, 361, 338 S.E.2d 310, 316 (1986). We conclude that when so considered, the evidence supports a reasonable inference that defendant confined or restrained the victim for the purpose of facilitating the commission of burglary and murder.

First-degree burglary is the unlawful breaking and entering into an occupied dwelling at night with the intent to commit a felony therein. *State v. Parks*, 324 N.C. 94, 97, 376 S.E.2d 4, 7 (1989). In the instant case, the evidence shows that defendant broke

into and entered the occupied dwelling house of Valerie Kyle in the nighttime, without her consent, with the formed intent to commit the felony of murder. Defendant arrived at the apartment with a loaded pistol, and when he was denied entry, he forced his way inside, with the pistol drawn. Defendant argues that the burglary was complete upon entry into the house and that the kidnapping could not facilitate this crime. We disagree. In *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds by State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986), the defendant argued that the evidence failed to support his kidnapping conviction because the State did not prove the theory charged in the indictment which was asportation of the victim to facilitate the commission of the felony of armed robbery. The defendant in *Hall* contended that since the evidence showed that the crime of armed robbery was complete at the time the victim was taken from the service station to a point on I-95, the kidnapping was for the purpose of facilitating flight, not for the purpose of facilitating armed robbery. This Court held that the defendant kidnapped the victim for the purpose of facilitating the armed robbery. The Court rejected defendant's argument that the crime was complete when Hyman (codefendant) pointed his pistol at the victim and attempted to take property by this display of force. The Court held that "the fact that all the essential elements of a crime have arisen does not mean the crime is no longer being committed. That the crime was 'complete' does not mean it was completed." *Id.* at 82-83, 286 S.E.2d at 555-56; *see also State v. Campbell*, 332 N.C. 116, 121, 418 S.E.2d 476, 479 (1992) (when the offenses are so connected as to be part of one continuous transaction).

In the instant case, the evidence shows that, once defendant entered the apartment, he waved the gun around and backed Valerie Kyle and her son, Saul, up against a side wall in the living room. Defendant was standing between the victim and the door to the apartment. Restraining the victim and her son in her apartment in this manner made the crime of burglary easier by enabling defendant to carry out his felonious intent. If defendant had not restrained the victim and had instead allowed her to flee from his presence, he may not have completed his intent to kill her.

A similar analysis applies to the question of whether the evidence was sufficient to establish that defendant confined, restrained, or removed Valerie Kyle for the purpose of facilitating defendant's commission of murder. Defendant argues that because

the State's uncontroverted evidence shows that defendant shot Valerie Kyle shortly after breaking into the apartment, "[t]he murder began and essentially finished before the confinement, restraint, or removal commenced." Defendant contends that no evidence suggested that defendant took the victim from her apartment to the car and drove toward Virginia for the purpose of killing her. Defendant contends that the evidence showed that defendant fired the second shot in the car to quiet the victim. We disagree.

The evidence taken in the light most favorable to the State shows that after shooting Valerie Kyle in her apartment, defendant dragged her and her son to her car while she was still living. The victim's son testified that the victim called defendant's name as they drove. Defendant shot the victim, saying, "I'll . . . make you shut up." Saul testified that he knew the victim was dead because she made no other sounds and her eyes rolled to the back of her head. Once defendant had driven the car into Virginia, the evidence shows that he stopped the car and dragged the victim's body out of the car and into a ditch, where he covered the body with leaves. This evidence supports a reasonable inference that defendant removed the victim from her apartment for the purpose of facilitating the commission of murder. This assignment of error is overruled.

[2] In his next assignment of error, defendant contends that the trial court erred in sustaining the prosecutor's objections to certain of defendant's questions of two prospective jurors, "if [they] were called upon to decide whether to impose the death penalty in this case," regarding their views about alcohol and drinking. Because defendant did not receive the death penalty, he could not have been prejudiced by the court's disallowing these questions. *State v. Bearthes*, 329 N.C. 149, 158-59, 405 S.E.2d 170, 175 (1991). We conclude that the trial judge's ruling in sustaining the objections to defendant's questions of the two prospective jurors in this regard, if error, was harmless beyond a reasonable doubt.

[3] Defendant next assigns as error the trial court's admission of the testimony of Saul Garcia regarding the October 1990 incident during which defendant struck the victim in the back of the head with a pole and threatened to cut her throat with a butcher knife. Defendant argues that this testimony was inadmissible under N.C.G.S. § 8C-1, Rule 404(b) and was more prejudicial than probative under N.C.G.S. § 8C-1, Rule 403.

The rules in regard to the admission of evidence of this type have recently been restated in *State v. Simpson*, 327 N.C. 178, 393 S.E.2d 771 (1990):

> Evidence of another offense is admissible under Rule 404(b) so long as it is relevant to any fact or issue other than the character of the accused. *State v. Coffey*, 326 N.C. 268, 278, 389 S.E.2d 48, 54 (1990). The evidence of defendant's prior assault on the victim tends to establish malice, an element of first-degree murder, and thus is relevant to an issue other than defendant's character. *State v. Spruill*, 320 N.C. 688, 693, 360 S.E.2d 667, 669 (1987) (evidence of defendant's prior assaults on victim, his former girlfriend, admissible under Rule 404(b)), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 934 (1988).
>
> Defendant argues that the danger of unfair prejudice substantially outweighed the probative value of the disputed evidence, rendering the evidence inadmissible under Rule 403. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court. . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *State v. Coffey*, 326 N.C. at 281, 389 S.E.2d at 56.

Simpson, 327 N.C. at 185, 393 S.E.2d at 775.

Applying these principles to the case at bar, we conclude that the trial court did not err in admitting Saul Garcia's account of the prior assault on the victim under Rule 404(b), nor did it abuse its discretion under Rule 403. Defendant argues that this case should not be controlled by *Simpson*. Defendant argues that in the instant case, unlike in *Simpson*, defendant did not challenge the prosecution's positive proof of him as the perpetrator or dispute proof of his malice. Defendant argues that he in fact conceded his guilt of second-degree murder during closing arguments. Defendant fails to recognize, however, that at the time such evidence was offered and received, no such concession had been made, and the issue of malice was still hotly contested. In addition, defendant did not object to defense witness Elsie Hamilton's account of the incident, which was elicited during cross-examination. The failure to object to the later admission of similar evidence is deemed to waive any benefit of the prior objection and precludes assigning error on the earlier admission. *State v. Shamsid-Deen*, 324 N.C. 437, 379 S.E.2d 842 (1989). This assignment of error is overruled.

[4] Defendant next argues that the trial court erred in failing to instruct the jury that it could consider the evidence of voluntary intoxication on the charges of burglary and kidnapping. At the instruction conference, defendant asked the trial court to give Pattern Jury Instruction 305.11 on the effect of voluntary intoxication. The trial judge agreed to do so. Later in the charge conference, the trial judge stated, "I will give the defense intoxication as to first degree murder. That's 305.11." With respect to intoxication, the trial judge charged the jury as follows:

> Now, you may find there is evidence which tends to show that the Defendant was so intoxicated or lacked mental capacity at the time of the acts alleged in this case.
>
> Generally, voluntary intoxication is not a legal excuse to a crime. However, if you find that the Defendant was intoxicated or lacked mental capacity, you may consider whether this condition effected [sic] his ability to formulate the specific intent which is required for conviction of first degree murder.
>
> In order for you to find the Defendant guilty of first degree murder, you must find beyond reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill formed after premeditation and deliberation.
>
> As a result, if, as a result of intoxication, or lack of mental capacity, the Defendant did not have the specific intent to kill the deceased formed after premeditation and deliberation, he is not guilty of first degree murder, therefore, I charge that if, upon considering the evidence with respect to the Defendant's intoxication or lack of mental condition, you have a reasonable doubt as to whether the Defendant formulated the specific intent required for conviction of first degree murder, then you will not return a verdict of first degree murder.

Defendant argues that the trial court committed reversible error by limiting the intoxication instruction to the murder charge and that the instruction should have been given in regard to burglary and kidnapping as well.

Voluntary drunkenness is not an excuse for a criminal act, but in certain instances, it may be sufficient to negate the requisite intent element of a crime. *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988). Where a specific intent element is an essential element

of the offense charged, voluntary intoxication may negate the existence of that intent. *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973). Voluntary intoxication may be a defense to the crimes of burglary, which requires the intent to commit a felony or felonies, and of kidnapping, which requires that it be committed for a particular purpose or purposes. Here, the State charged in the burglary count that defendant intended specifically to commit the crime of murder, and in the kidnapping counts that defendant confined, restrained, and removed the victim specifically for the purpose of facilitating the commission of the crime of murder and the crime of burglary.

In the instant case, defendant requested that the trial court instruct on the defense of voluntary intoxication, and the court agreed to do so. We conclude that it was error for the trial court to limit the voluntary intoxication instruction only to the murder charge. Defendant was entitled, upon his request, to have the trial court instruct the jury on the law regarding voluntary intoxication as it applied to the offenses of burglary and kidnapping. Nevertheless, we hold that the error here is harmless. Defendant has failed to meet his burden of showing that, "had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (1988). The trial court instructed the jury on voluntary intoxication with regard to the murder charge. The jury returned a verdict of first-degree murder on the bases of premeditation and deliberation and the felony murder rule. By finding defendant guilty of first-degree, premeditated and deliberated murder, the jury failed to find that defendant was intoxicated to a degree sufficient to negate his ability to form the specific intent to kill, thus rejecting defendant's voluntary intoxication defense. The jury's first-degree murder conviction based on premeditation and deliberation indicates that it considered defendant capable of forming specific intent. We do not believe that there is a reasonable possibility that had the voluntary intoxication instruction been given on the burglary and kidnapping charges, in addition to the murder charge, a different result would have been reached at trial.

[5] Defendant next argues that the trial court committed reversible error and abused its discretion by denying defendant's motion for a venire from another county. Prior to the trial, defendant filed a motion pursuant to N.C.G.S. §§ 15A-957(2) and 15A-958 seeking a special venire from another county on the grounds that the county was racially imbalanced and that adverse pretrial publicity

surrounded the case, thereby making it impossible for him to receive a fair and impartial trial. This motion was denied. On appeal, defendant argues that the trial court's ruling on his motion deprived him of his constitutional right to fair trial.

The moving party has the burden of proof in a hearing on a motion for a special venire or a change of venue. *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987). In order for a defendant to succeed on such a motion, defendant must show that, "due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial." *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1987). It is within the sound discretion of the trial court to determine whether the defendant has carried this burden. *State v. Madric*, 328 N.C. 223, 226-27, 400 S.E.2d 31, 33-34 (1991). On appeal, the trial court's ruling will not be overturned absent a showing of abuse of discretion. *Id.*

At the pretrial hearing on his motion for a special venire from another county, defendant put on evidence of the demographics of Ashe County, local newspaper articles concerning the crimes for which defendant was charged in this case, newspaper circulation figures, and affidavits from several Ashe County residents. The record shows that four articles appeared about the matter in the local newspaper, the *Jefferson Post*. The first account appeared on Friday, 16 November 1990, and the second appeared on Friday, 14 December 1990. These accounts were factual and noninflammatory. The third article ran on Friday, 15 February 1991; in this article, it was reported that the district attorney planned to seek the death penalty for defendant and that a motion to block the imposition of the death penalty had been denied. The final article appeared on Friday, 19 July 1991, before the trial started the following Monday. The article was factual and quoted sources that were a part of the public record. This article contained an account of defendant's prior assault on the victim and the fact that he was convicted in district court. "This Court has consistently held that factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue." *State v. Gardner*, 311 N.C. 489, 498, 319 S.E.2d 591, 598 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985).

"The best and most reliable evidence as to whether existing community prejudice will prevent a fair trial can be drawn from prospective jurors' responses to questions during the jury selection

process." *Madric*, 328 N.C. at 228, 400 S.E.2d at 34. "Where . . . 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." *Id.* at 228, 400 S.E.2d at 35. This Court noted in *Madric* that there was no requirement that jurors be totally ignorant of the facts and issues of the case they were to hear and that it is sufficient if the juror can set aside any impression or opinion and render a fair verdict based upon the evidence. *Id.* at 228-29, 400 S.E.2d at 35.

In the case *sub judice*, the trial court inquired at the beginning of jury selection whether any of the prospective jurors knew of or had heard about the case before coming to court. The trial court further inquired of the prospective jurors as to whether they had formed opinions that would interfere with their ability to give defendant a fair and impartial trial and whether anything they had read or heard would affect their decision in the case. The jurors were questioned thereafter through the standard selection procedure. The record shows that the trial court excused seven prospective jurors for cause due to their previously formed opinions as to guilt and their resulting inability to give defendant a fair trial. The record indicates that all of the jurors selected to hear the instant case stated unequivocally that they had formed no opinions about the matter and would base their decision solely on the evidence presented. We conclude, in light of such evidence, that the trial court did not abuse its discretion by denying defendant's motion for a special venire from another county. This assignment of error is overruled.

[6] Defendant next assigns as error the trial court's admission of eight autopsy photographs of the victim into evidence. Defendant contends that the photographs were gory, prejudicial, and irrelevant. Defendant argues that the prejudice that resulted from the admission of the photographs was compounded when one of the photographs was shown to the victim's mother, causing her to cry. Defendant argues that the timing of this crime, the identity of the victim's body, and the manner in which she died were neither disputed nor challenged by defendant. Defendant contends that the admission of these pictures was unnecessary because they did nothing more than rehash uncontroverted, anecdotal testimony by both expert and lay witnesses. Defendant argues, therefore, that the photographs lacked probative value, and the error resulting

from the admission of the photographs requires a new trial. We disagree.

This Court conducted an exhaustive review of the law surrounding the admission of photographic evidence at a murder trial in *State v. Hennis*, 323 N.C. 279, 372 S.E.2d 523 (1988). We held in *Hennis*:

> Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words, and properly authenticated photographs of a homicide victim may be introduced into evidence under the trial court's instructions that their use is to be limited to illustrating the witness's testimony. Thus, photographs of the victim's body may be used to illustrate testimony as to the cause of death. Photographs may also be introduced in a murder trial to illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree, and for this reason such evidence is not precluded by 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.
>
> . . . .
>
> 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.

Id. at 283-84, 285, 372 S.E.2d at 526-27 (citations omitted).

"This Court has rarely held the use of photographic evidence to be unfairly prejudicial, and the case presently before us is distinguishable from the few cases in which we have so held." *State v. Robinson*, 327 N.C. 346, 357, 395 S.E.2d 402, 409 (1990). In the case at bar, the autopsy photographs of the victim were

necessary to illustrate the testimony of the pathologist, Dr. Patrick Lantz, and were not excessive or repetitive. We find no abuse of discretion in the trial court's admitting these photographs. This assignment of error is without merit.

[7] In his next assignment of error, defendant contends that the trial court erred in denying his request to instruct the jury on false imprisonment. False imprisonment is a lesser included offense of kidnapping. *State v. Whitaker*, 316 N.C. 515, 342 S.E.2d 514 (1986). Whether the crime committed constitutes kidnapping or the lesser included offense of false imprisonment depends upon the purpose of the confinement, restraint, or removal of another person. If the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute, N.C.G.S. § 14-39, the offense is kidnapping. *Id.* at 520, 342 S.E.2d at 518; *State v. Pigott*, 331 N.C. 199, 415 S.E.2d 555 (1992).

In *State v. Boykin*, 310 N.C. 118, 310 S.E.2d 315 (1984), we held:

> The law is well settled that the trial court must submit and instruct the jury on a lesser included offense when, and only when, there is evidence from which the jury could find that defendant committed the lesser included offense. However, when the State's evidence is positive as to every element of the crime charged and there is no conflicting evidence relating to any element of the crime charged, the trial court is not required to submit and instruct the jury on any lesser included offense. The determining factor is the presence of evidence to support a conviction of the lesser included offense.

Id. at 121, 310 S.E.2d at 317 (citations omitted).

In our view, there was no evidence presented at trial from which the jury could reasonably have found that defendant was guilty merely of the lesser included offense of false imprisonment with regard to either Valerie Kyle or Saul Garcia.

With regard to the victim Valerie Kyle, the indictment charged that defendant confined, restrained, and removed her "for the purpose of facilitating the commission of the felonies of murder and burglary, and facilitating the flight of Edwin Lee Kyle following his participation in the commission of the felonies of burglary and murder." Defendant forcibly broke into and entered the victim's occupied apartment with a loaded pistol. Once inside, defendant

restrained the victim and her son. Defendant shot the victim while inside the apartment and then removed her and her son to her car. Defendant shot and killed the victim while driving toward Virginia. We conclude that there was no evidence upon which the jury could have concluded that defendant, although confining or restraining or removing the victim, did so for some purpose other than to facilitate defendant's commission of murder or burglary. Therefore, defendant was not entitled to an instruction on the lesser included offense of false imprisonment with regard to Valerie Kyle.

With regard to Saul Garcia, the indictment charged and the State sought to show that the kidnapping was for the purpose of facilitating defendant's commission of or flight after committing a murder or a burglary. As we noted above, defendant forcibly broke into and entered Valerie Kyle's occupied apartment with a loaded pistol, and once inside, defendant restrained Kyle and her son. Defendant shot Kyle while inside the apartment and then removed her and her son to her car. Defendant shot and killed Kyle while driving toward Virginia. When they arrived in Virginia, defendant dragged Kyle's body out of the car and into a ditch. Defendant forced Saul to place leaves over his mother's body and then ordered Saul to get back into the car and continued driving. Defendant said to Saul, "I'm going to have to shoot you." Defendant stopped the car and ordered Saul to get out. Saul got out of the car and ran. Defendant fired at least one shot at Saul and then returned to the car and drove away. This evidence shows that the kidnapping was for the purpose of facilitating flight into another jurisdiction following the commission of the felonies of burglary and murder. We conclude that there was no evidence from which the jury could have found defendant guilty of the lesser included offense of false imprisonment. The trial court did not err in denying defendant's requests for jury instructions on the lesser included offense of false imprisonment. This assignment of error is overruled.

[8] In his final assignment of error, defendant contends that the trial court committed reversible error in finding as aggravating factors both that defendant was armed with a deadly weapon and that he used a deadly weapon to commit the offenses of kidnapping and burglary. We agree.

Upon defendant's convictions of one count of first-degree burglary and two counts of first-degree kidnapping, the trial court

considered the evidence and made findings in aggravation and mitigation. The trial court found, as aggravating factors in each of these crimes, that defendant was armed with a deadly weapon at the time of the crime and that defendant used a deadly weapon at the time of the crime. The court imposed maximum sentences for the kidnapping and burglary convictions. Defendant contends that these two aggravating factors were supported by the same evidence in the instant case. We agree.

"[T]he same item of evidence may not be used to prove more than one factor in aggravation." N.C.G.S. § 15A-1340.4(a) (Supp. 1992). N.C.G.S. § 15A-1340.4(a)(1)(i) provides for the following aggravating factor: "The defendant was armed with *or* used a deadly weapon at the time of the crime." (Emphasis added); *see State v. Rios*, 322 N.C. 596, 599, 369 S.E.2d 576, 578 (1988) ("The sentencing judge may find as a factor in aggravation that '[t]he defendant was armed with or used a deadly weapon at the time of the crime.' N.C.G.S. § 15A-1340.4(a)(1)(i) (1983). As the statute makes clear this aggravating factor can be found if a defendant either uses a deadly weapon *or* is merely armed with one at the time of the crime.").

In the instant case, the evidence shows that defendant used a gun while he committed burglary and kidnapping. As we recognized in *Rios*, this statute was intended to encompass two kinds of conduct: (1) the actual use of a deadly weapon in the commission of a crime, and (2) merely having a weapon in one's possession at the time of the crime. The fact that both of these factors in aggravation are listed on the appropriate sentencing form merely affords a sentencing court with a mechanism for aggravating a crime where a defendant merely arms himself with a deadly weapon at the time of the crime but does not actually use it in the commission of the offense. In this case, the evidence shows that defendant used a deadly weapon in the commission of the crimes of burglary and kidnapping. Defendant could not use a deadly weapon in the commission of the offenses without also being armed with a deadly weapon at the time of the crimes. We conclude that the trial court improperly found these two factors in aggravation based upon the same evidence. We therefore conclude that defendant is entitled to a new sentencing hearing on his convictions for burglary and kidnapping. *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983).

For the reasons stated above, we find no reversible error in the guilt phase of defendant's trial or in the sentencing phase

as to the murder conviction. However, for reversible error in the sentencing proceeding, we vacate the sentences imposed for the burglary and kidnapping convictions and remand the case to the Superior Court, Ashe County, for resentencing on defendant's convictions for one count of first-degree burglary and two counts of first-degree kidnapping.

90CRS1857, FIRST-DEGREE MURDER: NO ERROR;

90CRS1857, FIRST-DEGREE BURGLARY: NO ERROR IN GUILT PHASE; SENTENCE VACATED AND REMANDED FOR RESENTENCING;

90CRS1857, FIRST-DEGREE KIDNAPPING OF VALERIE KYLE: NO ERROR IN GUILT PHASE; SENTENCE VACATED AND REMANDED FOR RESENTENCING;

90CRS1858, FIRST-DEGREE KIDNAPPING OF SAUL GARCIA: NO ERROR IN GUILT PHASE; SENTENCE VACATED AND REMANDED FOR RESENTENCING.

BEATRICE H. HOLLOWELL v. JAMES RODNEY HOLLOWELL AND WIFE, KAY MUNROE HOLLOWELL; TERESA H. WILLIAMS AND HUSBAND, DAVID WILLIAMS; CATHY HOLLOWELL PEARCE AND HUSBAND, LESTER PEARCE; DEBRA JOAN HOLLOWELL (UNMARRIED), AND LOUISIANA-PACIFIC CORPORATION

No. 333PA92

(Filed 4 June 1993)

1. Wills § 53 (NCI3d)— devise to life tenants—use of "equal portions" and "respective"—tenants in common

Where testator's will devised all of his lands "in equal portions" to his two nephews "for and during the terms of their natural lives," provided that "upon their deaths I give and devise their respective shares thereof in fee simple to their respective issue, who survive them, per stirpes," and further provided that if either nephew "shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee

simple, per stirpes," the testator intended for his nephews to be tenants in common rather than joint tenants. The phrase "equal portions" evidenced an intent to create a tenancy in common rather than a joint tenancy, and the word "respective" emphasized testator's intent that vesting of the future interest should occur at the death of each life tenant rather than upon the death of both tenants.

Am Jur 2d, Wills §§ 1127, 1128, 1288.

2. **Wills § 35.1 (NCI3d)— devise to life tenants—contingent remainders—time of vesting**

Where testator's will devised all of his lands "in equal portions" to two nephews "for and during the terms of their natural lives," provided that "upon their deaths I give and devise their respective shares thereof in fee simple to their respective issue, who survive them, per stirpes," and further provided that if either nephew "shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee simple, per stirpes," the testator intended the contingent remainders to the surviving issue to vest upon the death of each of the life tenants rather than only upon the death of both life tenants. Thus, when the first life tenant died leaving issue, the contingent remainder of each lineal descendant of that life tenant vested.

Am Jur 2d, Wills §§ 1127, 1128; Estates §§ 219, 220, 245.

3. **Wills § 35.2 (NCI3d)— doctrine of implied cross remainders—inapplicability**

The doctrine of implied cross remainders was inapplicable where the testator intended to devise his property so that as each life tenant died leaving issue the contingent remainder would vest in the surviving issue of that life tenant and did not intend to have a gift over of all the property at once.

Am Jur 2d, Estates §§ 230, 231, 245.

On defendants' petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 107 N.C. App. 166, 420 S.E.2d 827 (1992), which affirmed a judgment entered for plaintiff by Duke, J., at the 22 April 1991 Civil Session of

Superior Court, Wayne County. Heard in the Supreme Court 15 March 1993.

Jonathan S. Williams and J. Darby Wood, P.A., by J. Darby Wood, for plaintiff-appellee.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendant-appellants.

FRYE, Justice.

In this case we decide whether the Court of Appeals erred in affirming the trial court's entry of partial summary judgment for plaintiff in which the trial court concluded that plaintiff possesses a one-fourth undivided interest in fee simple in the ninety-five acres of land in question. The resolution of this issue turns upon the proper construction of the will of Ed Langston who died on 30 May 1948. The determinative question is whether the testator's grandnephew, Milford Edgar Hollowell, at the time of his death, owned an interest in the land in question. If not, Milford Edgar Hollowell's widow (plaintiff) has no interest in the land and partial summary judgment in her favor must be reversed. If, on the other hand, Milford Edgar Hollowell owned an interest in the land at the time of his death, then this interest passed to plaintiff under Milford Edgar Hollowell's will. We conclude that the trial court properly construed Ed Langston's will and that the testator's grandnephew, Milford Edgar Hollowell, owned an interest in the land at the time of his death which passed under Milford Edgar Hollowell's will to plaintiff. Accordingly, the Court of Appeals did not err in affirming partial summary judgment in plaintiff's favor.

On 20 February 1948, three months before his demise, Ed Langston executed a will which in pertinent part provides:

> I give and devise all of my lands, wherever situated, in equal portions to my nephews Milford Hollowell and Clarence Hollowell, for and during the term of their natural lives, and upon their deaths I give and devise their respective shares thereof in fee simple to their respective issue, who survive them, per stirpes.
>
> If either of my said two nephews shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee simple, per stirpes.

The central issue in interpreting the will is whether the testator intended the contingent remainders to the surviving issue to vest upon the death of each of the life tenants or only upon the death of both life tenants. The Court of Appeals held that it was the testator's intent to create two separate lines of descent, each operating independent of the other and the contingent remainders were to vest upon the death of each life tenant. We agree.

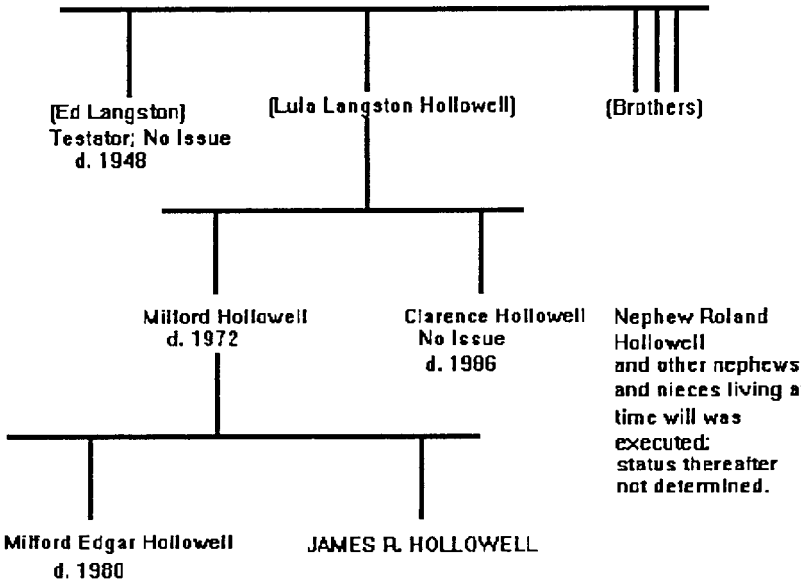
The testator, Ed Langston, had three brothers and one sister, Lula Langston Hollowell. Ed Langston was the last of the five to die, and at the time of his death he had never married and had no children. He was survived by at least two nephews, Milford Hollowell and Clarence Hollowell, children of his sister, Lula.[1]

To determine when the contingent remainders vested, there are two critical dates which must be considered—the date of Ed Langston's death and the date of the death of the first of the named life tenants to die. The first date is illustrated by Chart A and the second date is illustrated by Chart B.

Chart A illustrates the Langston family tree at the time Ed Langston executed his Last Will and Testament on 20 February 1948 and at the time of his demise on 30 May 1948. James Rodney Hollowell (James R. Hollowell), whose name is capitalized, is the only family member shown on the chart who is a party to this action.

1. Ed Langston's will bequeathed $1000 to a nephew, Roland Hollowell. The record does not indicate whether Roland survived the testator.

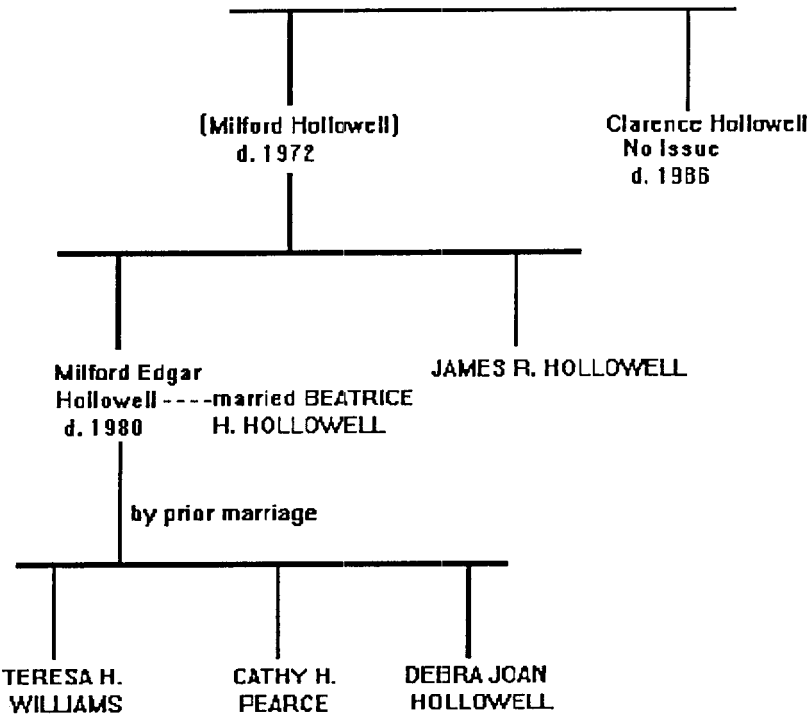
Chart A



Milford Hollowell died in 1972, survived by Milford Edgar Hollowell and James R. Hollowell. Both James R. Hollowell and Milford Edgar Hollowell were born before the testator executed his will. Milford Edgar Hollowell died testate in 1980 survived by plaintiff and three children from a previous marriage, Teresa H. Williams, Cathy H. Pearce and Debra Joan Hollowell. His will devised all of his estate to plaintiff.

Chart B illustrates the Langston family tree at the time of Milford Hollowell's (Ed Langston's nephew) demise in 1972. Family members whose names are capitalized are parties to this action.

Chart B



On 26 July 1986 Clarence Hollowell died intestate, leaving no issue. Apparently believing that they held all the interests in question, the individual defendants partitioned the property and conveyed the parcels to one another by division deeds. Plaintiff received no conveyance in these transactions.

On 17 December 1987, the individual defendants conveyed an interest in all the standing timber and pulpwood on the property by timber deed to B & C Logging, Inc., which assigned its interest to Louisiana-Pacific Corporation.

Plaintiff commenced this action by filing a complaint seeking a declaratory judgment construing the Last Will and Testament of Ed Langston and determining the ownership interests of the parties in the land in question. Plaintiff also sought to determine other rights and damages arising out of the ownership of the land. On 2 April 1991, the parties stipulated that if it is ultimately deter-

mined that plaintiff owns an interest in the property, defendant Louisiana-Pacific Corporation will be entitled to file pleadings as it shall deem necessary.

After cross motions for summary judgment had been filed, the trial court, on 24 April 1991, granted plaintiff partial summary judgment and denied defendants' summary judgment motion. As part of the judgment, the trial court set aside the division deeds previously executed among the individual defendants. The trial court ultimately concluded that the present title to the ninety-five acres of land is vested in fee simple in the following tenants in common with their respective shares being:

James R. Hollowell	one-half undivided interest
Beatrice H. Hollowell	one-fourth undivided interest
Teresa H. Williams	one-twelfth undivided interest
Cathy H. Pearce	one-twelfth undivided interest
Debra Joan Hollowell	one-twelfth undivided interest

The Court of Appeals affirmed the trial court. We granted defendants' petition for discretionary review and we now affirm the Court of Appeals.

I.

An elementary rule of will construction is "that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy." *Clark v. Connor*, 253 N.C. 515, 520, 117 S.E.2d 465, 468 (1960). *Pittman v. Thomas*, 307 N.C. 485, 299 S.E.2d 207 (1983), stated the well established rule:

> "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." *Trust Co. v. Wolfe*, 243 N.C. 469, 473, 91 S.E.2d 246, 250 (1956).

Pittman, 307 N.C. at 492-93, 299 S.E.2d at 211. Thus, our primary focus in interpreting Ed Langston's will is the testator's intent.

[1] As a preliminary matter, we must first determine whether the testator intended to create a tenancy in common or a joint tenancy between the two life tenants, his nephews Milford and Clarence. We conclude that the language shows an intent for Milford and Clarence Hollowell to be tenants in common. In Langston's will there are two separate ways that he evidenced his intent to have the two nephews hold the property as tenants in common. First, the will provides that the land is devised "in equal portions." The language "equal portions" shows an intent to create two separate but equal shares which is inconsistent with a joint tenancy which views the ownership to be single and unified. *See* Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* at 54-55 (2d ed. 1984) [hereinafter Bergin & Haskell]. Our Court of Appeals has held that the language "share equally" shows an intent to create a tenancy in common rather than the presumptive tenancy by the entireties between a husband and wife. *Dearman v. Bruns*, 11 N.C. App. 564, 566, 181 S.E.2d 809, 811, *cert. denied*, 279 N.C. 394, 183 S.E.2d 241 (1971). Dating back to 1895, this Court has held that the phrase "share and share alike" creates a tenancy in common. *Midgett v. Midgett*, 117 N.C. 8, 10, 23 S.E. 37, 38 (1895). We are convinced that the phrase "equal portions," like "share equally" and "share and share alike," evidences an intent to create a tenancy in common rather than a joint tenancy.

The second basis for our holding that a tenancy in common was created is the language in the will "I give and devise their respective shares . . . ." Defendants contend that the word "respective" is used in the will to clarify the division of the remainder interests in the two life estates. Plaintiff submits, and we agree, that by specifically stating in the will that the division is to be *per stirpes* there would be no need for clarification of how Ed Langston wanted his property to be distributed. Therefore, "respective" must be given another meaning. We conclude that Ed Langston included the word "respective" to emphasize his intent that vesting of the future interest occurred at the death of each life tenant rather than upon the death of both tenants.

[2] Defendants contend that plaintiff does not have any ownership interest in the ninety-five acres. The basis for defendants' argument

is that the contingent remainder held by plaintiff's late husband, the testator's grandnephew Milford Edgar Hollowell, never vested. Therefore, according to defendants, Milford Edgar Hollowell never held a one-fourth interest in the property to leave to plaintiff, his second wife.

In order to answer the central issue in this case we must determine when the future interests created by Ed Langston's will vested. "The law favors the construction of a will which gives to the devisee a vested interest at the earliest possible moment that the testator's language will permit." *Elmore v. Austin*, 232 N.C. 13, 19, 59 S.E.2d 205, 210 (1950); *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942); *McDonald v. Howe*, 178 N.C. 257, 100 S.E. 427 (1919). Nonetheless, defendants contend that there was no vesting until both life tenants died. Under their argument, when Milford Hollowell died, the contingent remainder which his issue held did not vest. Defendants argue that it was not until Clarence Hollowell died that vesting occurred. Stated differently, defendants contend that when the first life tenant (Ed Langston's nephew Milford) died leaving issue, his issue held contingent remainders in fee that would vest only upon their surviving the death of the second life tenant (Ed Langston's nephew Clarence). Defendants cite the following cases in support of this contention. *Kale v. Forrest*, 278 N.C. 1, 178 S.E.2d 622 (1971); *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963); *Biddle v. Hoyt*, 54 N.C. (1 Jones Eq.) 159 (1854); *Hooks v. Mayo*, 94 N.C. App. 657, 381 S.E.2d 197 (1989), *aff'd per curiam*, 326 N.C. 361, 388 S.E.2d 768 (1990); *Cowgill v. Faulconer*, 57 Ohio Misc. 6, 385 N.E.2d 327 (1978); *Waugh v. Poiron*, 315 Ill. App. 78, 42 N.E.2d 138 (1942).

However, each of these cases can be distinguished on factual grounds. In both *Kale v. Forrest*, 278 N.C. 1, 178 S.E.2d 622, and *Hooks v. Mayo*, 94 N.C. App. 657, 381 S.E.2d 197, there was only one life tenant. This Court in *Kale*, and the Court of Appeals in *Hooks*, held that the survivorship requirement in each will should be construed to refer to the death of the life tenant rather than the testator. In the present case, there are two intervening life estates and there is no ambiguity in the will as to whether the grandnephews had to survive the testator in order to take their respective shares. In both *Biddle v. Hoyt*, 54 N.C. (1 Jones Eq.) 159, and *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22, the life tenants were husband and wife, while the life tenants here are brothers. In both *Biddle* and *Strickland*, the future interests

at issue were to the surviving children of the marriage, a contingency clearly distinguishable from the instant case.

In addition to the fact that *Waugh v. Poiron*, 315 Ill. App. 78, 42 N.E.2d 138 and *Cowgill v. Faulconer*, 57 Ohio Misc. 6, 385 N.E.2d 327, are not binding precedent for this Court, the facts and issues in each are also distinguishable from the present case. The will in *Waugh*, for example, did not contain the clarifying language present in the Langston will: "upon their deaths I give and devise their respective shares . . . ." In *Cowgill*, the issue before the court was whether those claiming an interest in the estate had to survive the death of the testator. As previously mentioned, survivorship of the testator is not an issue in the instant case.

The pertinent language in the Langston will which we must interpret in order to determine the time of vesting is "upon *their* deaths I give and devise *their* respective shares thereof in fee simple to *their* respective issue, who survive *them*, per stirpes." (Emphasis added.) Defendants argue that the word "them" requires the remaindermen to survive both of the life tenants before vesting occurs. We disagree. Reading the will as a whole, we conclude the word "them" must be interpreted with reference to the words "their respective issue." So interpreted, this word causes no impediment to allowing vesting to occur when the first life tenant dies.

In this case, Milford Edgar Hollowell and James R. Hollowell each had to survive their father in order for their contingent remainder to vest. A remainder interest is contingent when it is "*either* subject to a condition precedent (in addition to the natural expiration of prior estates), *or* owned by unascertainable persons, *or both*." Bergin & Haskell, at 73. In the present case, the future interest was contingent since there was a survivorship requirement. The triggering event for the contingent remainder to vest was Milford Edgar Hollowell and James R. Hollowell surviving both the testator and their father Milford Hollowell. When Milford Hollowell died, Milford Edgar Hollowell and James R. Hollowell's contingent remainders became vested remainders in fee simple since they survived both the testator and their father.

A case factually similar to the instant one is *Williams v. Johnson*, 228 N.C. 732, 47 S.E.2d 24 (1948). The Court in *Williams* interpreted a will which devised property to the testator's grandchildren "for and during the term of their natural lives . . . then to their . . .

issue surviving them . . . ." *Id.* at 733, 47 S.E.2d at 25. This Court held that the language "their" and "surviving them" did not require the remaindermen to survive all the life tenants but that vesting was contingent upon their survival of the life tenant through whom the remaindermen took their interest. *Id.* at 735, 47 S.E.2d at 26. Thus, when one life tenant died the contingent remainder of each lineal descendant of that life tenant vested.

Defendants distinguish *Williams* on the basis of additional language in the *Williams* will: "in the event any of said grandchildren shall die, without leaving *him* surviving issue or issues, then to his next of kin in fee simple forever." *Id.* at 733, 47 S.E.2d at 25 (emphasis added). Defendants contend that the word "him" narrows the will so that vesting would occur upon the death of a life tenant and that that is the rationale for the Court's holding. We disagree. After determining the intent of the testator, this Court concluded that the words "their" and "surviving them" referred to the death of each life tenant. *Id.* at 735, 47 S.E.2d at 26. We likewise now conclude that Ed Langston's intent was to devise the property in question as two life estates with contingent remainders vesting upon the death of each life tenant.

One of the basic rules of will construction is to "give effect to the general intent of the testator as that intent appears from a consideration of the entire instrument . . . [and] the intent of the testator must be ascertained from a consideration of the will as a whole and not merely from consideration of specific items or phrases of the will taken in isolation." *Adcock v. Perry*, 305 N.C. 625, 629, 290 S.E.2d 608, 611 (1982) (citation omitted); *Wilson v. Church*, 284 N.C. 284, 200 S.E.2d 769 (1973). Defendants' argument that Ed Langston's intent was for the contingent remainders to vest only after the deaths of both life tenants fails when one reads the will as a whole and gives effect to every word and phrase. We conclude that Ed Langston specifically wrote a paragraph into his will to further evidence his intent to have the remainder interests descend separately after each life tenant died. That paragraph is as follows:

> If either of my said two nephews shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee simple, per stirpes.

If this Court were to adopt defendants' argument this paragraph in the testator's will would be irrelevant and immaterial. There would be no need for a provision to solve the problem of one nephew dying without issue since no vesting would occur in any event until both nephews died.

We conclude that Ed Langston intended to create a tenancy in common between the two life tenants. Since the two life tenants held the land as tenants in common, the second paragraph also served to prevent the remainder interest of the first life tenant who died without issue from going back into the estate for failure of the contingent remainder to vest.

[3] Anticipating that this Court might conclude that the original interest between the two life tenants was a tenancy in common, defendants advance an alternative argument of implied cross remainders to support their position that both the trial court and the Court of Appeals erred in interpreting Ed Langston's will. Cross remainders are occasionally implied where there is more than one life tenant and the will dictates that the remainder interest is to go over as a whole. *Trust Co. v. Miller*, 223 N.C. 1, 7, 25 S.E.2d 177, 180 (1943). Courts will imply a cross remainder to prevent the rents and income of the deceased life tenant's interest from passing by intestacy. When the cross remainder is implied then the surviving life tenant enjoys the rents and income from the deceased life tenant's share. Once all life tenants die then the cross remainder is terminated. *Id.* at 7, 25 S.E.2d at 181. In order for this Court to imply a cross remainder, the testator's intent would have to be that at the end of the life estates there would be a gift over of all the property at once. *Id.* at 7, 25 S.E.2d at 180-81. As stated earlier, we believe that the testator's intent was not to have a gift over of all the property at once. Instead, the testator intended to devise his property so that as each life tenant died leaving issue the contingent remainder would vest in the surviving issue of that life tenant. We see nothing in the will to suggest that the testator wanted to delay the taking of the fee by any surviving issue until both of the life tenants died. On the contrary, the consistent use of the word "respective" shares and "respective" issue evidences an intent that the property is to be devised separately rather than devised all at once. Therefore, the doctrine of implied cross remainders is inapplicable since there is no question as to what should happen to Milford Hollowell's one-half interest upon his death.

Defendants' last argument for preventing plaintiff from receiving her one-fourth share is based on the contention that it was the testator's intent that the property remain in the family. In determining the testator's dominant intent, we find nothing in the will as a whole to suggest an intent to require that the property remain in the family. First, the testator does not designate the property as the "family farm" but instead makes an encompassing devise of "all his lands, wherever situated" to two of his nephews, Milford and Clarence. Second, one of the testator's nephews, Roland Hollowell, received a cash bequest of $1,000. Except for a residuary clause, there was no provision for Roland Hollowell to be an alternative taker in case the real property did not pass to Milford and Clarence. Also, no trust was created to ensure that the land remained in the Langston-Hollowell family. The will includes no specific restrictions or limitations on the use or alienation of the property, nor is there a provision making the remainder interests subject to divestment if certain events occurred.

We conclude that the trial court and the Court of Appeals properly construed the will in accord with Ed Langston's intent for Milford and Clarence Hollowell to each have a one-half undivided life estate interest in the land to share as tenants in common. Upon Milford's death, the contingent remainder of one-half undivided interest in the property vested in his surviving issue in fee simple since he was survived by issue. Milford Edgar Hollowell, as one of Milford Hollowell's two surviving issue, received a one-fourth undivided interest in fee simple in the ninety-five acres. Milford Edgar Hollowell could, and did, devise this interest to plaintiff. James R. Hollowell, as the other of Milford Hollowell's surviving issue, also received a one-fourth undivided interest. After Clarence Hollowell's death, in accordance with the second paragraph of the will, the remaining one-half undivided interest vested in fee in James R. Hollowell and the issue of Milford Edgar Hollowell *per stirpes*. James R. Hollowell received another one-fourth undivided interest making his total interest one-half. The issue of Milford Edgar Hollowell each received a one-twelfth undivided interest in the ninety-five acre tract of land.

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

STATE OF NORTH CAROLINA v. CARL LYNN WILLIAMS

No. 137A92

(Filed 4 June 1993)

1. **Evidence and Witnesses § 1088 (NCI4th)— murder—incriminating statement in defendant's presence—silence—admissible**

The trial court did not err in a murder prosecution by admitting into evidence testimony that a statement had been made out of court in defendant's presence that defendant had participated in the shooting and defendant did not respond until some minutes later. The statement was properly admitted as an implied admission, and the trial court's instructions properly left to the jury the question of whether defendant's disavowal was a responsive denial or the product of self-serving cogitation.

Am Jur 2d, Evidence § 638.

2. **Criminal Law § 560 (NCI4th)— murder—out-of-court statement admitted—mistrial denied**

There was no error in denying a motion for a mistrial in a murder prosecution where the out-of-court statement on which the motion was based was properly admitted.

Am Jur 2d, Trial § 1955.

3. **Appeal and Error § 504 (NCI4th)— murder—failure to instruct on lesser included offense—invited error**

The trial court did not err in a murder prosecution by failing to instruct on the lesser included offense of second-degree murder where defendant foreclosed any inclination of the trial court to instruct on second degree murder.

Am Jur 2d, Appeal and Error §§ 776, 778, 810.

4. **Criminal Law § 794 (NCI4th)— murder—instructions—acting in concert—evidence sufficient**

The evidence in a murder prosecution supported an instruction on acting in concert where defendant's admission that, at the least, he knew that another man intended to shoot one of the victims and that he directed this other man to the location of the pistol is ample evidence of active encouragement and assistance to the perpetrator, as was his questioning

of the other man's decision not to kill a witness. That witness's testimony that she saw defendant holding a small handgun as he and the other man left the house after the shootings corroborates evidence of defendant's presence and active participation in the shootings.

Am Jur 2d, Trial §§ 1077, 1228, 1281.

5. **Homicide § 258 (NCI4th)— murder—instructions—intentional use of deadly weapon—instruction given substantially as requested**

The trial court did not err in a murder prosecution in not giving the instruction on intentional use of a deadly weapon as defendant requested where the substance of the requested instruction, absent reference to the "sufficiency" of facts and inferences to sustain proof of premeditation and deliberation, was given more clearly by the trial court in instructions that kept inferences from the use of a deadly weapon separate from instructions regarding premeditation and deliberation. The trial court is not required to give requested instructions verbatim, even when they correctly state the law.

Am Jur 2d, Trial §§ 1092, 1094, 1098.

6. **Criminal Law § 823 (NCI4th)— murder—instructions—credibility of law enforcement officers—requested instruction denied**

The trial court did not err in a murder prosecution by refusing to give an instruction on the credibility of law enforcement officers. The trial court properly instructed the jury about witness credibility in general, focusing neither on law enforcement officers nor on any other class of witnesses. To have singled out any one class of witnesses might well have prompted the jury to be more critical of its credibility than that of other witnesses.

Am Jur 2d, Trial §§ 1092, 1093, 1094.

Justice PARKER 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 two consecutive terms of life imprisonment entered by Gore, J., at the 25 September 1991 Criminal Session of Superior

Court, Cumberland County, on jury verdicts finding defendant guilty of first-degree murder. Heard in the Supreme Court 7 October 1992.

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

James R. Parish for defendant-appellant.

WHICHARD, Justice.

A jury found defendant guilty of murder in the first degree on the basis of premeditation and deliberation in the deaths of William Fowler and Mitchell McNeill. From our review of the record and of defendant's assignments of error, we conclude that defendant received a fair trial free from prejudicial error.

The evidence, viewed in the light most favorable to the State, tended to show that defendant and his friend David Beal went to a pool hall Saturday evening, 19 May 1990. There they met defendant's cousin Lee Carver and a man named William Fowler, whom Beal agreed to drive home in exchange for ten or fifteen dollars. Beal, accompanied by defendant, Fowler, and Mattie Robeson, who was with Fowler, drove to Fowler's sister's house. Carver followed in his own car. Around fifteen minutes after their arrival, Mitchell McNeill arrived.

Shortly afterwards an altercation arose between a neighbor and Fowler and McNeill. When calm was restored, everyone except the neighbor went back inside and talked. Beal asked McNeill to get Fowler to pay for his ride, but Fowler had gone to sleep. McNeill said he would give Beal the money when he got paid. Defendant and Beal then left the house.

Outside, Beal stated he had not been paid, and defendant responded, "Well, they ain't paid you your money, looks like we will have to put a cap in them." To "cap" someone, Beal explained, meant to shoot him.

Mattie Robeson testified that McNeill went to the back bedroom to use the telephone, and Fowler went into another bedroom. Fowler went to answer the door, and defendant entered with Carver and Beal. Mattie went into the den to watch television. A few minutes later Fowler came to the den door and asked Mattie if she was getting sleepy. She said she was, and Fowler said Beal, Carver, and defendant were getting ready to leave "in a few minutes."

As soon as Fowler was out of the doorway, Mattie heard two gunshots. She shut the den door and hid in the closet. She then heard McNeill say twice, "Man, I didn't have nothing to do with it," and the sound of two more shots. When she stuck her head out the door she saw Beal, defendant, and Carver walking out the door. Defendant was carrying a little gun, and Carver was carrying a shotgun. When she heard cars driving away, she went to a neighbor's house and called the police.

An autopsy of Mitchell McNeill revealed that he died from a shot to the aorta. A second bullet grazed his hand and lodged in his abdomen. The forensic pathologist who performed the autopsy opined that the second shot was fired while McNeill was in a crouched or defensive position or that he was shot while falling. Fowler had also been shot twice—in the heart and in the back of the head. The bullets were recovered from the bodies and examined by an S.B.I. agent. The agent's written report, to which defendant and the State stipulated, stated that all four bullets had been fired from the same .32 caliber revolver. Officers found the revolver in a sofa at defendant's trailer two days after the murders.

The police questioned defendant on 21 May 1990. He gave a statement and responded to police questioning, first denying he was present when the victims were shot, then admitting he had been with Carver but stating that he had not fired any shots. Although Beal testified it was defendant who said he was going to "cap" the victims because Beal had not been paid, defendant attributed these remarks, like the killing itself, to Carver. Defendant admitted he had put the gun under the seat of Beal's car earlier in the evening and that he had told Carver its location.

Defendant's first four assignments of error concern the admissibility of a hearsay statement to which David Beal testified. Beal stated that Carver and defendant came to his home the day after the shooting. After *voir dire* Beal was permitted to restate Carver's remarks about the shooting made in defendant's presence. The testimony was as follows:

> Q. Did you have a conversation with Mr. Carver and Mr. Williams outside?
>
> A. Yes, sir.

Q. What, if anything, was said about what happened the night before?

A. Well, that is when Lee had told me that both men had been shot.

Q. And, for the jury, identify who "Lee" is.

A. Mr. Carver.

Q. Tell them exactly what you recall him having said.

A. He had told me, both men had shot one, and one shot the other.[1]

Q. What, if anything, was said about where the men had been shot?

A. I think he told me one was shot in the chest and the head, and I think it was the side.

Q. Where was Mr. Williams while this was being said by Mr. Carver?

A. He was outside with me.

Q. How close together were the three of you?

A. Right beside each other.

Q. Was Mr. Williams right beside of you when Mr. Carver was saying that?

MR. PARISH: Objection to leading.

THE WITNESS: Yes, sir.

THE COURT: Sustained.

MR. COLYER: How far away, literally, how far away were the three of you from each other?

THE WITNESS: Maybe a foot at the most.

Q. Physically, where were you located?

A. Right beside my car, I believe.

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1. Beal varied this statement somewhat on cross-examination, reiterating phrasing from a prior statement to police officers that "one shot one and one shot the other."

Q. What, if anything, did Carl Williams say when Lee Carver made that statement to you?

A. He didn't say nothing.

On cross-examination of Beal, defense counsel referred to one of Beal's pre-trial interviews in which Beal stated that defendant had told him he left before the shooting started, that he did not want any part of it, and that he walked away down the road. At defense counsel's request the trial court held a second *voir dire* examination of Beal to determine the proximity of these self-exculpatory statements to Carver's admission that "both men had shot one, and one shot the other." In the absence of the jury Beal testified that defendant's remarks occurred five to ten minutes after Carver's admission. The subject of the conversation had shifted away from the shooting, and Carver was talking about getting ready to leave. Defendant's explanation that he had had nothing to do with the shooting occurred "out of the clear blue," just before he and Carver left.

Before the jury was called in to hear the resumption of Beal's testimony, the trial court denied defendant's motion for a mistrial on the grounds that Carver's statement was the only evidence identifying defendant as a shooter. Beal then testified before the jury essentially as he had on *voir dire*. Following his testimony the trial court instructed the jury:

> Ladies and gentlemen, there has been evidence offered through the testimony of David Beal tending to show that at an earlier time, Mr. Beal made a statement or statements which may be consistent or may conflict with his testimony at this trial.
>
> You must not consider such earlier statements as evidence of the truth of what was said at that earlier time because it was not made under oath at this trial.
>
> If you find that such earlier statement or statements were made and that it or they are consistent or that it or they do conflict with the testimony of the witness at this trial, then you may consider this together with all other facts and circumstances bearing upon the witness's truthfulness in deciding whether you will believe or disbelieve Mr. Beal's testimony at this trial, and for no other purpose.

Ladies and gentlemen, there has been testimony from the witness, David Beal, that Lee Carver said, in the Defendant, Carl Williams', presence, "both of them shot both men," and "one shot one and one shot the other." And that Defendant Carl Williams did not say anything to rebut or deny these statements immediately after they were made, but remained silent during and after the time Lee Carver spoke them.

. . . .

[T]he Defendant, Carl Williams', silence may be considered as an adoption or ratification of Lee Carver's statement as an admission against penal interest.

There has also been testimony from the witness, David Beal, that five or ten minutes after the statements were made by Lee Carver, that the Defendant, Carl Williams, told David Beal, in Lee Carver's presence, that when Lee Carver said he was going to shoot them, he, the Defendant, Carl Williams, said, "I don't want no part of this," and left, walking up the road, and Lee came behind him in the Pinto and told him to hop in, and he did.

. . . .

Additionally, you may consider this statement if you find that it was made by the Defendant, Carl Williams, at the time David Beal said it was made, as a rebuttal or denial of the statements made by Lee Carver regarding the shooting of the two men, even though Lee Carver's statements were made five or ten minutes earlier.

It is for the jury to determine and say whether any or all of these statements were in fact made and whether they were made when the witness says they were. It is for the jury to say what force and effect these statements have if, in fact, you find that they have any force and effect at all.

. . . .

I instruct you that you, as the jury, are the sole finders of the facts. You, as the jury, are the sole judges of the credibility of each witness. You must decide for yourselves whether to believe the testimony of any witness. You may believe all or any part or none of what a witness has said on the stand.

> You are the sole judges of the weight to be given any evidence. By this, I mean, if you decide that certain evidence is believable, you must then determine the importance of that evidence in light of all other believable evidence in the case.

Defendant contends that the trial court erred, first, in permitting Beal to testify as to Carver's statement that both Carver and defendant shot the victims; second, in denying defendant's motion for mistrial on the grounds that there was no legal basis to admit the hearsay statement; third, in refusing to instruct the jury that it should disregard Beal's reiteration of Carver's statement; and fourth, in instructing the jury as it did when neither the facts nor the law supported a continuing conspiracy between Carver and defendant or defendant's admission by silence.

[1] Carver's statement that "both men had shot one, and one shot the other" was offered in evidence through Beal's testimony "to prove the truth of the matter asserted." As such, it was hearsay. N.C.G.S. § 8C-1, Rule 801(c) (1992). Rule 801(d)(B) permits an exception to the hearsay rule for admissions of a party, which include "a statement of which he has manifested his adoption or belief in its truth."

> Implied admissions are received with great caution. However, if the statement is made in a person's presence by a person having firsthand knowledge under such circumstances that a denial would be naturally expected if the statement were untrue and it is shown that he was in a position to hear and understand what was said and had the opportunity to speak, then his silence or failure to deny renders the statement admissible against him as an implied admission.

State v. Spaulding, 288 N.C. 397, 406, 219 S.E.2d 178, 183 (1975), *vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). *See also* 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 179, p. 48 (3d ed. 1988).

Defendant contends his subsequent disavowal of any role in the shooting served to rebut or recant his admission by silence. We disagree. The trial court's instructions properly left to the jury the question whether disavowal was a responsive denial or the product of self-serving cogitation. We hold that Carver's statement was properly admitted as an implied admission, and that

the jury was properly instructed it could consider the statement on these grounds.[2]

[2] Defendant's contention that the trial court abused its discretion in denying defendant's motion for mistrial because it erroneously admitted Carver's statement also fails: a mistrial must be declared upon defendant's motion if there occurs during the trial an error that results in substantial and irreparable prejudice to the defendant's case. N.C.G.S. § 15A-1061 (1988). No such error occurred here, for the admissibility of Carver's statement was supported by the implied admission exception to the hearsay rule.

For the same reason the trial court did not err in refusing to instruct the jury that it should disregard Beal's reiteration of Carver's statement.

[3] Defendant's four remaining assignments of error concern the trial court's instructions to the jury. Defendant first contends that the trial court failed to instruct on the lesser-included offense of second-degree murder for each homicide. The record plainly reveals that any error in not instructing on the lesser-included offense was invited by defendant, who expressly requested that such an instruction not be given.

At the charge conference, defendant indicated unequivocally to the trial court that he did not wish for the jury to be instructed on second-degree murder:

> THE COURT: Now, with regard to that, let me make inquiry, at this time, as to the parties' positions regarding lesser-included offenses. What says the Defense?
>
> MR. PARISH: No, sir.
>
> THE COURT: What says the State?
>
> MR. COLYER: Judge, I have been giving some thought this afternoon to Second-degree, and quite frankly, I think the only

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2. Although the trial court also supported its ruling with grounds other than the instruction on adoption or ratification by silence, it is not necessary to consider the propriety of those supplementary grounds here, as the instructions articulate a proper basis for the admissibility of Carver's statement. "The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." *State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650, *cert. denied*, 484 U.S. 916, 98 L. Ed. 2d 224 (1987).

thing that supports that would be the statement that Lieutenant Oakes read that attributed to the Defendant with respect to knowing that . . . Mr. Carver had the gun and following him into the residence when the gun was used to shoot Mr. Fowler after heard [sic], according to Mr. Williams' statement, Mr. Carver say something about "capping them," and then saying, to him, that meant "to shoot them."

THE COURT: All right. Thank you. Do you want to respond to that?

MR. PARISH: No, sir. We don't want to respond.

THE COURT: All right. The Court, as to each victim, the Court will instruct only on First-degree Murder and will not submit a lesser-included offense of Second-degree Murder.

And for the record, as I understand it, that is the Defense's position on that; is that correct?

MR. PARISH: And not guilty. First-degree or not guilty.

THE COURT: Yes, sir, I was talking about lesser-included offenses.

A defendant is not prejudiced by error resulting from his own conduct. N.C.G.S. § 15A-1443(c) (1988). Here defendant foreclosed any inclination of the trial court to instruct on the lesser-included offense of second-degree murder. He is not entitled to any relief and will not be heard to complain on appeal. *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992).

[4] Second, defendant contends the trial court's instructions to the jury should not have included an instruction on acting in concert because the evidence presented no common plan or scheme. Defendant argues Beal's hearsay statement, rephrased on cross-examination, that "one shot one and one shot the other," shows independent, not concerted action, and he relies on his own statement that he entered the house behind Carver, who immediately began shooting.

The trial court instructed the jury as follows:

For a person to be guilty of a crime, ladies and gentlemen, it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit murder, each of them is

held responsible for the acts of the others done in the commission of the murder.

However, the mere presence of the Defendant at the scene of the crime at the time it was committed does not make him guilty of the offense charged. This is so, even though he makes no effort to prevent the crime, if he is in sympathy with the criminal act, if he silently approves of the crime, or if he may secretly intend to assist the perpetrator in the commission of the crime in case his aid becomes necessary.

To find someone who does not actually participate in the commission of a crime guilty of the offense, there must be some evidence showing that he, by word or deed, gave active encouragement to the perpetrator of the crime, or by his conduct, made it known to the perpetrator that he was standing by to knowingly lend assistance to the accomplishment of the crime.

These instructions accurately mirror aspects of the acting in concert instruction this Court has approved in *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E.2d 572, 586 (1971), *death sentence vacated*, 408 U.S. 939, 33 L. Ed. 2d 761 (1972).

Evidence in the record, particularly defendant's own statement, supports these instructions. In his statement defendant said he knew when he arrived at Fowler's house with Carver and Beal that Carver had a revolver. He heard Beal say if he was not paid his ten dollars he was going to "cap his ass," meaning, defendant said, "shoot him." Defendant said Beal left and he was with Carver when Carver shot both victims. In his statement defendant said he tried to dissuade Carver from shooting Fowler and McNeill, saying, "Come on, Lee, man, don't be doing no stupid junk like that." Yet Carver responded, "Going to cap this mawfucker. . . . Going to cap his ass," and shot "the big guy" in the hall. Defendant then said Carver told him he was going in the room to shoot "the little [guy]," and defendant heard two shots as he was walking out the door. Defendant then asked Carver why he did not shoot Mattie Robeson, saying, "You still got one left." Defendant asserted in his statement that the pistol had belonged to Carver, but defendant himself had put it under the seat of Beal's car to protect Carver from being cited for carrying a concealed weapon if they were stopped. Defendant said after all three men had exited Fowler's house, Carver, "disgusted" that Beal had

not been paid for the ride, said, "I'm [going to] bust a cap in him" and asked for the gun. Defendant then told Carver the gun was under the seat.

Defendant's admission that, at the very least, he knew Carver intended to shoot Fowler and that he directed Carver to the location of the pistol is ample evidence of active encouragement and assistance to the perpetrator, as was his questioning Carver's decision not to kill Mattie Robeson, too. Mattie Robeson's testimony that she saw defendant holding a small handgun as he and Carver left the house after the shootings corroborates evidence of defendant's presence and active participation in the shootings.

We conclude the evidence was sufficient to support the trial court's instructions on acting in concert.

[5] Third, defendant argues the trial court erred in failing to give the jury the following requested instruction:

> As I have instructed you, members of the jury, in order to convict the DEFENDANT of premeditated and deliberated murder, the jury must find, beyond a reasonable doubt, that the DEFENDANT not only intended the killing, but that he formed that intent after premeditation and deliberation. However, in this regard, I caution you, members of the jury, that while the intentional use of a deadly weapon may, in and of itself, give rise to an inference that the killing was malicious, this fact alone is insufficient to sustain a finding of premeditation and deliberation.

In *State v. Thompson*, 328 N.C. 477, 402 S.E.2d 386 (1991), this Court held the trial court did not err in refusing to give the second sentence of this proposed instruction because the language, extracted from *State v. Zuniga*, 320 N.C. 233, 258, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), was inappropriate for a jury instruction: "It is confusing and not helpful to instruct a jury in terms of what an appellate court will consider sufficient to sustain a jury finding." *Thompson*, 328 N.C. at 490-91, 402 S.E.2d at 393.

The substance of these instructions, absent reference to "sufficiency" of facts and inferences to sustain proof of premeditation and deliberation, was given more clearly by the trial court in instructions that kept inferences from the use of a deadly weapon separate from instructions regarding premeditation and delibera-

tion. With regard to inferences that may be drawn from the intentional use of a deadly weapon the trial court instructed:

> If the State proves, beyond a reasonable doubt, that the defendant killed the victim with a deadly weapon, or intentionally inflicted a wound upon the victim with a deadly weapon, that proximately caused the victim's death, you may infer, first, that the killing was unlawful, and second, that it was done with malice, but you're not compelled to do so. You may consider that along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

The trial court instructed on the definition of premeditation and deliberation separately:

> [T]he State must prove that the Defendant acted with premeditation, that is, that he formed the intent to kill the victim over some period of time, however short, before he acted.
>
> And . . . the State must prove that the Defendant acted with deliberation, which means that he acted while he was in a cool state of mind.

We hold that the trial court complied in substance with defendant's request, properly separating the issue of inferences to be drawn from the use of a deadly weapon from a potentially confusing link to proof of premeditation and deliberation. The trial court is not required to give requested instructions verbatim, even when they correctly state the law. *State v. Groves*, 324 N.C. 360, 373, 378 S.E.2d 763, 771 (1989). When the trial court gives substantially the same instructions as those requested, particularly, as here, where they are purged of irrelevant and confusing features, the court does not err in refusing to give defendant's instructions exactly as proposed. *See State v. Monk*, 291 N.C. 37, 54, 229 S.E.2d 163, 174 (1976).

[6] Finally, defendant complains that the trial court erred in refusing to give the following instruction on the credibility of law enforcement officers:

> You have heard the testimony of law enforcement officials. The fact that a witness may be employed by the federal or state government as a law enforcement official does not mean that his testimony is necessarily deserving of more or less

> consideration or greater or lesser weight than tha[t] of an ordinary witness.
>
> At the same time, it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his testimony may be colored by a personal or professional interest in the outcome of the case.
>
> It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

Defendant cites *Bush v. United States*, 375 F.2d 602 (D.C. Cir. 1967) as authority for the correctness and appropriateness of this requested instruction. To the contrary, in *Bush* the D.C. Circuit refused to adopt a rule requiring a jury instruction "that the uncorroborated testimony of police narcotics officers must be viewed with suspicion and acted upon with caution." *Id.* at 603. To this suggestion the court responded:

> The law has recognized that some witnesses, the accomplice and informant, for example, should in some circumstances be the subject of a cautionary instruction when requested. But it would be a dismal reflection on society to say that when the guardians of its security are called to testify in court under oath, their testimony must be viewed with suspicion. This would be tantamount to saying that police officers are inherently untrustworthy. The cure for unreliable police officers is not to be found in such a shotgun approach.

Id. at 604 (footnotes omitted).

We concur with this reasoning, and hold that the trial court properly instructed the jury about witness credibility in general, focusing neither on law enforcement officers nor on any other class of witnesses. To have singled out any one class of witnesses might well have prompted the jury to be more critical of its credibility than that of other witnesses. Indeed, this was the trial court's intention in giving special instructions regarding the testimony of David Beal, which the court cautioned was pursuant to a plea agreement. The trial court also gave special instructions regarding Mattie Robeson's testimony, charging the jury to be particularly attentive to her capacity and her opportunity for observation, and her emotional and physical condition at the time of the observation.

Special instructions concerning potentially interested witnesses are proper, *e.g.*, *State v. Vance*, 277 N.C. 345, 346, 177 S.E.2d 389, 390 (1970), but they are inappropriate when, as here, there is nothing in the record to cast doubt upon the truthfulness and objectivity of the witness.

We conclude that defendant's assignments of error are meritless, and that he received a fair trial, free from prejudicial error.

NO ERROR.

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

STATE OF NORTH CAROLINA v. HORACE BENJAMIN BEACH, JR.

No. 86A92

(Filed 4 June 1993)

1. Jury § 257 (NCI4th)— murder—jury selection—State's use of peremptory challenges against blacks—no error

There was no error in the prosecution of a white defendant for killing two white victims in the prosecutor's use of peremptory challenges to excuse black veniremen. Although the United States Supreme Court has held that a defendant does not have to be a member of the race against whose members he alleges the discriminatory challenges are being made, the number of peremptory challenges exercised against blacks in this case does not show that the challenges were racially motivated and there was nothing in the conduct of the prosecuting attorney which shows he exercised the challenges in a racially discriminatory manner.

Am Jur 2d, Jury § 235.

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

2. Evidence and Witnesses § 2299 (NCI4th)— murder—psychiatrist's testimony—cross-examination—defendant's ability to appreciate criminality of conduct—objection sustained—no prejudicial error

There was no prejudicial error in a murder prosecution where the court sustained an objection to a defense attorney asking the State's psychiatrist on cross-examination whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. Evidence that a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is impaired has some tendency to prove he does not know the nature and quality of his acts or the difference between right and wrong in relation thereto. However, defendant was able to elicit substantial evidence of a similar nature and there was no reasonable possibility of a different result had the error not been committed.

Am Jur 2d, Expert and Opinion Evidence §§ 164, 176, 177, 190.

3. Criminal Law § 468 (NCI4th)— murder—insanity defense—closing argument—prosecutor's comment on defendant pleading not guilty—no prejudicial error

There was no prejudicial error in a murder prosecution where the prosecutor implied in his closing argument that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime. A criminal defendant may only plead not guilty, guilty or no contest, and may raise the defense of insanity if he pleads guilty by filing a pretrial motion that he intends to rely on that defense. However, despite the incorrect statement of law, there was no prejudice here because the prosecutor said that the State wanted to put on all of the evidence and, while the defendant contends that the prosecutor was allowed to argue that defendant's attorneys had misled the jury and were not to be trusted, the jury was not misled.

Am Jur 2d, Trial §§ 275 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing two consecutive sentences of life imprisonment entered by John, J., at the 16 September 1991 regular Criminal

Session of Superior Court, Guilford County, upon jury verdicts of guilty of two first degree murders. The defendant's motion to bypass the Court of Appeals as to additional judgments was allowed by the Supreme Court 18 August 1992. Heard in the Supreme Court 15 March 1993.

The defendant, a white male, was tried for his life for the first degree murders of two white females, Cara Lee Cross Bennett and Mary A. Strickland. He was found guilty on the two first degree murder charges. The jury did not reach a verdict at the sentencing phase of the trial and the defendant was sentenced to consecutive life sentences on the convictions of murder. The defendant was also tried and convicted of the following: first degree rape and sentenced to a consecutive term of life imprisonment; first degree sexual offense and sentenced to a consecutive term of life imprisonment; first degree kidnapping and sentenced to a consecutive term of forty years imprisonment; felony larceny and sentenced to a consecutive term of ten years imprisonment; felony possession of stolen property and sentenced to a consecutive term of ten years imprisonment; non-felonious larceny, non-felonious possession of stolen goods, felony breaking or entering and larceny, and was sentenced to a consecutive term of ten years imprisonment; felony possession of burglary tools and sentenced to a consecutive term of ten years imprisonment.

The evidence showed that the body of Cara Lee Cross Bennett was found in her apartment at approximately 6:00 p.m. on 5 April 1989. Her arms were tied to her legs. When the officers came to investigate the murder of Ms. Bennett, they found the body of Mary A. Strickland in an upstairs apartment in the same building. A piece of cable was wrapped around her neck and a knife was lodged in her side. There was substantial evidence that the defendant had killed both the victims and was guilty of the other crimes for which he was charged.

The defendant relied on insanity as a defense. The defendant appealed from the sentences imposed.

Michael F. Easley, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

Wallace C. Harrelson, Public Defender, Walter L. Jones, Assistant Public Defender, and W. David Lloyd for defendant-appellant.

WEBB, Justice.

[1] The defendant first contends there is reversible error because the State exercised its peremptory challenges to remove persons from the jury only because they were black. In *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986), the United States Supreme Court overruled *Swain v. Alabama*, 380 U.S. 202, 13 L. Ed. 2d 759, *rehearing denied*, 381 U.S. 921, 14 L. Ed. 2d 442 (1965), and held a defendant can make a *prima facie* case of purposeful discrimination in the selection of the petit jury on evidence concerning the prosecutor's exercise of peremptory challenges. The Court said:

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

Batson v. Kentucky, 476 U.S. 79, 96, 90 L. Ed. 2d 69, 87-88.

In *Powers v. Ohio*, --- U.S. ---, 113 L. Ed. 2d 411 (1991), the United States Supreme Court held that a defendant does not have to be a member of the race against whose members he alleges the discriminatory challenges are being made in order to claim prejudice because of the challenges. The defendant and the victims in this case were white. When a defendant has made a *prima facie* case of racial discrimination, the State must rebut it by showing racially neutral reasons for the exercise of peremptory challenges.

In this case, the court held that the defendant had not made a *prima facie* case that the State's peremptory challenges were racially discriminatory. The State was not required to make a showing that its peremptory challenges were racially neutral. The question posed by this assignment of error is whether the court was correct in this holding.

The first twelve prospective jurors placed in the box consisted of eight blacks and four whites. One black juror and two white

jurors were excused for cause. The State then exercised peremptory challenges to three black jurors and one white juror. This left five potential jurors, four of whom were black and one of whom was white. The next seven persons who were placed in the box consisted of four blacks and three whites. Two of the blacks and one white said they would not impose the death penalty and were excused for cause. One of the white jurors was excused for cause after she said she could not give the defendant a fair trial if he used insanity as a defense. The State then exercised a peremptory challenge to the two black potential jurors.

Six additional persons were then put in the box. Three of them were white, two were black and one was of Asian ancestry. One prospective black juror and one prospective white juror were excused for cause after they said they could not impose the death penalty. One prospective white juror was excused for cause after he said he could not give the defendant a fair trial. The Asian juror was excused for cause after she said she might not be able to understand the judge's charge because she was not fluent in the English language. One black prospective juror was challenged peremptorily by the State. The State passed one white juror.

Five more persons were then put in the box. All of them were white. The State passed on all five and tendered the jury to the defendant. At that point, the jury consisted of eight white persons and four black persons.

The court allowed the defendant's challenges for cause to one black prospective juror and one white prospective juror. The defendant then exercised peremptory challenges to five of the proposed jurors, including two of the four black jurors who had been passed by the State. This left four white jurors and one black juror.

The jury was then returned to the State and seven more prospective jurors were put in the box. Four of them were black and three were white. Three of the black jurors and two of the white jurors were excused for cause after being challenged by the State. This left seven jurors in the box, five of whom were white and two of whom were black.

Five additional prospective jurors were then put in the box of whom one was black and four were white. The black prospective juror and three of the white prospective jurors were challenged for cause by the State. These challenges were allowed.

Four prospective jurors were then put in the box of whom two were black and two were white. The two black jurors and one of the white prospective jurors were then excused for cause on motion of the State.

Three prospective jurors were then put in the box of whom two were white and one was black. One of the white jurors was excused for cause on motion of the State and the State exercised a peremptory challenge to the black prospective juror. Two prospective white jurors were put in the box and both were excused for cause.

Two white prospective jurors were then put in the box. One was excused for cause. The other was passed by the State. A white prospective juror was then put in the box and passed by the State.

The jury, then composed of ten white persons and two black persons, was returned to the defendant. The defendant challenged one white proposed juror for cause, which was allowed, and exercised peremptory challenges to three white jurors. He passed the remainder of the panel consisting of six white and two black persons.

The jury was returned to the State and four proposed jurors were put in the box. All of them were white. Two of the four were excused for cause and two persons were put in the box to replace them. One of these persons was white and one was black. Both of them were excused for cause and the State accepted the other two persons as jurors.

At this point, the jury was returned to the defendant to examine the two persons in the box who had not previously been examined by the defendant. The defendant exercised a peremptory challenge as to one of them and passed the other person. The jury was returned to the State.

Three potential jurors were put in the box one of whom was black and two of whom were white. The State exercised peremptory challenges to the black and one of the white persons. Two white persons were then put in the box. The State exercised a peremptory challenge to one of them. A white person was then put in the box and the State accepted him as a juror. The jury, which was then composed of ten white persons and two black persons was returned to the defendant. The court allowed the

defendant's challenge for cause to three white potential jurors and the jury was returned to the State.

Three white persons were put in the box. One of them was excused for cause and was replaced by a white person. This person was excused for cause and replaced by a black person. The State exercised a peremptory challenge to this person. Four more white persons were put consecutively in this seat and were excused for cause. A white person was then put in the seat and was accepted by the State. The jury was then passed to the defendant.

The defendant then exercised peremptory challenges as to two of the proposed white jurors and returned the jury to the State. The State accepted two proposed white jurors and returned the jury to the defendant. Both of them were excused for cause and the jury was returned to the State.

Two white jurors were placed in the box and one of them was excused for cause. His replacement, who was white, was excused for cause. Another white juror was put in the box and accepted by the State. The jury was then returned to the defendant. The defendant peremptorily challenged the two white jurors.

Two white jurors were put in the box and one was excused for cause. He was replaced by a white. The State accepted these two jurors and returned the jury to the defendant. The defendant then accepted the jury. The jury which decided defendant's case consisted of ten white persons and two black persons.

Four alternate jurors were seated. In the course of the selection process for alternate jurors, there were six white and three black veniremen who were not excused for cause. Of the six whites, the State peremptorily excused two and passed four. Of the three blacks, the State peremptorily challenged one and passed two. The defendant exercised peremptory challenges against one white and one black veniremen. Three white jurors and one black juror served as alternates. We have recounted the jury selection process in some detail in order to show the pattern of strikes by the State.

The defendant argues that the disparate treatment of the veniremen raises an inference that blacks were peremptorily challenged because of their race. He says the blacks that were accepted by the State were amenable to the prosecution and the blacks that were peremptorily challenged were of the "same levels of education, work experience and socio economic [sic] standing" as

the whites who were passed. He says a reading of the transcript shows that the questioning of some of the black veniremen who were excused was perfunctory. The defendant argues further that the number of black jurors accepted by the State should not be considered because their acceptance was cosmetic.

In a case in which one of the methods the defendant uses in an attempt to show discrimination is the pattern of strikes, we cannot ignore the number of black jurors accepted by the State. We believe it is particularly significant that of the first twelve veniremen submitted to the defendant, four were black. The number of blacks who sat on the jury was reduced to two because of challenges by the defendant. This does not show discrimination by the State.

There is no question the State exercised more peremptory challenges against blacks than against whites. Of the thirteen black jurors who were not challenged for cause, the State exercised peremptory challenges to nine or seventy percent. With the inclusion of the alternate jurors, there were sixteen blacks who were not challenged for cause. The State exercised peremptory challenges to ten or sixty-three percent of them. We cannot say that this alone shows the peremptory challenges were racially motivated. In *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987), the State peremptorily challenged three of the four or seventy-five percent of the black jurors who were not challenged for cause and we held this did not show discrimination. In *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *judgment vacated*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990), the State challenged ten of the seventeen black jurors tendered to it and we held this did not make a *prima facie* case of racial discrimination.

We do not believe there is anything in the conduct of the prosecuting attorney which shows he exercised peremptory challenges in a racially discriminatory manner. We have read the portion of the transcript which the defendant says shows the questions by the prosecuting attorney show a perfunctory examination of the jurors by the State before the peremptory challenges to the blacks were made. As we read the transcript, the prosecuting attorney conducted an evenhanded examination of the veniremen which was designed to elicit information as to whether the veniremen could give the State and the defendant a fair trial.

We also note that the defendant and the victims were white. After considering the above factors, we cannot hold that the superior court was in error in holding that the plaintiff did not make a *prima facie* case of racial discrimination in the selection of the jury. *State v. Smith*, 328 N.C. 99, 400 S.E.2d 712 (1991); *State v. Robbins*, 319 N.C. 465, 356 S.E.2d 279, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

[2] The defendant next assigns error to the sustaining of an objection to a question asked by the defendant's attorney on cross-examination. Two witnesses, who qualified as experts, testified for the defendant to the effect that he was insane at the time of the two killings. The State called as a witness Dr. James Groce, a psychiatrist who had treated the defendant at Dorothea Dix Hospital pursuant to a court order. Dr. Groce testified that in his opinion, the defendant at the time of the killings knew the nature and quality of his acts and the difference between right and wrong in relation thereto.

On cross-examination, the defendant's attorney asked Dr. Groce, "is it your opinion that at the time Mr. Beach committed these crimes, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired?" The court sustained an objection to this question. The record shows Dr. Groce would have answered in the affirmative if the objection had not been sustained.

It was error not to allow Dr. Groce to answer this question. N.C.G.S. § 8C-1, Rule 611(b) provides, "[a] witness may be cross-examined on any matter relevant to any issue in the case[.]" N.C.G.S. § 8C-1, Rule 401 says, " '[r]elevant 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." Evidence that a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is impaired has some tendency to prove he does not know the nature and quality of his acts or the difference between right and wrong in relation thereto, which is the definition of insanity. *State v. Evangelista*, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987).

The question then becomes whether this error was prejudicial. The defendant was able to introduce evidence through Dr. Groce's testimony on cross-examination that the defendant had a serious

mental illness for a substantial amount of time before the killings. Dr. Groce did not dispute the testimony of the defendant's expert witnesses that the defendant suffered from a major depression with psychotic features, and that at the time of the killings he was under the influence of a mental or emotional disturbance including a gender identity problem. The defendant was able to show through the cross-examination of Dr. Groce that the defendant may have thought he was killing his foster mother when he was killing each of the victims.

The excluded testimony that the defendant wanted to elicit from Dr. Groce was for the purpose of getting Dr. Groce to "admit that although he felt Mr. Beach could distinguish between right and wrong, that ability was still impaired due to his mental illness and that even though he knew the nature and quality of his acts, his capacity to appreciate their criminality was impaired." Although this relevant testimony was excluded, the defendant was able to elicit substantial evidence of a similar nature, as shown above, which tended to negate the defendant's capacity to understand the nature of his acts and the difference between right and wrong in relation thereto. We hold that there is not a reasonable possibility that, had the error not been committed in excluding this cumulative evidence, there would have been a different result. N.C.G.S. § 15A-1443(a) (1988). This was harmless error.

[3] The defendant next assigns error to the trial court's failure to sustain his objection to the prosecutor's argument that the defendant could have pled not guilty by reason of insanity.

During closing arguments, the district attorney argued as follows:

> Ladies and Gentlemen, let's talk about two seconds about how up front the defense lawyers are with you, and things like that, because one thing they said, "We wanted to let you know up front that we think he did it," but I contend to you, they could have done that by pleading not guilty by reason of insanity, and leaving out that not guilty plea, but didn't do that in this case—
>
> MR. LLOYD:—Well, OBJECTION, Your Honor.
>
> MR. KIMEL:—Invited argument.
>
> THE COURT:—OVERRULED. Go ahead.

> MR. KIMEL:—They pled not guilty, and they pled not guilty by reason of insanity, like the Judge told you, and since they pled not guilty, we had to, as we wanted to do in this case—we wanted to do in this case—we had to put on this physical evidence; we had to put on the statements; we had to put on all the things we found in those apartments, every single one of them that linked this defendant to this crime—every one of them—and we wanted to put on all that evidence because, I contend to you, under this evidence, he's guilty of two counts of first degree murder; he's guilty of kidnaping [sic]; he's guilty of rape; he's guilty of sexual offense; he's guilty of larceny. He's guilty of each and every one of these crimes under the evidence as we've put on.

The prosecuting attorney by this argument implied that the defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime. This is an incorrect statement of the law. A criminal defendant may only plead not guilty, guilty or no contest. N.C.G.S. § 15A-1011 (1988). If a defendant pleads not guilty he may raise the defense of insanity by filing a pretrial motion that he intends to rely on that defense. N.C.G.S. § 15A-959 (1988); *State v. Nelson*, 316 N.C. 350, 341 S.E.2d 561 (1986).

We must determine whether allowing this incorrect statement of the law was prejudicial error. We hold that it was not. We note first that the prosecuting attorney said that although the defendant's attorneys had forced him to put on a great deal of evidence "we wanted to put on all of that evidence" in order to show that the defendant had committed several crimes. The jury should not have felt it had an extra burden because of any action by the defendant's attorneys.

The defendant contends that the prosecutor was allowed to argue that the defendant's attorneys had misled the jury and were not to be trusted. We do not believe the jury inferred so serious an accusation from the prosecutor's argument. The jury knew from the trial tactics of the defendant's attorneys that the defendant did not contest the fact that he killed the two women. We do not believe the jury was misled by this argument of the prosecuting attorney. The prosecutor's argument did not go to the truth or falsity of any evidence in the case. We cannot hold there is a reasonable possibility that had this argument not been made there

would have been a different result in the trial. *State v. Covington*, 290 N.C. 313, 226 S.E.2d 629 (1976). This assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. CALVIN CHRISTMAS CUNNINGHAM

No. 232A91

(Filed 4 June 1993)

1. **Jury § 191 (NCI4th)— denial of challenge for cause—preservation of assignment of error**

Defendant satisfied the mandates of N.C.G.S. § 15A-1214(h) in order to preserve an assignment of error from a denial of a challenge for cause by (1) exhausting his peremptory challenges, (2) renewing his challenge for cause of the juror, and (3) having that renewed challenge denied by the trial court.

Am Jur 2d, Jury § 218.

2. **Jury § 201 (NCI4th)— presumption of innocence—confusion or reluctance by prospective juror—erroneous denial of challenge for cause**

The trial court in a first-degree murder prosecution erred in the denial of defendant's challenge for cause to a juror whose *voir dire* colloquy demonstrated confusion about, or a fundamental misunderstanding of, the principles of the presumption of innocence or a simple reluctance to apply those principles should the defense fail to present evidence of defendant's innocence. Although the juror ultimately stated, after a great deal of explanation from the trial court, that she understood that defendant was not required to prove his innocence, her subsequent comment that "if [defendant] doesn't want to prove his innocence, I would have to accept that" was at best ambiguous and was insufficient to abrogate her earlier assertions that she would expect defendant to prove his innocence. N.C.G.S. § 15A-1212(8) and (9).

Am Jur 2d, Jury §§ 294, 301.

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing the sentence of death entered by Fulton, J., at the 3 May 1991 Criminal Session of the Superior Court, Mecklenburg County. Heard in the Supreme Court on 17 February 1993.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, Linda M. Fox, Assistant Attorney General, and Robert T. Hargett, Assistant Attorney General, for the State.

Thomas F. Loflin III for defendant-appellant.

EXUM, Chief Justice.

Defendant Calvin Christmas Cunningham was capitally tried for the first-degree murder of Charlotte Police Officer Terry Lyles. The evidence tended to show that on 5 August 1990 defendant, while seated in the rear of Officer Lyles' police cruiser, shot Officer Lyles in the head. Prior to the shooting, defendant had been in custody following his arrest for communicating threats to police officers during a domestic disturbance. The jury found defendant guilty as charged and recommended that the death penalty be imposed. Judgment was then entered, and defendant was sentenced to death.

Defendant Cunningham has preserved one hundred twenty-two assignments of error, and briefed fifty-seven of those issues. Because we find error which prejudiced defendant during the jury selection phase of his trial, we need only discuss defendant's twenty-fourth assignment. In this assignment, defendant contends that the trial court improperly denied his motion to remove for cause two jurors, Carnes and Schormak, thereby violating his right to a fair and impartial jury, as guaranteed by North Carolina law and the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Because we find prejudicial error requiring a new trial with regard to the denial of defendant's challenge of juror Carnes for cause, we decline to address the *voir dire* of juror Schormak.

Defendant contends that, during *voir dire*, juror Carnes stated that she believed defendant would need to prove his innocence to avoid conviction on the charge of first-degree murder. By harboring such a misunderstanding of defendant's presumption of innocence,

defendant alleges that juror Carnes was "unable to render a fair and impartial verdict," as required by N.C.G.S. § 15A-1212. Therefore, defendant must be given a new trial.

N.C.G.S. § 15A-1212, entitled "Grounds for challenge for cause," provides in pertinent part:

> A challenge for cause to an individual juror may be made by any party on the ground that the juror:
>
> . . . .
>
> (8) As a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.
>
> (9) For any other cause is unable to render a fair and impartial verdict.

N.C.G.S. § 15A-1212(8) codifies the rule of the United States Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987).

[1] In order to preserve an assignment of error from a denial of a challenge for cause, defendant must follow the procedures set out in N.C.G.S. § 15A-1214(h). Having thoroughly reviewed the transcript of the jury selection phase, we find that defendant has satisfied the mandates of § 15A-1214(h) by (1) exhausting his peremptory challenges, (2) renewing his challenge for cause as to juror Carnes, and (3) having that renewed challenge denied by the trial court. Should we find any error in the denial of defendant's challenge to Ms. Carnes for cause, defendant's conviction must be reversed and the case remanded for a new trial. *State v. Leonard*, 296 N.C. 58, 248 S.E.2d 853 (1978).

[2] Defendant's contention that Ms. Carnes was "unable to render a verdict in accordance with North Carolina law," N.C.G.S. § 15A-1212(8) (1988), or that she was "unable to render a fair and impartial verdict," N.C.G.S. § 15A-1212(9) (1988), requires that we review the entire, albeit lengthy, transcript of her *voir dire* testimony regarding defendant's right to be presumed innocent until proven guilty *by the State*. During the course of juror Carnes' *voir dire* testimony, the following conversation took place between Ms. Carnes and Mr. Murphy, counsel for defendant:

Q. Do you understand, Ms. Carnes, that we have at law what is called the presumption of innocence, that is, a person who is charged with a criminal offense is presumed to be innocent until and unless the State can prove that person's guilt beyond a reasonable doubt?

A. Yes, sir.

Q. You understand that, don't you?

A. Yes, sir, I do.

Q. And, of course, you understand that the charge in this particular case is first-degree murder. It involves the shooting of a police officer. Do you understand that?

A. Yes, I do.

Q. And one of the things that you will be called upon to do is to apply the principles that we were talking about to this particular case if you sit as a juror.

A. Yes, I do.

Q. Now, it is one thing, of course, to say that you can do something and it may be entirely different.

A. Yes.

Q. That is, that you actually be able to do that, and that is really what I want you to search yourself about. I want you to think about that. You seem to be one who holds your opinion strong, and that's fine. Given that you have such a strong feeling about the death penalty in your statement that if a person takes another life, they should be put to death, given that Mr. Cunningham is charged with first-degree murder, as you sit there today, can you honestly say to yourself, not to me necessarily but to yourself, that you are able to presume Mr. Cunningham innocent?

A. Until he is proven guilty.

Q. Do you expect that to happen?

MR. WOLFE [the prosecutor]: Object.

THE COURT: Sustained.

A. I don't know.

THE COURT: Don't answer the question when I sustain it.

Q. I understand that if he is proven guilty of first-degree murder, then that would remove the presumption of innocence, but that is really not what I am asking you. Okay? What I am really asking you at this point is can you honestly, as he sits there right now, and as you sit in that seat right now, and nobody knows this any better than you, I'm just asking, can you honestly presume him to be innocent?

A. Yes, because I don't know what happened.

Q. Now, part and parcel of the principle of the presumption of innocence is the defendant's right not to testify, not to present any evidence if he doesn't want to, because he doesn't have that burden. The State has the entire burden of proof in a criminal case to satisfy you beyond a reasonable doubt of a person's guilt, if they can do that. Okay? Now, would it present a problem for you in returning a verdict of not guilty if the State fails to prove to you beyond a reasonable doubt the defendant's guilt and Mr. Cunningham didn't testify?

A. I'm not sure I follow that.

Q. Okay. If Mr. Cunningham doesn't testify in this case, in your mind does that make the State's job any more difficult or easier?

A. I would think it would be more difficult.

Q. If he does not testify?

A. Yes, because they have to prove him innocent or guilty. I would think that he would have to testify, or need to.

Q. Okay. You understand that the State only has to prove guilt. They don't have to prove innocence.

A. Yes.

Q. And is it your expectation or is it your thinking now that we would have to prove that Mr. Cunningham is innocent?

A. Do I think you would have to prove it?

Q. Yes.

A. Yes, I thought that is what you would be trying to do.

Q. Trying to prove that he's innocent?

A. Yes.

Q. Do you understand that the burden of proof is on the State?

A. Yes.

Q. Not us?

A. Yes.

Q. You would still expect him, or us, to prove Mr. Cunningham is innocent. Correct?

A. Yes.

MR. WOLFE: I would ask for a clarification on the law on that, your Honor.

THE COURT: Ms. Carnes—

A. He's getting me very confused.

THE COURT: Okay. Let me explain to you. I think I told you that Mr. Cunningham has entered a plea of not guilty.

A. Yes.

THE COURT: And under the law of North Carolina, the fact that he has been charged with a crime is not evidence of his guilt. He is not required to prove his innocence; he is presumed to be innocent.

A. Okay.

THE COURT: The State of North Carolina has the burden of proof, and that burden is to prove each element of the offense of which he is charged beyond a reasonable doubt. Now, the law also says that Mr. Cunningham does not have to testify in his own behalf. He doesn't have to call any witnesses or present any other form of evidence, and that you cannot hold that against him. Do you understand that?

A. Yes, ma'am.

THE COURT: Can you follow that law?

A. Yes, ma'am.

THE COURT: Mr. Murphy?

Q. All right. Now, that's what I'm asking you, Ms. Carnes. The judge told you what the law is, and I think the district attorney also said the same thing to you. I thought I had explained that. I thought I said that. Now, the question is your ability to follow that law.

A. Yes.

Q. And that's what I'm asking you. That given your understanding at this point—and I trust that that is clear—is it your feeling that Mr.—we at this table would have to prove to you that Mr. Cunningham is innocent of this offense?

A. Yes.

MR. MURPHY: We offer her for cause.

MR. WOLFE: Object, Your Honor.

THE COURT: Did you understand the explanation?

A. Yes, ma'am.

THE COURT: And in light of my explanation that he is presumed to be innocent and is not required to prove his innocence, you would still require him to testify or to prove his innocence?

A. Right now he is innocent, or he is innocent until proven guilty. I understand that. But you are saying I need to—I'm sorry, I'm not sure.

THE COURT: You need to slow down just a little bit.

A. He is innocent until proven guilty. I understand that, until he is proven guilty, before we can say he is guilty. That, I understand.

THE COURT: Which part is it that you don't understand?

A. Well, I thought I understood everything.

THE COURT: Well, I told you that he is not required to prove his innocence.

A. Then I guess that means his attorney will have to prove that he is not guilty? He doesn't have to prove his innocence then—is that what you're saying—since he's innocent until proven guilty?

THE COURT: Let me start over. I told you that the fact that he has been charged with an offense is not evidence of his guilt. You can't consider it as evidence of his guilt. I told you also that he is presumed to be innocent and is not required to prove his innocence. The State of North Carolina, represented by Mr. Wolfe and Ms. Brown, has the burden of proof. That burden is to prove each element of the offense with which Mr. Cunningham is charged beyond a reasonable doubt. The State has to carry that burden of proof and convince all twelve jurors beyond a reasonable doubt of each element of the offense before the jury may return a verdict of guilty. Mr. Cunningham is presumed to be innocent, and that presumption stays with him throughout the course of the trial unless the jury finds after they go into the jury room to deliberate that the State has carried its burden of proof. The law also says that Mr. Cunningham does not have to testify. He does not have to call any witnesses on his behalf or present any evidence. He is not required to prove his innocence. And that you, as a juror, cannot hold that against him. Do you understand that?

A. Yes.

THE COURT: Were you confused?

A. Yes.

THE COURT: I'm going to deny the challenge for cause at this point.

Q. Okay. Ms. Carnes, it is not my purpose to try to confuse you. That's why I want you to stop me when we go along. If you don't understand anything that I have said, or if you need further clarification, stop me and we will ask the judge to do that because we don't want a confused juror. We want a juror who is clear with what they have to do. Okay?

A. Okay.

Q. Now, I do, however, want to pursue that with you just a little bit because I want to know how you feel about the matter and not just telling me things because you think that's what I want to hear. Okay? Because it's not what I want to hear; it's how you honestly feel about things. And what I want you to tell me is that if you would require the defendant to prove his innocence to you.

A. No.

Q. You would be satisfied then just to hear from the State and rely, if necessary, just on what the State presents to you on the guilt or innocence phase before you would return a verdict. Is that correct?

MR. WOLFE: Object.

MR. MURPHY: Well, the State has the burden.

MR. WOLFE: That is an improper statement of the law.

THE COURT: Sustained as to form.

Q. I will rephrase the question. Can you require the State to prove to you, if they can, Mr. Cunningham's guilt beyond a reasonable doubt?

A. Well, if I understand what they are saying, they have to prove he is guilty and not require his innocence to be proven. He doesn't have to prove his innocence, I guess, is what I'm trying to say.

Q. And would you accept that? I mean—

A. Yes, if he doesn't want to prove his innocence, I would have to accept that.

Q. Okay.

MR. WOLFE: May we approach the bench just a minute, Your Honor?

THE CORUT [sic]: Yes.

(Conference at the Bench)

Q. I guess I'm a little bit confused myself at this point, Ms. Carnes. Let's see if we can understand each other. Okay? You had indicated something to the effect that if we didn't want to prove his innocence, that you would accept what the State offered?

A. I understand that he is innocent right now until proven guilty. So if they prove him guilty, I would accept the fact that he is guilty, if they prove him to be guilty.

Q. Okay. I guess I didn't understand what you meant when you said if we didn't want to prove his innocence.

A. And then I said until they prove him guilty. When they prove him guilty, then he is guilty, when they prove he is guilty.

Q. Okay. When you say when they prove him guilty, what do you mean?

A. When they prove that he did it, when they come up with all of the evidence that he did it.

Q. I suppose I'm having some problems with that. It sounds like you expect them to do that.

MR. WOLFE: Object.

A. No, I don't. I said—

THE COURT: Sustained.

A. Well, I should have said if they do.

THE COURT: Ms. Carnes, let me say when there is an objection, you need to stop talking.

It is important to note here that the repeated explanations outlined above of our law on the presumption of innocence followed two, separate explanations of the same subject by the trial judge and the prosecutor during their *voir dire* of juror Carnes.

The transcript reveals that after the above testimony, counsel for defendant pursued a different, and unrelated, line of questioning. Neither the trial court nor counsel for defendant returned to the subject of whether Ms. Carnes would require that defendant prove his innocence or whether Ms. Carnes still believed that defendant's failure to testify would potentially compromise his presumption of innocence. Following questioning by Mr. Murphy, defendant exercised one of his fourteen peremptory challenges, and Ms. Carnes was excused. As previously noted, defendant exhausted his peremptory challenges, and renewed his challenge for cause to Ms. Carnes. Counsel for defendant informed the trial court that, if his challenge for cause was allowed and defendant received an additional peremptory challenge, he would excuse juror Schormak who did in fact serve on the jury which convicted defendant.

We have oft stated that the granting of a challenge for cause rests in the sound discretion of the trial court. *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991); *State v. Watson*, 281 N.C.

221, 227, 188 S.E.2d 289, 293, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972). As a rule, we will therefore not disturb the trial court's ruling on a challenge for cause absent a showing of an abuse of that discretion. "Nevertheless, in a case . . . in which a juror's answers show that he could not follow the law as given . . . by the judge in his instructions to the jury, it is error not to excuse such a juror." *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240.

We find that the opinion of this Court in *Hightower* controls the outcome of the case *sub judice*. In *Hightower*, we found error in the denial of a challenge for cause to a juror who said on *voir dire* that defendant's failure to testify during his trial for first-degree murder would "stick in the back of my mind." *Id.* Although the *Hightower* juror ultimately acknowledged that he would "try to follow the law" despite this feeling, we concluded that the trial court erred in failing to grant the defendant's challenge for cause. Writing for the *Hightower* majority, Justice Webb stated: "We can only conclude from the questioning of this juror that he would try to be fair to the defendant but might have trouble doing so if the defendant did not testify." *Id.* Because the defendant's challenge for cause should have been allowed under both sections (8) and (9) of N.C.G.S. § 15A-1212, the Court reversed the defendant's conviction and remanded for a new trial.

In the case *sub judice*, juror Carnes' *voir dire* colloquy demonstrates either confusion about, or a fundamental misunderstanding of, the principles of the presumption of innocence or a simple reluctance to apply those principles should the defense fail to present evidence of defendant's innocence. Whether Ms. Carnes' reluctance to give defendant the benefit of the presumption of innocence was caused by confusion regarding the law, a misunderstanding of the law or a reluctance to apply the law as instructed, its effect on her ability to give defendant a fair trial remained the same.

After a great deal of explanation from the trial court, juror Carnes ultimately stated that she understood that defendant was not required to prove his innocence. We cannot, however, overlook her subsequent comment that "if [defendant] doesn't want to prove his innocence, I would have to accept that." While in some circumstances this would be a satisfactory response, we believe that, in the context of the entire *voir dire* on this topic, the comment

is at best ambiguous. Furthermore, and again taken in context, the statement is not sufficient to abrogate Ms. Carnes' earlier assertions that she would expect defendant to prove his innocence. It was, therefore, error for the trial court to deny defendant's challenge for cause.

We are cognizant of certain factual similarities between this case and *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991). In *McKinnon*, we found no error in the trial court's denial of the defendant's challenge for cause to a juror who expressed some confusion as to the defendant's presumption of innocence, and gave ambiguous answers to questions about whether she would hold the State to its burden of proof. *Id.* at 677, 403 S.E.2d at 479. Her *voir dire* testimony included a comment that she would require defendant to present evidence in his defense. *Id.*

McKinnon, however, is distinguishable from the present case because the juror there "ultimately agreed *three times* that if the State did not meet its burden of proof she could find defendant not guilty even though he presented no witnesses in his behalf." *Id.* (emphasis added). In *McKinnon*, the following final exchange between the juror and defense counsel was dispositive:

> [Q.] You wouldn't have that in the back of your mind the fact that he didn't testify or call any witnesses?
>
> [A.] No, sir.
>
> [Q.] That wouldn't be of any concern? If it would, just tell us.
>
> [A.] No, sir, not if the State couldn't prove it.
>
> [Q.] Okay. And that's irregardless [sic] of whether he testifies or puts on any evidence?
>
> [A.] Yes, sir.

Id. at 677, 403 S.E.2d at 479. It is clear from this unequivocal exchange that any doubt or confusion in the juror's mind as to the State's burden and the defendant's presumption of innocence was dissipated to the extent that she could give the defendant there a fair trial and render an impartial verdict.

That is not the case here. We cannot point to any exchange between juror Carnes and either the trial court or defense counsel which satisfies us that Ms. Carnes' confusion about or misunderstanding of or reluctance to apply the law, whichever it was, on

such a fundamental concept as defendant's presumption of innocence was resolved as required by N.C.G.S. § 15A-1212.

We therefore find error requiring a

NEW TRIAL.

STATE OF NORTH CAROLINA v. LARRY NOBLE DANIEL

No. 136A92

(Filed 4 June 1993)

1. Evidence and Witnesses § 2302 (NCI4th)— murder and assault—expert testimony—alcoholism—ability to plan—admissible

There was prejudicial error in a prosecution for murder and assault with a deadly weapon with intent to kill inflicting serious injury in the exclusion of testimony from defendant's expert in psychiatry and addiction that defendant suffered from both chronic and acute alcohol dependence; that defendant suffered from severe nervous system impairment, including significant brain atrophy; that defendant's ability to plan, think, or reflect was impaired; and that he was unable to form the specific intent to kill at the time of the shootings. Such testimony was relevant to whether defendant had premeditated and deliberated and to whether he intended to kill when he shot and wounded the assault victim and is not rendered inadmissible on the basis that it embraces ultimate issues to be decided by the jury. The term "specific intent to kill" is not a precise legal term with a definition which is not readily apparent and it has been held that a medical expert may properly be allowed to testify to his or her opinion that a defendant could not form the specific intent to kill. Finally, the exclusion of this evidence was prejudicial because the issue of defendant's state of mind constituted his only defense and the exclusion substantially reduced his ability to defend himself against the charges.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362, 363.

Admissibility of expert testimony as to whether accused had specific intent necessary for conviction. 16 ALR4th 666.

2. Evidence and Witnesses § 90 (NCI4th)— murder and assault—recorded telephone conversation with sheriff—probative value outweighs prejudice

The trial court did not err in a prosecution for murder and assault with a deadly weapon with intent to kill inflicting serious injury by permitting the jury to listen to an audio tape recording of defendant's telephone conversation with the sheriff and to read transcripts of that recorded conversation. Although defendant contended that playing the tape created the danger of unfair prejudice, potential confusion of issues, and needless presentation of cumulative evidence, the recording was extremely probative in that defendant discussed problems he had had with his stepson, one of the victims, admitted shooting his stepson and "the other fellow," stated that he told the other victim that he would shoot him if officers came and did in fact shoot that victim because officers had been called, and stated that he should have "gotten" his stepson and that he hoped his stepson would die. This evidence was probative of defendant's mental state at the time of the shootings and, although it prejudiced defendant, it was not unfairly prejudicial. Evidence is unfairly prejudicial only if it unduly tends to suggest a decision on an improper basis.

Am Jur 2d, Evidence § 260.

Appeal of right by the defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Stephens, J., at the 7 October 1991 Criminal Session of Superior Court, Orange County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 15 February 1993.

Michael F. Easley, Attorney General, by Clarence J. DelForge, Assistant Attorney General, for the State.

James E. Williams, Jr., Public Defender, by M. Patricia DeVine, Assistant Public Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Larry Noble Daniel, was indicted on 10 September 1990 on charges of murder and assault with a deadly

weapon with intent to kill inflicting serious injury. He was tried capitally at the 7 October 1991 Criminal Session of Superior Court, Orange County. The jury returned verdicts of guilty of first-degree murder and of assault with a deadly weapon with intent to kill. During a capital sentencing proceeding, the jury was unable to unanimously agree as to its sentence recommendation for the murder conviction. The trial court imposed a sentence of life imprisonment for the murder conviction and a consecutive ten-year sentence for the assault with a deadly weapon with intent to kill conviction.

The defendant appealed the first-degree murder conviction and resulting life sentence to this Court as a matter of right. On 17 June 1992, this Court allowed the defendant's motion to bypass the Court of Appeals on his appeal from the judgment imposing a sentence of ten years' imprisonment for assault with a deadly weapon with intent to kill.

The State presented evidence at the defendant's trial which tended to show the following. Stanley Horner is the defendant's thirty-six-year-old stepson. On 30 July 1990, Horner was living in the Orange County home of Tillie Daniel, Horner's mother and the defendant's estranged wife.

Horner testified that, on the morning of 30 July 1990, he took his mother to work. He then drove with Alton Florence to look at two house siding jobs that they were working on together. After taking measurements at the job sites, the two men went to Tillie Daniel's house at about 11:00 a.m. to plan the jobs. They were standing on the back porch when Horner heard the sound of a shell being chambered in a pump-action shotgun. He turned to look and saw the defendant standing between twelve and sixteen feet away, pointing a shotgun at him. Horner said to Florence, "Run like hell, we're going to get shot." As soon as he had spoken the words, Horner was shot in the back and was propelled by the shot into the house. He ran through the house, out the front door, and across the front yard. When he reached the dirt road in front of the house, he was shot again, and he fell. When he got back up and continued to run, he was shot a third time. Horner then saw the defendant go back toward the house. Horner was able to drag himself to the nearby home of the Wilsons, his aunt and uncle, where he telephoned 911 for help. He told the dispatcher that Larry Daniel had shot him. While he was talking to the 911 dispatcher, Horner heard four more gunshots.

Deputy Sheriff Joe Griffin of the Orange County Sheriff's Department testified that he responded to the call from the 911 dispatcher at 12:20 p.m. and arrived at the scene in about six minutes. When he pulled up in the driveway of the Wilsons' house, he saw two white males standing in the driveway across the road. Griffin went into the house and found Horner sitting on the floor and talking to the 911 dispatcher on the telephone. As Horner identified himself and stated that the defendant had shot him, Griffin heard what sounded like a shotgun blast outside. He called for assistance and then positioned himself outside. He saw no one else for approximately ten minutes while he waited for additional officers to arrive; the two men he had seen standing in the driveway earlier had disappeared.

When more officers arrived, the defendant's name was called over a loudspeaker, but he did not appear. As deputies began to approach the Daniel residence, Investigator Alexander "Skip" Wade of the Orange County Sheriff's Department discovered the body of Alton Florence lying face down to the left of the driveway, near the location where Griffin earlier had seen the two men standing. A pathologist later determined that Florence was killed by a shotgun blast to the chest.

Joretta Hayes testified that she received a telephone call from the defendant on 31 July 1990. The defendant asked to speak to Jim Mask. When Hayes told the defendant that Mask was not in, the defendant told her to tell Mask that he could not come in because the Sheriff's Department was looking for him. He told Hayes that he "blew somebody's ass off yesterday" and that his "stepkid" had caused it all. The defendant said that he could not come in because officers would shoot him on sight, and he did not want to go back to jail because he would "get the chair." He then told Hayes that he was going to the "lower part of Georgia."

Orange County Sheriff Lindy Pendergrass testified that the defendant called him on 31 July 1990 at around 3:00 p.m. Their telephone conversation was taped and later was transcribed. The jury was allowed to listen to the tape and to follow along with individual copies of the five-page transcript. During the conversation, the defendant admitted shooting the victims and stated that he hoped Horner would die.

Law enforcement officers located the defendant at a residence in Graham on 31 July 1990. On the way back to Hillsborough,

the defendant talked to Investigator Don Tripp and Investigator Jimmy Earp of the Orange County Sheriff's Department about what had happened. Neither officer questioned the defendant. The defendant told the officers that a man named Alvin had taken him to the Daniel house and had let him out. The defendant was behind the barn when Horner and Florence drove up. He stepped out from behind the barn and told them that he "had something for them." He then shot Alton Florence. Horner began to run toward the road, and he shot Horner. The defendant stated that he shot Florence again and killed him because Horner called the police. Before he killed Florence, he told Florence that "if the law came, he was going to blow his ass away." The defendant told the officers that when he saw the patrol car pull up, he shot Florence. The defendant stated that he was tired of what had been going on for the last few years and that he had been ordered off his property. The defendant smelled of alcohol when he made these statements to the officers, but he did not appear to be intoxicated.

The only witness called by the defendant was Thomas Brown, M.D., whom the defendant called as an expert in the areas of psychiatry and addiction medicine. Dr. Brown was found qualified by the trial court as an expert in these areas. Dr. Brown testified that he first examined the defendant in October of 1990. He also reviewed the defendant's medical records, which contained information extending as far back as 1978. Seven to nine of the sets of medical records dealt with diagnoses of the defendant's alcoholism, his need for detoxification, and attempts to treat him for alcoholism. Following the prosecutor's objection to testimony by Dr. Brown regarding the defendant's mental condition, the trial court conducted a *voir dire* hearing, after which the court sustained the prosecutor's objection.

[1] The defendant contends by his first assignment of error that the trial court erred in sustaining the State's objection to the expert testimony proffered by the defendant concerning the defendant's mental condition at the time of the shootings in question here. We agree.

During the direct examination of Dr. Brown, the defendant's counsel asked, "Based upon your examination of Mr. Daniels and your review of his medical record, do you have an opinion as to his mental condition on July 30, 1990?" The trial court sustained

the prosecutor's objection to this question. Defendant's counsel next asked, "Did you reach an opinion as to Mr. Daniel's mental condition based on your review of the records, your examination of Mr. Daniels?" Upon the prosecutor's objection to this question, the trial court ordered the jury to leave the courtroom and held a *voir dire* hearing outside the presence of the jury. During *voir dire*, Dr. Brown testified that, in his opinion, the defendant suffered from "both chronic and acute alcohol dependence." Dr. Brown testified that alcoholism is a disease recognized by the medical profession and that the disease of alcoholism is accompanied by a loss of nerve tissue and impaired functioning of nerve tissue, the effects of which are exacerbated by acute ingestion of alcohol.

Dr. Brown testified that his diagnosis of the defendant as suffering from chronic and acute alcohol dependence was based in part on his examination of the defendant's medical records, which showed a consumption of alcohol ranging from a fifth to a half-gallon of spirits per day since 1978. Dr. Brown testified that his diagnosis was further supported by the defendant's own description of his drinking pattern and by Brown's examination of the defendant in October 1990, at which time the defendant had been sober for nearly three months, yet still exhibited "severe abnormalities . . . consistent with an organic—meaning chemical or physical—impairment of brain functioning." Dr. Brown testified that the defendant suffered from nervous system impairment so severe that he was hospitalized after he was taken into custody. During the hospitalization, a CAT scan was performed which showed "significant brain atrophy, atrophy being the wasting away of the actual brain substance itself."

Dr. Brown further testified that he had interviewed the defendant regarding the events of 30 July 1990 and had concluded that the defendant's mental functioning on that date was typical of someone with a long-term and acute history of alcohol use. When asked how the defendant's illness affected his ability to make and carry out plans, Dr. Brown responded that

> [t]he ability to plan is in the area of higher mental function that I mentioned to you before, the higher ones being most severely impaired by chronic and acute alcohol ingestion. Planning involves the ability to picture oneself in the future, the ability to envision consequences of one's actions and envision all of those consequences in their complexity. The ability to

> think about moral values. . . . So my sense of his ability to plan is that it would be very severely impaired, the way we use the term, the way we talk about it, meaning something with some complexity and some thought to it.

In Dr. Brown's opinion, "Mr. Daniel was a fellow at the time that this shooting occurred where there was really substantial impairment of capacity to plan, to think or reflect." Dr. Brown also stated that, in his opinion, the defendant was unable to form the specific intent to kill at the time of the shootings.

The trial court sustained the State's objection to Dr. Brown's testimony, stating that "I am satisfied at this juncture of the proceeding, based upon the evidence that is before me, to allow this testimony as I have just heard it to be an extension of existing law. And the evidence would not be admissible under present law." We disagree with the trial court's conclusion.

Pursuant to Rule 402 of the North Carolina Rules of Evidence, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). To convict this defendant of first-degree murder, the State was required to prove beyond a reasonable doubt that the defendant killed the victim after premeditation and deliberation. *State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992); N.C.G.S. § 14-17 (Supp. 1992). Deliberation requires " '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.' " *Keel*, 333 N.C. at 58, 423 S.E.2d at 462 (quoting *State v. Jackson*, 317 N.C. 1, 23, 343 S.E.2d 814, 827 (1986), *cert. granted and judgment vacated on other grounds*, 479 U.S. 1077, 94 L. Ed. 2d 133 (1987)). Testimony of Dr. Brown, a psychiatric expert, that in his opinion the defendant was suffering from organic brain impairment, that the defendant's capacity to plan, think or reflect was impaired at the time of the shootings, and that the defendant was incapable of forming the specific intent to kill at the time of the shootings was evidence tending to show

that the defendant acted without premeditation or deliberation when he killed Florence and that he was incapable of forming the specific intent to kill when he shot Horner. *See State v. Shank*, 322 N.C. 243, 248, 367 S.E.2d 639, 643 (1988). Therefore, such testimony was relevant in the defendant's trial for first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury.

Rule 702 of the North Carolina Rules of Evidence provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702 (1992). Expert testimony that, as a result of his chronic alcohol abuse, the defendant suffered from organic impairment of brain functioning and from a loss of brain tissue which impaired his ability to think, plan, or reflect could assist the jury in determining a fact at issue—whether the defendant had premeditated and deliberated. *See Shank*, 322 N.C. at 248, 367 S.E.2d at 643. Dr. Brown's testimony that, in his expert opinion, the defendant lacked the capacity to form the specific intent to kill at the time of the shooting also could help the jury determine whether the defendant had premeditated and deliberated before killing Florence. *See State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). Likewise, the tendered testimony of Dr. Brown that the defendant was unable to form a specific intent to kill at the time of the shootings in question here could assist the jury in determining whether the defendant intended to kill Horner when he shot and wounded him. A specific intent to kill is an essential element of assault with a deadly weapon with intent to kill inflicting serious injury. N.C.G.S. § 14-32(a) (1986); *see State v. Meadows*, 272 N.C. 327, 331, 158 S.E.2d 638, 640-41 (1968). Such expert opinion testimony is not rendered inadmissible on the basis that it embraces the issues of premeditation and deliberation and specific intent to kill, which are ultimate issues to be determined by the jury. N.C.G.S. § 8C-1, Rule 704 (1992); *Shank*, 322 N.C. at 249, 367 S.E.2d at 643. The State argues that the testimony of Dr. Brown that the defendant was incapable of forming a specific intent to kill was inadmissible, nevertheless, because it was testimony that a precise legal standard had been met. It is true that we have held that testimony by medical experts relating to precise legal terms such as "premeditation" or "deliberation," definitions

of which are not readily apparent to such medical experts, should be excluded. *State v. Weeks*, 322 N.C. 152, 166-67, 367 S.E.2d 895, 902-903 (1988). However, the term "specific intent to kill" is not one of those precise legal terms with a definition which is not readily apparent. Consequently, we have concluded previously that a medical expert may properly be allowed to testify to his or her opinion that a defendant could not form the specific intent to kill. *Rose*, 323 N.C. at 458, 373 S.E.2d at 428. The State's argument in this regard is, therefore, unpersuasive. Furthermore, the probative value of the expert's testimony was not substantially outweighed by any danger of confusing the issues, misleading the jury, or wasting time; therefore, this testimony was not excludable under Rule 403. N.C.G.S. § 8C-1, Rule 403 (1992); *see Shank*, 322 N.C. at 248-49, 367 S.E.2d at 643.

Because the excluded testimony of the psychiatric expert was relevant and was not rendered inadmissible by any of the North Carolina Rules of Evidence or by any other statutory or constitutional provision, the trial court erred in sustaining the prosecutor's objection to this testimony. The issue of the defendant's state of mind comprised his only defense, and the exclusion of this evidence substantially reduced his ability to defend himself against the charges of first-degree murder and assault with a deadly weapon with intent to kill. Although there was evidence that the defendant disliked Stanley Horner and that the defendant shot Alton Florence, the murder victim, after telling him he would "blow him away" if "the law came," such evidence would not preclude a reasonable jury's finding that the defendant lacked the capacity either to form a specific intent to kill or to premeditate and deliberate. Without determining whether the error committed by the trial court in the present case constitutes a violation of the defendant's rights under the Constitution of the United States, we conclude that the trial court's error in excluding expert testimony concerning the defendant's mental capacity was prejudicial. Even if the error does not rise to the level of a violation of the defendant's rights under the Constitution of the United States, the defendant was prejudiced, because there is a reasonable possibility that, absent the error, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Thus, without question, the error is prejudicial under the harmless error standard to be applied to violations of the defendant's rights under the Constitution of the United States; the error is not harmless beyond a reasonable doubt. N.C.G.S.

§ 15A-1443(b). Therefore, the defendant must receive a new trial on both the murder and assault charges.

[2] The defendant contends in his second assignment of error that the trial court erred by permitting the jury to listen to an audio tape recording of the defendant's telephone conversation with Orange County Sheriff Lindy Pendergrass and to read transcripts of that recorded conversation. We address this issue here because it is likely to arise again at the defendant's new trial.

The telephone conversation at issue occurred on 31 July 1990, the day after the shootings. The defendant called Sheriff Pendergrass. Another law enforcement officer tape-recorded most of the conversation, and a written transcript of the recording was made. The tape recording and copies of the transcript were admitted into evidence at trial, and the tape recording was played for the jury. The defendant's counsel objected to the playing of the tape because it included an exchange between the defendant and the Sheriff regarding whether anyone in Orange County had ever been executed and also included the defendant's statement during the conversation that "I know damn well when your deputies come after me, I know it's going to be me or them."

After reviewing the five-page written transcript of the taped conversation, the trial court reached the conclusion that "all of the contents contained in here are relevant. They are—it is competent, admissible evidence in its entirety, and there is nothing in here that is discussed that would be so inflammatory or prejudicial that it would outweigh the probative value of it." The defendant contends that the trial court's evidentiary rulings constitute an abuse of discretion.

The defendant argues that the playing of the tape created the danger of unfair prejudice, potential confusion of the issues, and needless presentation of cumulative evidence which required its exclusion under N.C.G.S. § 8C-1, Rule 403. Pursuant to Rule 403, a trial court in its discretion may exclude relevant evidence if the probative value of that evidence is "substantially outweighed" by its tendency to prejudice the defendant unfairly, to confuse the issues, to mislead the jury, or to waste time. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). The tape recording at issue in the present case was extremely probative. During the conversation, the defendant discussed problems he had experienced with his stepson, Stanley Horner. The defendant admitted shooting

Horner and the "other fellow" and stated that he told the "other guy" that he would "blow your f---ing head away" if "the law comes out here." The defendant also stated that he had shot Florence because Stanley Horner had called the law. The defendant stated, "that damn Stanley is the one I should have got, instead of that other one and that's where I messed up at right there." The defendant further stated that he hoped Horner died. This evidence was probative of the defendant's mental state at the time of the shootings. Although this evidence prejudiced the defendant, it was not unfairly prejudicial; evidence is unfairly prejudicial only if it unduly tends to suggest a decision on an improper basis, such as an emotional basis. *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986). The evidence of the defendant's telephone conversation with Sheriff Pendergrass suggested no improper basis for decision. The probative value of the evidence also was not substantially outweighed by any tendency of the evidence to confuse the issues, to mislead the jury, or to waste time. We conclude that the trial court did not abuse its discretion in overruling the defendant's objections under Rule 403 to the admission of this evidence.

For the reasons previously given in this opinion, the defendant must receive a new trial on the charges against him.

New trial.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 138, MARILYN R. BISSELL, RESPONDENT

No. 29A92

(Filed 4 June 1993)

1. Judges, Justices, and Magistrates § 43 (NCI4th)— recommendation of censure of judge—minority opinion—filing with Supreme Court

A written minority opinion filed with the Judicial Standards Commission by one or more of its members recommending that respondent judge not be censured is not confidential and should be filed in the Supreme Court with the Commission's

recommendation. N.C.G.S. § 7A-377; Rule 4, Rules of the Judicial Standards Commission.

Am Jur 2d, Judges §§ 18 et seq.

2. Judges, Justices, and Magistrates § 36 (NCI4th) — district court judge — barring attorney from her courtroom — conduct prejudicial to administration of justice — censure

A district court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for barring an attorney from sessions of juvenile court over which she would be presiding because he had initiated a preliminary investigation by the Judicial Standards Commission of allegations that the judge had engaged in improper *ex parte* communications with potential witnesses in pending juvenile cases. Although respondent judge's actions were intended to preclude her from hearing the attorney's cases while she harbored angry feelings toward him, the proper course of action was the judge's own recusal.

Am Jur 2d, Judges §§ 18 et seq.

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

This matter is before the Court upon a recommendation by the Judicial Standards Commission, filed 8 January 1992, that Judge Marilyn R. Bissell, a Judge of the General Court of Justice, District Court Division, Twenty-sixth Judicial District, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute. Heard in the Supreme Court 14 May 1992.

Weinstein & Sturges, P.A., by T. LaFontine Odom and L. Holmes Eleazer, Jr., for Judge Marilyn R. Bissell, respondent-appellant.

James J. Coman, Senior Deputy Attorney General, Special Counsel to the Judicial Standards Commission.

PER CURIAM.

The record filed with us in support of the recommendation of the Judicial Standards Commission (Commission) that Judge Marilyn Bissell (Respondent) be censured reveals the following:

In February 1990 Mr. Robert McCarter, then an attorney with the Youth and Family Services Division of the Mecklenburg County Department of Social Services, became concerned that Respondent had engaged in improper *ex parte* communications with two witnesses scheduled to testify in a re-commitment hearing regarding a juvenile. The witnesses were a psychologist who had evaluated the juvenile pursuant to Respondent's order and the juvenile court counselor assigned to the case. Mr. McCarter's concern arose from conversations he had with the two witnesses. It caused him to send a memorandum to personnel in the Youth and Family Services Division prohibiting them from engaging in certain kinds of *ex parte* communications with judges assigned to juvenile court. He sent copies of the memorandum to district court judges assigned to juvenile court, including Respondent. Respondent forcefully expressed her disagreement with part of the memorandum to Mr. McCarter.[1] Mr. McCarter filed a complaint against Respondent with the Commission.

On 23 May 1990 the Commission notified Respondent that it had ordered a preliminary investigation to determine whether formal proceedings under Commission Rule 8 should be instituted against her. The notice related that the subject matter of the investigation included allegations that the Respondent had initiated *ex parte* communications with potential witnesses in pending juvenile cases.

On 12 July 1990, knowing that Mr. McCarter had instigated the Commission's investigation, Respondent called him into her office and told him he was *persona non grata* in her court and that he should not practice before her.

On 16 November 1990 Special Counsel for the Commission filed complaint alleging that on two occasions Respondent had engaged in conduct prejudicial to the administration of justice and violative of the North Carolina Code of Judicial Conduct: First, Respondent in February 1990 had discussed *ex parte* a juvenile case with two individuals who were to be witnesses at a hearing involving the juvenile. Second, Respondent on 12 July 1990 "in retaliation" against Mr. McCarter's "involvement in this inquiry"

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1. Part of the memorandum placed certain restrictions on *ex parte* communications concerning juvenile justice "systemic issues," and it was these restrictions with which Respondent most vigorously expressed her disagreement.

informed Mr. McCarter that he was *persona non grata* in her courtroom and should no longer appear in cases before her.

In her answer Respondent averred that in January or February 1990 she had discussed the general problem of finding appropriate treatment facilities and programs for all juvenile sex offenders with the two individuals named in the complaint; that she received notice of the Commission's preliminary investigation on 24 May 1990; and that on 12 July 1990 she invited Mr. McCarter into her office and informed him privately that "she considered him *persona non grata* in her courtroom and requested that he not practice in a court in which she was the presiding judge."

After Respondent was served with a Notice of Formal Hearing on 16 September 1991, a plenary hearing was held before the Commission on 21 November 1991. At the hearing Mr. McCarter, the two persons with whom the *ex parte* communications had allegedly been made and Respondent, among others, testified. The evidence tended not to support the allegations of improper *ex parte* communications; indeed, it tended to show that these allegations were unfounded.

There was little conflict in the evidence of the 12 July 1990 incident regarding Mr. McCarter. Respondent, herself, testified that she was "upset" when she received formal notice of the Commission's investigation on 24 May 1990; that she knew Mr. McCarter had caused the investigation to occur; and that after thinking about it for about two weeks, she determined that "it would be inappropriate for him to practice in my court under these circumstances [because] [h]e had filed a complaint against me and I knew he had filed a complaint against me, and that's not fair to his clients." Respondent described her encounter on this date with Mr. McCarter as follows:

> I saw Bob on the stairs—Mr. McCarter on the stairs in the old courthouse, the one with the pillars. He was either going up or coming down; I don't remember which. I asked him to come to my office, which at that time was in that old building on the second floor, I wanted to talk to him. He came over there. We closed the door. I sat behind my desk. I believe he sat in a chair, and I very quietly told him that it was inappropriate for him to come into my court. I called him persona non grata. Maybe that's a bad term, but that's what I used. And that's what I said. . . . He acted like he was

> real surprised and he said, "Oh, I don't know why you're doing this." And I said, "Oh, yes, Bob[,] I think you know why I'm doing this."

Respondent said she followed this conversation with a handwritten note to Mr. McCarter which read: "Dear Mr. McCarter: As of this date [12 July 1990], you are declared *Persona Non Grata* in my Courtroom. Please do *not* practice in any Court in which I am presiding. Very truly yours, Marilyn R. Bissell."

Other evidence established without contradiction that Mr. McCarter had left his position with the Youth and Family Services Division on 1 July 1990 to enter the private practice of law.

After hearing the evidence the Commission found the facts essentially as they have been related and in accordance with the testimony recounted above. The Commission found:

> The respondent issued her interdiction against Mr. McCarter in *retaliation* for his filing a complaint against her with the Commission. The respondent did so notwithstanding the fact and her admission that she attributed no malice to Mr. McCarter for reporting her conduct to the Commission, and she recognized that an attorney has an ethical responsibility to report matters the attorney believes are a violation of the Code of Judicial Conduct. Furthermore, the respondent's action occurred after a seven-week period during which the respondent pursued no other alternatives for resolving her perceived conflict with Mr. McCarter.

Based on these findings the Commission concluded "on the basis of clear and convincing evidence" that Respondent's actions on 12 July 1990 constituted:

> a. conduct in violation of Canons 2A and 3A(3) of the North Carolina Code of Judicial Conduct;[2] and

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2. Canon 2A of the North Carolina Code of Judicial Conduct provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3A(3) provides, in pertinent part: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity . . . ."

b. willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[3]

Upon these findings of fact and conclusions of law, the Commission recommended that this Court censure Respondent. The Commission's formal "Recommendation" recited that six members of the Commission heard the case; the Commission determined that there was not clear and convincing evidence to support the allegations regarding the *ex parte* communications; and the Commission dismissed these allegations. The Recommendation recites that "at least five" members concur in the findings, conclusions and recommendation regarding the 12 July 1990 incident.

After this matter was argued on 14 May 1992, Respondent on 21 May 1992 petitioned the Court for its writ of certiorari to add to the record on appeal a written minority opinion filed by one member of the Commission. The Commission responded to the petition and prayed that the petition for the writ be denied. The Commission contended that any minority position with regard to the Commission's recommendation was confidential under the statutes and rules governing the Commission's deliberations. After considering the petition, the response and the statutes and rules governing the Commission's deliberations, we issued the writ to bring forward and make a part of the record before us the minority opinion referred to in the petition.

General Statute § 7A-377(a) (Supp. 1992) and Rule 4 of the Rules of the Judicial Standards Commission, Annotated Rules of North Carolina 211 (Michie 1993), govern the confidentiality of matters before the Commission and how the Commission's recommendations are made to this Court. In pertinent part the statute provides:

> Unless otherwise waived by the justice or judge involved all papers filed with and proceedings before the Commission, including any preliminary investigation which the Commission may make, are confidential, except as provided herein. After the preliminary investigation is completed, and if the Commission concluded that formal proceedings should be instituted, the notice and complaint filed by the Commission, along with

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3. As grounds for censure or removal N.C.G.S. § 7A-376 provides, among other things, "conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

> the answer and all other pleadings, are not confidential. Formal hearings ordered by the Commission are not confidential, and recommendations of the Commission to the Supreme Court, along with the record filed in support of such recommendations are not confidential . . . . At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. . . . The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation.

Rule 4 provides in pertinent part:

> (a) All papers filed with and proceedings before the Commission are confidential, unless the respondent judge otherwise requests. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential.

The Commission argued in its response to the petition that when five of its members concur in a recommendation to this Court only those parts of the record before it which support the recommendation must be filed here; minority votes are not required to be revealed and, to protect the confidentiality of the Commission's deliberations, should not be revealed.

[1] We are not, however, dealing here with a simple minority vote. The question presented by the petition and response is whether a written minority opinion duly filed with the Commission by its author and recommending that the respondent judge not be censured should be made a part of the record before this Court.

The answer provided by both General Statute § 7A-377 and Rule 4(a) is yes. Both say that the "recommendations" of the Commission to the Court and the record in support of the "recommendations" are not confidential. We think the word "recommendations" includes both the recommendation of the Commission, that is, the recommendation in which at least five members of the Commission concur, and any contrary minority recommendation which one or more members of the Commission may have duly filed. That both the statute and the rule use the plural form of the noun shows that the legislature and the drafters of the rule contemplated the

possibility of majority and minority recommendations, particularly when a subsequent sentence in the statute reverts to the singular form when it provides that at least five members of the Commission must concur in a "recommendation" of censure or removal.

This interpretation of the statute and the rule comports with how deliberative, quasi-judicial bodies, such as the Commission, normally operate. Since this Court must ultimately decide whether to discipline the judge, it ought to have the benefit of any written minority opinion which recommends to it action contrary to or different from the recommendation of the Commission to assist it in its deliberations. For these additional reasons we believe our reading of the statute to be the proper one.

We hold, therefore, that a written minority recommendation filed with the Commission by one or more of its members is not confidential and should be filed with this Court together with the Commission's recommendation.

[2] As to the merits of the Commission's recommendation that Respondent be censured, we approve the recommendation.

The evidence makes clear that Respondent barred Mr. McCarter from sessions of juvenile court over which she would be presiding because he had initiated the Commission's preliminary investigation of her. Respondent's actions were apparently intended to preclude her from hearing Mr. McCarter's cases while she harbored angry feelings towards him. In such situations, when interest or prejudice may compromise the objectivity of a judge, the proper course of action is the judge's own recusal. Code of Judicial Conduct, Canon 3C(1)(a).[4]

Here, rather than recuse herself in cases in which Mr. McCarter was serving as counsel, which would have been the proper course, Respondent inappropriately put the onus on Mr. McCarter and his clients to avoid her court. In effect, instead of taking full responsibility upon herself for dealing with her bias in Mr. McCarter's cases, understandable enough under the circumstances, Respondent improperly shifted that responsibility to Mr. McCarter.

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4. This Canon provides: "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings."

The gravamen of Respondent's impropriety was not her motive, characterized by the Commission as retaliatory, but "the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976); *accord In re Crutchfield*, 289 N.C. 597, 603, 223 S.E.2d 822, 826 (1975). One likely impact of such conduct is to discourage attorneys and other court personnel from reporting judicial misconduct because they fear judicial reprisal.

For these reasons, we conclude the evidence supports the Commission's conclusions that Respondent's actions constitute conduct in violation of Canons 2A and 3A(3) of the Code of Judicial Conduct and "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." N.C.G.S. § 7A-376.

Now, therefore, it is ordered by the Supreme Court of North Carolina, in Conference, that the Respondent, Judge Marilyn R. Bissell, be, and she is hereby, censured according to the recommendation of the Judicial Standards Commission.

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

JACKSON N. EVANS, ADMINISTRATOR OF THE ESTATE OF JACKSON EDWARD EVANS v. ROSE MARIE DIAZ

No. 149PA92

(Filed 4 June 1993)

Death § 23 (NCI4th)— death of child—negligence by mother—mother as child's sole beneficiary—mother's renunciation—wrongful death action not permitted

Where a mother's allegedly negligent operation of an automobile caused her son's death and the mother was the son's sole heir, the mother's purported renunciation of her right to inherit from her son in favor of the son's two sisters did not permit a wrongful death recovery against the mother in favor of the sisters because (1) the mother succeeded to no property interest under the Wrongful Death Act and there was thus no interest under the Act to which the sisters could

succeed by virtue of the mother's renunciation; and (2) the legislature did not intend for the renouncement statute, N.C.G.S. § 31B-1(a), to apply to wrongful death recoveries.

Am Jur 2d, Death § 208.

Contributory negligence of beneficiary as affecting action under death or survival statute. 2 ALR2d 785.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 105 N.C. App. 436, 413 S.E.2d 558 (1992), reversing a judgment entered 17 January 1991 by Cornelius, J., in the Superior Court, Alexander County. Heard in the Supreme Court on 3 November 1992.

Joel C. Harbinson and James O. Icenhour for plaintiff-appellee.

Patrick Harper and Dixon, by Stephen M. Thomas, for defendant-appellant.

EXUM, Chief Justice.

This is a wrongful death action in which the deceased, a seven-year-old boy, was killed by the allegedly negligent operation of an automobile by defendant, the boy's mother and his only heir. Allegedly, defendant permitted the boy to ride on the hood of the car; and when he fell off, the car ran over him.

Under our precedents it is clear this action could not be maintained for the benefit of defendant-mother. She, however, before the action was filed renounced her right to inherit from her son in favor of her two daughters, the sisters of her son.

The issue is whether this renunciation breathes life into an otherwise moribund claim. The trial court concluded not; the Court of Appeals reversed; we agree with the trial court and reverse the Court of Appeals.

The parties have stipulated, or it is otherwise uncontradicted in the record, as follows: The deceased, who died intestate, was survived by defendant and two sisters; thus, defendant was at the time of death the deceased's sole heir under the Intestate Succession Act, N.C.G.S. § 29-15(3) (1984), and solely entitled to

any recovery which would be realized in a wrongful death action brought on account of her son's death, N.C.G.S. § 28A-18-2 (1984). On 5 January 1990 pursuant to Chapter 31B (1989) of the General Statutes, defendant formally renounced her right to inherit from her son and purported to transfer this right to her two remaining children, the deceased's sisters. On the same date defendant also formally renounced her right to administer her son's estate in favor of plaintiff, her father and the deceased's grandfather. Plaintiff filed this action under the Wrongful Death Act, N.C.G.S. § 28A-18-2, on 14 February 1990.

May the action be maintained? Judge Cornelius, presiding at trial, held, on stipulated facts, that it could not. He reasoned that "[t]he determination as to the beneficiaries of the estate . . . is to be made as of the time of death . . . and . . . that the defendant has since . . . filed a renunciation of her right to inherit from [the deceased] should not be allowed to . . . affect the fact that the sole original beneficiary of the plaintiff estate was the defendant . . . ." Judge Cornelius, pursuant to the parties' pretrial stipulation, entered judgment for plaintiff for $10,000.[1] The Court of Appeals disagreed, interpreting a portion of the Act governing renunciation of transfers by intestacy, N.C.G.S. § 31B-3, to mean that the action could proceed on behalf of the defendant's two remaining children. The Court of Appeals remanded for entry of judgment in accordance with the parties' stipulation.

We allowed defendant's petition for further review. Concluding, for essentially the reason given by Judge Cornelius, that the action cannot be maintained, we reverse the decision of the Court of Appeals and reinstate the trial court's judgment.

In an action brought under the Wrongful Death Act the real party in interest is not the estate but the beneficiary of the recovery as defined in the Act. *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947). The proceeds of a wrongful death recovery do not constitute, generally, assets of the estate and are not available to pay creditors or legacies, except for burial expenses and limited hospital and medical expenses. N.C.G.S. § 28A-18-2; *Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984).

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1. Interestingly, the parties stipulated before trial that if the courts should ultimately determine that the action is barred, a judgment of $10,000 shall nevertheless be entered for plaintiff against defendant; but if the courts ultimately determine that the action is not barred, the judgment shall be for $20,000.

In *Carver* the Court summarized the law relating to the maintenance of wrongful death actions when recovery depends on establishing the liability of one who, under the Wrongful Death Act, would share in the recovery:

> in wrongful death actions where recovery depends on establishing the liability of a party who is also a beneficiary of the decedent's estate, the recovery obtained shall be reduced by the party-beneficiary's pro rata share and the party-beneficiary is precluded from participating in the recovery; but the action may be maintained on behalf of the other beneficiaries, if any. Further, if recovery in a wrongful death action depends on establishing the liability of a party who is the sole beneficiary of decedent's estate, the action may not be brought at all.

Carver, 310 N.C. at 678, 314 S.E.2d at 744 (citations omitted). These rules are based on the ancient maxim that one should not profit by one's own wrong. *In re Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958).

It is thus clear, and all parties agree, that had defendant-mother not renounced her right to inherit from her deceased son, she being his sole heir and solely entitled to any wrongful death recovery, this action, which rests on establishing her liability for the death, could not be maintained. The question is, what effect does her renunciation pursuant to Chapter 31B have on the viability of the action against her.

Recognizing the principle that "[t]he rights of claimants to the proceeds recovered in an action for wrongful death are determined as of the time of the intestate's death," *Davenport v. Patrick*, 227 N.C. 686, 688, 44 S.E.2d 203, 205, the Court of Appeals relied on two provisions of the renunciation statute which make renunciation also effective as of the time of death. Both provisions are contained in N.C.G.S. § 31B-3(a). The first provides, with exceptions not here pertinent, that "the property or interest renounced devolves as if the renouncer had predeceased the decedent." The second is that "[a] renunciation relates back for all purposes to the date of death of the decedent . . . ."

The Court of Appeals apparently believed the phrase "for all purposes" was broad enough to include the Wrongful Death Act; for it reasoned that for the purpose of determining whether an

action under that Act could be maintained, the interest of a renouncing wrongful death beneficiary should be treated as devolving "as if the renouncer had predeceased the decedent." So treated, it is as if the renouncer never was a wrongful death beneficiary; therefore, there is no bar to a wrongful death recovery by the succeeding wrongful death beneficiaries since they are, and have always been, innocent.

While this analysis has a surface appeal based on its logic, we believe it is flawed for two reasons. First, it overlooks other, more substantive provisions of the renunciation statute which would preclude the result reached by the Court of Appeals even if the Act applied to wrongful death recoveries. Second, applying the renunciation statute to wrongful death recoveries gives the Act a reach far beyond what the legislature intended.

Substantively, the renunciation Act clearly contemplates that the renouncer has some property interest subject to being renounced. The Act begins by providing that "[a] person who succeeds to a property interest as [listing the capacities in which such succession could occur] . . . may renounce . . . the right of succession to any property or interest therein . . . ." N.C.G.S. § 31B-1(a). The Act then provides, "In no event shall the persons who succeed to the renounced interest receive from the renouncement a greater share than the renouncer would have received." N.C.G.S. § 31B-1(c).

Here the defendant-mother succeeded to no property interest whatever under the Wrongful Death Act. She would have been barred from any wrongful death recovery because whatever recovery there might have been rested on establishing her liability for the death. Since she succeeded to no property interest under the Wrongful Death Act, there was nothing under that Act which she could renounce. Further, since the persons who succeeded to the renounced interest cannot receive a greater share from renouncement than the renouncer would have received, there is no interest under the Wrongful Death Act to which defendant's children can succeed by virtue of her renouncement.

In short, since there was no interest in a wrongful death recovery which defendant could have renounced, under the renouncement statute itself her renouncement created no such interest in her children. Thus, even if the renouncement statute applied to wrongful death recoveries, it would be unavailing to the estate in this case.

More fundamentally, we are convinced the legislature did not intend for the renouncement statute to apply to wrongful death recoveries. In determining what the legislature intended, we "consider the act as a whole, weighing 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *In Re Arthur*, 291 N.C. 640, 641, 231 S.E.2d 614, 615 (1977).

With regard to the language of the renouncement statute, it contains a long and specific list of the capacities in which one must succeed to an interest which may be renounced.[2]

The list, as exhaustive as it was obviously intended to be, does not include beneficiaries of wrongful death recoveries. Under

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2. They are as follows:

(1) Heir, or

(2) Next of kin, or

(3) Devisee, or

(4) Legatee, or

(5) Beneficiary of a life insurance policy who did not possess the incidents of ownership under the policy at the time of death of the insured, or

(6) Person succeeding to a renounced interest, or

(7) Beneficiary under a testamentary trust or under an inter vivos trust, or

(8) Appointee under a power of appointment exercised by a testamentary instrument or a nontestamentary instrument, or

(9a) Surviving joint tenant, surviving tenant by the entireties, or surviving tenant of a tenancy with a right of survivorship, or

(9b) Person entitled to share in a testator's estate under the provisions of G.S. 31-5.5, or

(9c) Beneficiary under any other testamentary or nontestamentary instrument, including a beneficiary under:

a. Any qualified or nonqualified deferred compensation, employee benefit, retirement or death benefit, plan, fund, annuity, contract, policy, program or instrument, either funded or unfunded, which is established or maintained to provide retirement income or death benefits or results in, or is intended to result in, deferral of income;

b. An individual retirement account or individual retirement annuity; or

c. Any annuity, payable on death, account, or other right to death benefits arising under contract, or

(9d) The duly authorized or appointed guardian with the prior or subsequent approval of the clerk of superior court, or of the resident judge of the superior court, of any of the above.

(10) The personal representative appointed under Chapter 28A of any of the above or the attorney-in-fact of any of the above . . . .

N.C.G.S. § 31B-1(a).

the doctrine of *expressio unius est exclusio alterius*, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list. *See Alberti v. Manufacture Homes, Inc.*, 329 N.C. 727, 407 S.E.2d 819 (1991); *Morrison v. Sears, Roebuck*, 319 N.C. 298, 354 S.E.2d 495 (1987).

Legislative intent may also be inferred from the "consequences which would follow, respectively, from various constructions." *Alberti*, 329 N.C. at 732, 407 S.E.2d at 822. Interpreting the renunciation statute to apply to wrongful death recoveries would have untoward results. Recoveries under the wrongful death statute are grounded almost always in the law of torts. Fundamental to this branch of the law is the notion that rights and defenses of the parties are fixed at the time the tort occurs or the cause of action accrues. *See, e.g., Davenport v. Patrick*, 227 N.C. at 689, 44 S.E.2d at 205 ("The rights of claimants to the proceeds recovered in an action for wrongful death, are determined as of the time of intestate's death."); *see also Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982); *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970). If the beneficiary of a wrongful death recovery could renounce in favor of others, this would alter, after the fact of the tort giving rise to the claim, the rights and defenses of the parties. Here, for example, it would mean that the action could be maintained; whereas at the time of the tort the action would have been barred. In other cases it could mean a change in the extent of damages recoverable. Certain damages recoverable in wrongful death actions are measured by considering the relationship of the beneficiaries to the deceased and, in certain instances, the ages of the various beneficiaries. *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973). "The first step to determine the damages recoverable under [section (b)(4) of the Wrongful Death Statute, N.C.G.S. § 28A-18-2] is to identify the particular persons who are entitled to receive the damages recovered." *Id.* at 418, 196 S.E.2d at 805. Altering the identity of wrongful death beneficiaries through the device of renunciation would alter the measure of damages for which the defendant could be liable. We are confident the legislature did not intend to empower wrongful death beneficiaries to manipulate in this way the damages for which a defendant might be liable.

Instructive on this point is our decision in *In re Estate of Glenn*, 258 N.C. 351, 128 S.E.2d 408 (1962) (per curiam). There a husband and wife, Herbert and Jo Ann Glenn, were both killed

in an automobile accident; but the husband survived the wife. Both died intestate. The estates of both brought wrongful death actions against certain defendants. The husband's father was administrator of his son's estate. The husband's parents, his father both as administrator and as heir and his mother as heir petitioned the clerk under the predecessor statute to Chapter 31B to be permitted to renounce their son's estate's and their individual interests in the wife's estate. The clerk allowed the petition but the Resident Superior Court Judge declined to approve the clerk's order. On appeal this Court concluded that while the husband's parents were entitled to renounce their interests in his wife's estate, "[t]he renunciation . . . shall not adversely affect any rights or defenses which may be asserted to defeat any claim on behalf of the estate of the decedent." *In re Estate of Glenn*, 258 N.C. at 353, 128 S.E.2d at 409. In effect, this Court held that the renunciation had no application to the wrongful death actions.

The purpose of the renunciation statute, it seems clear to us, is to provide according to its terms for renunciation of property interests which are transferred by intestate succession or by wills, life insurance, testamentary or inter vivos trusts, pension plans or other such voluntarily drawn instruments of transfer. The legislature did not intend the statute to apply to recoveries under the Wrongful Death Act.

For the foregoing reasons, the decision of the Court of Appeals reversing the judgment of the superior court is

REVERSED.

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

WILLIS G. NESBIT AND ELIZABETH C. NESBIT v. PAUL HOWARD AND EVELYN HOWARD

No. 79PA92

(Filed 4 June 1993)

On discretionary review of an unpublished decision of the Court of Appeals, 105 N.C. App. 105, 412 S.E.2d 373 (1992), reversing the judgment entered by John, J., in the Superior Court, Iredell County, on 14 September 1990 and remanding the case for trial on defendants' counterclaim for damages. Heard in the Supreme Court 6 October 1992.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr., and Thomas L. Nesbit, for plaintiff-appellants.

David P. Parker for defendant-appellees.

PER CURIAM.

Justice Parker recused and took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See Kempson v. N.C. Dept. of Human Resources*, 328 N.C. 722, 403 S.E.2d 279 (1991).

AFFIRMED.

JERRY BAYNE, INC. v. SKYLAND INDUSTRIES, INC., AND S. WADE HALL, SAUNDRA D. HALL, A/K/A TOUR-O-TEL OF ASHEVILLE, INC.

No. 18A93

(Filed 4 June 1993)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 209, 423 S.E.2d 521 (1992), affirming the judgment of Allen (C. Walter), J., at the 16 July 1991 Civil Session of Superior Court, Henderson County. Heard in the Supreme Court on 11 May 1993.

Safran Law Offices, by Perry R. Safran and Jonathan P. Carr, for the plaintiff-appellant.

Roberts, Stevens & Cogburn, P.A., by Allan P. Root, for the defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ARTHUR MONROE STALLINGS

No. 347PA92

(Filed 4 June 1993)

On discretionary review of the decision of the Court of Appeals, 107 N.C. App. 241, 419 S.E.2d 586 (1992), finding no error in the defendant's trial by Long (James M.), J., at the 20 August 1990 Session of Superior Court, Guilford County. Heard in the Supreme Court 11 May 1993.

Michael F. Easley, Attorney General, by Isham B. Hudson, Jr., Special Deputy Attorney General, for the State.

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

PER CURIAM.

Discretionary review improvidently allowed.

HOUSEHOLD FINANCE CORPORATION v. WILLIAM C. ELLIS

No. 351PA92

(Filed 4 June 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 107 N.C. App. 262, 419 S.E.2d 592 (1992), reversing the order of Sharp, J., entered on 28 February 1991 in the District Court, Forsyth County. Heard in the Supreme Court 13 May 1993.

Robert A. Lauver, P.A., by Robert A. Lauver, for plaintiff-appellant.

Legal Aid Society of Northwest North Carolina, Inc., by Joanna B. George and Ellen W. Gerber, for defendant-appellant.

Smith, Helms, Mulliss & Moore, by Benjamin F. Davis, Jr., and John J. Korzen, for North Carolina Bankers Association, North Carolina Financial Services Association, and North Carolina Retail Merchants Association, amici curiae.

North Carolina Legal Services Resource Center, by Robert M. Schofield, for North Carolina Clients Council, amicus curiae.

Gulley & Calhoun, by Michael D. Calhoun, for North Carolina Consumers Council, amicus curiae.

PER CURIAM.

AFFIRMED.

NORTH CAROLINA STATE BAR v. EDWARD DANIELS NELSON

No. 396PA92

(Filed 4 June 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31(a) of the unanimous decision of a panel of the Court of Appeals, 107 N.C. App. 543, 421 S.E.2d 163 (1992), affirming an order filed 23 January 1991 by John Shaw, Chairman, for a Hearing Committee of the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Supreme Court 12 May 1993.

Carolin Bakewell for plaintiff-appellee.

Cheshire, Parker, Hughes & Manning, by Joseph B. Cheshire, V, and Alan M. Schneider, for defendant appellant.

PER CURIAM.

AFFIRMED.

Justices MITCHELL and PARKER did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JIMMY RAY NOBLES

No. 401A92

(Filed 4 June 1993)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 627, 422 S.E.2d 78 (1992), reversing the order entered by Griffin, J., at the 11 February 1991 Criminal Session of Superior Court, Pitt County, granting defendant's motion to dismiss the charges. Heard in the Supreme Court 13 May 1993.

Michael F. Easley, Attorney General, by J. Allen Jernigan, Special Deputy Attorney General, for the State.

Pritchett, Cooke & Burch, by Lloyd C. Smith, Jr., David J. Irvine, Jr. and Lars P. Simonsen, for defendant-appellant.

PER CURIAM.

AFFIRMED.

BARRY BOWLES, INDIVIDUALLY AND IN HIS CAPACITY AS GUARDIAN AD LITEM FOR BRANDY RENAE BOWLES, A MINOR v. BOB E. MUNDAY

No. 327PA92

(Filed 4 June 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished opinion by the Court of Appeals, affirming the judgment entered 31 August 1990 and an order entered 26 October 1990 by Currin, J., in Superior Court, Alexander County. Heard in the Supreme Court 11 May 1993.

Edward Jennings for plaintiff-appellant.

Patrick, Harper & Dixon, by Gary F. Young, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

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

BALLANCE v. N.C. COASTAL RESOURCES COMM.

No. 019P93

Case below: 108 N.C.App. 288
333 N.C. 536

Petition by defendant for reconsideration of petition for discretionary review dismissed 3 June 1993.

BOWSER v. WILLIAMS

No. 425PA92

Case below: 333 N.C. 343
108 N.C.App. 8

Motion by Horace Mann Insurance Co. to dismiss appeal allowed 27 May 1993. Motion by Continental Insurance Company to withdraw appeal allowed 27 May 1993. Motion by plaintiff to dismiss appeal allowed 27 May 1993.

BOYD v. BOYD

No. 155P93

Case below: 109 N.C.App. 313

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 3 June 1993.

BOYD v. NATIONWIDE MUTUAL INS. CO.

No. 39PA93

Case below: 108 N.C.App. 536

Petition by defendant (Nationwide Mutual Insurance Company) to withdraw petition for discretionary review allowed 3 June 1993.

CAPITAL OUTDOOR ADVERTISING v. CITY OF RALEIGH

No. 136PA93

Case below: 109 N.C.App. 399

Motion by plaintiffs to dismiss appeal for lack of substantial constitutional question denied 3 June 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993.

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

CLARK TRUCKING OF HOPE MILLS v. LEE PAVING CO.

No. 120P93

Case below: 109 N.C.App. 71

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

DARNELL v. AETNA CASUALTY & SURETY CO.

No. 164P93

Case below: 109 N.C.App. 488

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

DURHAM CITY BOARD OF EDUCATION v. NATIONAL UNION FIRE INS. CO.

No. 152P93

Case below: 109 N.C.App. 152

Petition by defendant (National Union Fire Insurance Company of Pittsburgh, Pennsylvania) for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

EATMON v. JOYNER

No. 161P93

Case below: 109 N.C.App. 488

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

HALVERSON v. HALVERSON

No. 38P93

Case below: 108 N.C.App. 786

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

HERITAGE HOSPITAL v. PEEK

No. 130PA93

Case below: 109 N.C.App. 134

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

HOMEBUILDERS ASSN. OF CHARLOTTE v. CITY OF CHARLOTTE

No. 133PA93

Case below: 109 N.C.App. 327

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993. Petition by defendant for writ of supersedeas allowed 3 June 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993.

LAW BUILDING OF ASHEBORO, INC. v. CITY OF ASHEBORO

No. 143P93

Case below: 109 N.C.App. 313

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

LINDLER v. DUPLIN COUNTY BD. OF EDUCATION

No. 118P93

Case below: 108 N.C.App. 757

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

LYON v. MAY

No. 90P93

Case below: 108 N.C.App. 633

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

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

MORRELL v. FLAHERTY

No. 203P93

Case below: 109 N.C.App. 628

Petition by defendants for temporary stay allowed 1 June 1993 pending determination of petition for discretionary review.

NATIONWIDE MUT. INS. CO. v.
STATE FARM MUT. AUTO. INS. CO.

No. 151P93

Case below: 109 N.C.App. 281

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

PERFORMANCE CHEVROLET v. MANSOUR

No. 140P93

Case below: 109 N.C.App. 313

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

SECTION 51 ASSOC. v. WARREN

No. 182P93

Case below: 109 N.C.App. 488

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

SIMPSON v. HATTERAS ISLAND GALLERY RESTAURANT

No. 163P93

Case below: 109 N.C.App. 314

Petition by third-party defendants for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

SLOAN v. MILLER BLDG. CORP.

No. 166PA93

Case below: 109 N.C.App. 489

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993.

STATE v. BAKER

No. 176P93

Case below: 109 N.C.App. 697

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

STATE v. BRINSON

No. 189A93

Case below: 110 N.C.App. 314

Petition by Attorney General for temporary stay allowed 24 May 1993.

STATE v. EVANS

No. 188P93

Case below: 109 N.C.App. 697

Petition by defendant for writ of supersedeas and temporary stay denied 4 June 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 4 June 1993.

STATE v. GUTHRIE

No. 178P93

Case below: 110 N.C.App. 91

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 3 June 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993. Motion by defendant to be appointed as legal counsel in order to file response dismissed 3 June 1993.

STATE v. McCARROLL

No. 172PA93

Case below: 109 N.C.App. 574

Petition by Attorney General for writ of supersedeas allowed 3 June 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993.

STATE v. NOELL

No. 121P93

Case below: 109 N.C.App. 134

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

STATE v. SMITH

No. 213A93

Case below: 110 N.C.App. 119

Petition by Attorney General for writ of supersedeas and temporary stay denied 7 June 1993.

STATE v. SUITES

No. 156P93

Case below: 109 N.C.App. 373

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

STATE v. TUGGLE

No. 145P93

Case below: 109 N.C.App. 235

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 June 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

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

STATE v. WILLIS

No. 104P93

Case below: 109 N.C.App. 184

Petition by Attorney General for writ of supersedeas denied and temporary stay dissolved 3 June 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

TAYLOR v. BRINKMAN

No. 131P93

Case below: 108 N.C.App. 767

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

TURNAGE v. NATIONWIDE MUTUAL INS. CO.

No. 153PA93

Case below: 109 N.C.App. 300

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 3 June 1993.

WACHOVIA BANK & TRUST CO. v.
TEMPLETON OLDSMOBILE-CADILLAC-PONTIAC

No. 168P93

Case below: 109 N.C.App. 352

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993.

WHITAKER v. CLARK

No. 137P93

Case below: 109 N.C.App. 379

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 3 June 1993. Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 3 June 1993.

APPENDIXES

PRESENTATION OF CHIEF JUSTICE BOBBITT PORTRAIT

PRESENTATION OF CHIEF JUSTICE BRANCH PORTRAIT

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IMPLEMENT A LAW PRACTICE ASSISTANCE PROGRAM

AMENDMENTS TO THE CONTINUING LEGAL EDUCATION RULES TO IMPLEMENT A LAW PRACTICE ASSISTANCE PROGRAM

AMENDMENTS TO RULE 4 OF THE RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO RULE 2.5 OF THE RULES OF PROFESSIONAL CONDUCT

AMENDMENT TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR CHANGING THE NAME OF THE COMMITTEE ON UNAUTHORIZED PRACTICE TO THE COMMITTEE ON CONSUMER PROTECTION

AMENDMENT TO RULE 10.3, LAWYERS' TRUST ACCOUNTS, OF THE RULES OF PROFESSIONAL CONDUCT

AMENDMENTS TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ELIMINATE INACTIVE STATUS IN CERTAIN CASES

AMENDMENTS TO THE PLAN OF LEGAL SPECIALIZATION TO CREATE THREE NEW SPECIALTIES

AMENDMENTS TO THE PLAN OF LEGAL SPECIALIZATION OF THE RULES OF THE NORTH CAROLINA STATE BAR TO PERMIT DISCRETION IN SATISFYING CERTAIN CERTIFICATION AND RECERTIFICATION CRITERIA

AMENDMENTS TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH STANDING COMMITTEES ON CONTINUING LEGAL EDUCATION, LAWYERS' TRUST ACCOUNTS, AND BUDGET, FINANCE AND AUDIT

AMENDMENT TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR CONCERNING THE APPOINTMENT OF COUNSEL TO PROTECT THE INTERESTS OF A MISSING OR INCAPACITATED LAWYER AND HIS OR HER CLIENTS

AMENDMENT TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR RELATING TO THE PERFORMANCE OF TRUST ACCOUNT AUDITS

AMENDMENT TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH A STANDING COMMITTEE ON FEE ARBITRATION

MODEL PLAN FOR DISTRICT BAR FEE ARBITRATION

AMENDMENT TO RULE 2.6 OF THE RULES OF PROFESSIONAL CONDUCT

PRESENTATION OF THE PORTRAIT

OF

WILLIAM HAYWOOD BOBBITT

Chief Justice
SUPREME COURT OF NORTH CAROLINA
1969-1974

Associate Justice
SUPREME COURT OF NORTH CAROLINA
1954-1969

March 10, 1993

RECOGNITION OF JUSTICE WILLIS WHICHARD

BY

CHIEF JUSTICE JAMES G. EXUM, JR.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court. The invocation was pronounced by Rev. William C. Simpson, Jr., Senior Minister of Edenton Street United Methodist Church, Raleigh, N.C. The Chief Justice then recognized the Honorable Willis P. Whichard, Associate Justice, who would address the court:

I am pleased now to call to the podium Associate Justice Willis Whichard, a man who began his legal career as a law clerk to then Associate Justice William Bobbitt. Justice Whichard, after his clerkship, practiced law in Durham, served as a representative in the North Carolina House of Representatives, and later as a Senator in the State Senate. He thereafter served as a Judge of the North Carolina Court of Appeals until he was elected to a seat on this Court in 1986. Justice Whichard holds undergraduate and law degrees from the University of North Carolina at Chapel Hill, the Master of Laws degree from the University of Virginia where he is now completing work on the SJD degree. Justice Whichard.

PRESENTATION ADDRESS

BY

THE HONORABLE WILLIS P. WHICHARD,
ASSOCIATE JUSTICE,

SUPREME COURT OF NORTH CAROLINA

MAY IT PLEASE THE COURT:

The late William Haywood Bobbitt served this Court with diligence, distinction, a keen sense of duty, and a thoroughly pleasant demeanor for almost twenty-one years—almost sixteen as an Associate Justice and over five as Chief Justice. He died September 27, 1992 in Raleigh, North Carolina, and was buried in Elmwood Cemetery in Charlotte.

On behalf of the family of our distinguished predecessor, mentor, and friend, I have the honor to present to the Court this portrait, to be unveiled momentarily, and a memorial to his exemplary life and career.

The portrait was painted from life by the late North Carolina artist Irene Price, who also painted the portraits of Chief Justices Walter Stacy and Emery Denny which now grace this courtroom. Judge Bobbitt sat for the painting of this portrait in December 1969 and January 1970, shortly after his assumption of the office of chief justice. The artist, who was a little over a month younger than the judge, died shortly after completing the painting.

William Bobbitt was born in Raleigh, North Carolina, October 18, 1900, the son of James Henry (Hal) Bobbitt and Eliza May Burkhead Bobbitt. Both of his grandfathers were Methodist ministers. His Burkhead grandfather once served as minister of Edenton Street Methodist Church in Raleigh, where Judge Bobbitt's parents were married in 1889 and which he regularly attended and supported during the last thirty-nine years of his life.

In Judge Bobbitt's childhood, his family moved to Baltimore for a time while his pharmacist father marketed a patent medicine he had developed. While there, at the age of five or six, Bobbitt endured a critical illness. The family was told he would not recover, but he did. He did, however, have to learn anew how to walk.

When Bobbitt was seven, his mother died from complications of childbirth. When he was around twelve, his father sold the patent

medicine rights to a large company, and the family returned to Raleigh. It later moved to Charlotte, where young William started the first boy scout troop in the city and became the city's first scout to achieve the rank of first class. In addition, he always had a job, because, as he expressed it, "my father was always in rather straitened circumstances."

Because the Baltimore schools of the time were somewhat advanced, Judge Bobbitt was able to enter high school when the family moved to Charlotte. He completed his secondary education in the public schools of Charlotte and spent three years in the general college and one year in the law school at the University of North Carolina. At the time that was all the formal education required for admission to the Bar.

Judge Bobbitt received many honors at Chapel Hill, including Phi Beta Kappa, Order of the Golden Fleece, the Bingham Debating Medal and the Wiley P. Mangum Medal in Oratory. He was elected permanent President of his class. He remained a loyal son of the University throughout his life, attending many of its functions and serving as President of its General Alumni Association in 1954-55. The University awarded him an honorary Doctor of Laws degree in 1957, its Distinguished Alumnus Award in 1976, and the Law School's Distinguished Alumnus Award in 1981.

The judge could easily have missed both his career in law and his years in Chapel Hill. As to careers, his commitment to the Methodist church, and the example of his oldest brother who was a Methodist minister, left him torn between a career in the ministry and a career in law. A perceived calling to the law ultimately prevailed. As to schools, he won a scholarship to Washington and Lee University, and an uncle who chaired the board of trustees of Trinity College assured him he could have a scholarship to Trinity. Because of the influence of C.W. Tillett, a prominent Charlotte lawyer, and the offer of a scholarship to Chapel Hill by President Edward Kidder Graham, he opted for the Chapel Hill campus.

Even then, however, the question was not settled with finality. It was wartime, and Congressman Bob Doughton secured for the youthful Bobbitt an appointment to the United States Naval Academy. Bobbitt decided to accept, and wrote the U.N.C. Dialectic Society, in which he had been active as a freshman, expressing his regret over having to sever that connection.

When World War I ended, though, he relinquished the appointment and returned to Chapel Hill. He remained active in the Dialec-

tic Society, serving as its president in his senior year. His associates at Chapel Hill included Jonathan Daniels—later a distinguished newspaper publisher and presidential confidante, Luther Hodges—later governor of North Carolina and United States Secretary of Commerce, and Thomas Wolfe—later a renowned novelist. Bobbitt would say of his activities with Wolfe that he did not think too much of them at the time. He knew him well, however, and the Dialectic Society files contain his recollections of Wolfe.

When Bobbitt graduated from Chapel Hill in 1921, he had satisfied the educational requirements, but not the age requirements, for taking the North Carolina bar examination. He thus returned to Charlotte and "read law" in the offices of Stewart & McRae until old enough to take the examination. He was, as he later expressed it, "entirely out of money," and thus had arranged to teach English at Charlotte High School. John McRae told him, however, that he should commence the practice of law then or he never would, and McRae agreed to endorse his note so he could return to Chapel Hill to take the two courses he yet needed to prepare for the bar exam. The legal career of the future jurist thus was preserved, and he successfully stood for the bar examination the following year.

At that time the exam was given by a member of the North Carolina Supreme Court. Justice W.J. Adams, the junior member, gave the exam when Bobbitt took it. There was a rumor that Bobbitt had made the highest score among the applicants, and Bobbitt, in his words, "didn't take any pains to deny it."

Following his successful completion of the bar exam, Bobbitt was administered the oath as an attorney by Superior Court Judge Thomas Finley. He appeared with John McRae in the first case tried thereafter in Mecklenburg Superior Court. He made his first appearance in the North Carolina Supreme Court in the case of *State v. Arthur Grier*, reported at 184 N.C. 723, at the Fall Term, 1922. He lost, as the Court upheld his client's conviction of aiding and abetting in the manufacture of spirituous liquors.

Bobbitt had first met John J. Parker when Parker attended a meeting of the U.N.C. Dialectic Society over which Bobbitt was presiding. He saw him again when Parker, the Republican candidate for Governor in 1920, appeared at Gerrard Hall and, in Bobbitt's view, made the best speech of those given by the gubernatorial candidates. Bobbitt's view is interesting in that Bobbitt was present on this occasion for the purpose of distributing buttons for Cameron Morrison, who was the Democratic candidate.

Parker, who lost the election to Morrison, later moved from Monroe to Charlotte and joined the Stewart & McRae firm. The firm then practiced for several years under the name Parker, Stewart, McRae & Bobbitt. Bobbitt was guaranteed a salary of $250 a month, which he later said was "pretty good then."

This firm is noteworthy for the achievements of its members. John J. Parker became a U.S. Circuit Court Judge in 1925, narrowly missed confirmation for a seat on the U.S. Supreme Court, received the American Bar Association Award for Distinguished Service, and represented the United States as a judge at the Nuremberg trials. Plummer Stewart was a highly successful trial lawyer and was considered the czar of the trial calendar in Mecklenburg County. John A. McRae was a Democratic candidate for Governor in 1936. And Bobbitt served as a superior court judge and as associate justice and chief justice of the North Carolina Supreme Court.

In his seventeen years of law practice, Bobbitt dealt with a variety of matters. In the early years, he handled minor criminal cases and appeared in a number of civil trials, either with Stewart or McRae or alone. He also did title work and jokingly said later that he ran for the superior court to get out of the deed room.

According to Bobbitt, he had not thought at all about being a superior court judge. When Judge W.F. Harding announced his impending retirement, however, the lawyers were dissatisfied with the three candidates who announced for the position, and they ultimately persuaded Bobbitt to run. His partner, Plummer Stewart, in Bobbitt's words, "didn't think a thing about my going into the race." He nevertheless said: "Now, William, we'll have to get up a brag sheet." The "brag sheet" was not difficult to compose, and it worked. With strong bipartisan support, and the aid of lawyers who generally did not involve themselves in politics, Bobbitt was elected over his opponents in the first Democratic primary, thus commencing a judicial career that would continue for thirty-six years.

The new judge held his first term of court in Cabarrus County. In over fifteen years on the superior court bench, he became known for his fairness, consideration, and learning. Lawyers sought to have their cases heard in his court. He would study the documents in a case in his hotel room at night, and it was said that by the time the case was tried he was more familiar with it than the lawyers were. When he returned to Charlotte on the weekends, he was in the courthouse regularly on Saturday mornings, and the lawyers brought numerous matters to him for decisions.

In 1952, upon the death of Walter Stacy, Judge Bobbitt was prevailed upon to run for the Supreme Court. The other candidates were three other superior court judges, an Asheville attorney, and the incumbent appointed by the Governor. Restraint characterized the Bobbitt campaign. While holding court in Asheville, he announced, with characteristic devotion to duty, that the campaign could not interfere with his court schedule. "My fitness for the place, whatever it may be," he wrote, "has been determined by my record up till now, and nothing I say now can add anything to my qualifications." His standard solicitation for votes was typically modest and to the point. It read:

> This is to call your attention to my candidacy for the office of Associate Justice of the Supreme Court of North Carolina in the second primary on Saturday, June 28th. It will not be possible for me to see you in person between now and then. Naturally, I am interested to have the approval and support of a citizen of your standing and influence.
>
> If you come to the conclusion that I am the man for the place, I shall be greatly pleased to have your approval and active support.

Perhaps the judge was too modest, for this would not be his time to assume the state's highest bench. In the first primary, Judge R. Hunt Parker received 28 percent of the vote, Judge Bobbitt received 24 percent, and the other four candidates shared the remaining 48 percent. In the second primary, the vote in the Piedmont was unusually light, and Judge Parker, the eastern candidate, prevailed by the slender margin of 2,288 votes. It was the closest statewide race in over thirty years, and the light vote in the Piedmont was probably decisive. Had Bobbitt received the same vote in his home county of Mecklenburg in the second primary that he did in the first, he would have won the election.

This was not the first time Judge Bobbitt had been considered for the Supreme Court, nor would it be the last. Fifteen months after the 1952 defeat, Governor William B. Umstead appointed him to the Court upon the retirement of Chief Justice W.A. Devin and the elevation of Justice M.V. Barnhill to the chief justiceship. Bobbitt served as an associate justice from February 1, 1954 until he assumed the chief justiceship on November 17, 1969, following the death of Chief Justice R. Hunt Parker. The other justices had gone as a body to Governor Robert W. Scott to request that he appoint Justice Bobbitt to the seat. Bobbitt served as chief

justice through December 31, 1974, when he was mandatorily disqualified from further service because of age.

In an interview late in his life, Judge Bobbitt indicated that he found himself unable to say which of the opinions he authored as a member of the Court were important. It would be equally unwise for us to attempt to make that determination this morning. Instead, it will suffice to say that he authored many opinions which, at the time, were of great importance to the public and to the jurisprudence of the state, and that some of them will influence the jurisprudence of the state and the country for many years to come. These opinions appear in volumes 239 through 286 of the North Carolina Reports. They reflect the author's extensive knowledge of the law, his capacity for clarity, and his soundness of judgment. The opinions of the other justices with whom he served also bear the stamp of his influence, for he concerned himself with the Court's products, not just his own.

Upon Justice Bobbitt's elevation to the position of chief justice, a *Morganton News Herald* editorial stated: "Chief Justice Bobbitt has firmly established a reputation as one of North Carolina's outstanding jurists." His five years as chief justice enhanced that already excellent reputation. In fifty-two years as a lawyer and jurist, he established a record of service which few have equalled in duration or quality.

One of his former law clerks, Pender McElroy, said of Judge Bobbitt when the Dialectic Society at U.N.C.-Chapel Hill received a bronze bust of the judge:

> If one were to list all the desirable qualities of a judge, Judge Bobbitt would have each of them in great measure. I am thinking of intelligence, perceptiveness of legal issues, common sense, even temperament, hard working, impeccable character, honesty (as a person and intellectually), a love of the law, a desire to excel as a judge and a desire to see a just and sensible result reached in every case.

We can add to Pender's observation that if one were to list all the desirable qualities of a human being, Judge Bobbitt possessed them in great measure as well. The title of *The News and Observer* editorial following his death perhaps best captured his essence: "A great mind, a merry twinkle." What his contemporaries and several generations thereafter most loved about him, the paper stated, "was his twinkling sense of humor." "He was a merry fellow," it said, "who treated all who crossed his path with even-tempered

fairness, whether they lived modestly or in mansions." The U.N.C. Alumni Report said of him, with equal accuracy: "He was known for his exacting standards, his wit and his kindness." And columnist A.C. Snow said: "Judge Bobbitt enriched the lives of so many of us with his wit, almost infinite wisdom and unfailing good manners that we feel something of great value has been taken from us. He came awfully close to being the complete man."

In his private life Judge Bobbitt was deeply devoted to his family. His wife, Sarah Buford Dunlap, and his son, William Haywood Bobbitt, Jr., preceded him in death—Mrs. Bobbitt in October 1965, and Haywood in April 1968. His three daughters—Sarah Bobbitt Carter of Morganton, Buford Bobbitt Sachtler of Midland Park, New Jersey, and Harriet Bobbitt Moss of Enfield—survive, as do ten grandchildren and nine great-grandchildren.

In the last quarter of a century of his life, a "special friendship" (his words) with Chief Justice Susie Sharp enhanced Judge Bobbitt's life. A.C. Snow described them as "two inseparable friends." They dined together, considered and appraised the work of their successors on the Court together, and shared a social life that included many of the significant events of the church, legal, and University of North Carolina communities.

Judge Bobbitt was a deeply dedicated churchman. He was an active member of Dilworth Methodist Church in Charlotte and regularly attended and supported Edenton Street Methodist Church while in Raleigh. He also regularly attended and participated in meetings of the Watauga Club during his years in Raleigh.

His relationship with his law clerks was also a special part of Judge Bobbitt's life. Eighteen young men served him in this capacity. All would join me in saying we gained far more from our experience with him than he did from our assistance to him. The benefits continued long after the formal relationship ended, for he kept up with us and continued to educate and inspire us. Our annual gatherings for his birthday were significant occasions for him and for us and our families. "Aside from my own family," he would say late in life, "I felt closer to these men than any other group of men."

I hope you will tolerate a personal recollection in this respect. When Governor Hunt announced my appointment to the Court of Appeals, Judge Bobbitt was on an extended trip to England. One of his neighbors sent him the news clipping, and I received a letter from England in his hand expressing his delight over my

impending entry upon a judicial career. On the day I took my oath, Judge Sharp told me: "Judge is so proud he's about to bust his buttons." In 1990, when I was a candidate to retain my subsequently acquired seat on this Court, Judge Bobbitt told a friend that he supported all the incumbent justices, but he was "most interested in Whichard." When I visited him on his ninety-first birthday, as I closed the door to his apartment on my way out I heard him say to two of his grandchildren who were there, "He's on the Supreme Court now." The animation in his voice told me that it meant a great deal to him that one of "the boys," as he called his clerks, was sitting where he had sat.

When John Quincy Adams was eighty years old, he met an old friend who shook his trembling hand and said, "Good morning, How is John Quincy Adams today?" The former President looked at the friend for a moment and then replied:

> John Quincy Adams himself is quite well, sir, quite well, but the house in which he lives at present is becoming dilapidated. It is tottering upon its foundations. Time and the seasons have almost destroyed it. Its roof is pretty worn out. Its walls are much shattered, and it crumbles with every wind. The old tenement is becoming almost uninhabitable, and I think John Quincy Adams will have to move out of it soon. But he himself is well, sir, quite well!"

William Haywood Bobbitt could have said much the same. Progressive congestive heart failure over the last three plus years of his life greatly diminished his physical vitality. The man himself, however, remained quite well. The great mind and merry twinkle endured. The tenacious memory for people and events persisted. As A.C. Snow wrote for *The News and Observer* following Judge Bobbitt's demise: "His keen mind was clear, his wit intact, until the day he died."

One of the judge's favorite recollections from his years on the trial bench was of his first experience holding a term of superior court in Cherokee County. He had made reservations at the only inn in Murphy, but when he arrived the innkeeper told him it was the height of the summer season and there simply were no rooms. Judge Bobbitt's protestations that he had made reservations weeks before were to no avail. Ultimately, the exasperated innkeeper said, "I'm as sorry as I can be, but I only have one room left, and I'm holding it for the judge." When informed that the supplicant was the judge, the rather stunned innkeeper paused

a moment, and then responded in his mountain drawl, "Well howdy, judge."

On September 27, 1992, it was not a Murphy innkeeper, but St. Peter, who said, "Howdy, judge." This time, there was no question about it. There definitely was a room for him there. And from that day to this, the hosts of heaven have been enjoying that great mind and merry twinkle.

Meanwhile, his legacy here on earth is secure. He was a great jurist, whose contributions to our jurisprudence over almost twenty-one years as a member of this Court will benefit our people so long as the State of North Carolina and the rule of law endure. As stated editorially by *The Fayetteville Observer-Times*: "The majesty of the law in North Carolina was enhanced and polished by the . . . service of William H. Bobbitt. His legacy is shared by all the people of the state who live under laws imbued with his spirit."

Those of us who sit on this bench in Judge Bobbitt's shadow, too, will continue to benefit from his work and to draw inspiration from his spirit. The portrait which the judge's great-granddaughter, Elizabeth Haywood Carter, will now unveil, will serve as a tangible reminder of that work and of the great spirit behind it, which abides and pervades this occasion.

ACCEPTANCE OF CHIEF JUSTICE BOBBITT'S PORTRAIT BY CHIEF JUSTICE EXUM

On behalf of the Court, I thank Justice Whichard for his insightful remarks on the life and work of Chief Justice William Bobbitt. I thank all of Chief Justice Bobbitt's family for the gift of the portrait to the Court, a gift which the Court now gratefully accepts. Justice Whichard's remarks will be spread upon the minutes of the Court and the portrait will be hung in this chamber together with the other portraits of former Chief Justices which you see hanging here.

The structure of the law has many masons. Those of us who now labor at building it know how much we are indebted to those who labored before us. It is the challenge of each generation of judges and lawyers and teachers to keep this structure strong—to keep it well grounded in right and reason—and so to pass it to those who come after us.

Chief Justice Bobbitt, as Justice Whichard so ably recounted, met the challenge well and contributed in many ways to the soundness of structure. He did his part and more to keep it grounded in right and reason. We continue to enjoy, to use and to build upon his excellent work. His portrait hanging here will serve to remind us of these things. It will remind us of our debt to the past. It will be a source of inspiration to all who enter this chamber for the purpose of adding their labors to his.

PRESENTATION OF THE PORTRAIT

OF

JOSEPH BRANCH

Chief Justice
SUPREME COURT OF NORTH CAROLINA
1979-1986

Associate Justice
SUPREME COURT OF NORTH CAROLINA
1966-1979

May 20, 1993

RECOGNITION OF FORMER JUSTICE DAVID BRITT

BY

CHIEF JUSTICE JAMES G. EXUM, JR.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court. The invocation was pronounced by Dr. T. L. Cashwell, Retired Senior Minister, Hayes Barton Baptist Church, Raleigh, N.C. The Chief Justice then recognized Former Associate Justice David Britt, who would address the court:

I am pleased now to call to the podium former Associate Justice David Britt, a long-time and close friend of Chief Justice Branch, and a distinguished North Carolinian. He served with great distinction as a member of the House of Representatives, becoming Speaker in the 1967 Session. He was a charter member of the Court of Appeals and served there for eleven years. He then joined this Court as an Associate Justice in 1978 and served here until his retirement in 1982. He is the recipient of numerous awards and recognition for his public service and contributions to the legal profession, including the North Carolina Bar Association's John J. Parker Award. Justice Britt was born in McDonald in Robeson County. When he felt the need to get out of Raleigh for some deserved rest and relaxation, his parting words to us would most often be, "I'll see you in McDonald." Former Associate Justice David Britt.

PRESENTATION ADDRESS

BY

THE HONORABLE DAVID M. BRITT, RETIRED JUSTICE, SUPREME COURT OF NORTH CAROLINA

As we assemble here this afternoon, I consider it a great honor to be asked by the family of the late Chief Justice Branch to present on their behalf his portrait to the Court that he served and loved for twenty eventful years.

My acquaintance with Joseph Branch began in 1933 when we were freshmen at Wake Forest College, then located in Wake County. Our initial acquaintance very soon ripened into a close friendship that gradually grew closer, not only during our college years but in the years that followed. Part of the time we were in college we were roommates and that was the case during the summer of 1937 as we attended summer school and prepared to take the bar examination a year before we were supposed to. Fortunately for us we both passed the examination. Our friendship culminated when we served on the Supreme Court together for four years.

Joseph Branch was born in Enfield, Halifax County, North Carolina, on 5 July 1915, the fifth and last child of James Clarence Branch and Laura Applewhite Branch. Both of his parents were natives of Halifax County. Joseph's siblings were brothers Stafford, Edwin and Harry Branch, and sister Virginia Branch, later Virginia Branch Pope. A foster sister, Elise Dunn Kimball, also grew up in the Branch home.

Following his graduation from Enfield High School, Branch entered Wake Forest College in the fall of 1933. It will be noted that 1933 was one of the years of the great depression and student Branch found it necessary to earn part of his college expenses. For several years he worked for his meals in a boarding house—washing dishes, cleaning floors, and waiting on tables.

Very soon after entering law school in the fall of 1935, he decided to work toward taking the bar examination in August of 1937. To accomplish this he would have to attend two regular sessions of law school and two summer sessions. At that time while a law degree was not a prerequisite to taking the bar examination, it was necessary to take and pass certain courses of study required by the Board of Law Examiners. By taking the full course load allowed by the law school, by monitoring several courses, and working long and hard he took and passed the ex-

amination in 1937. He then returned to Wake Forest for the fall semester and was awarded his law degree in January of 1938.

Branch's love for and devotion to his alma mater did not terminate with his graduation. Beginning in the mid sixties, after the college was moved to Winston-Salem and became Wake Forest University, he served numerous terms as one of its trustees, and during most of two terms he served as chairman of the board. At the time of his death he was a Life Trustee of the University. He devotedly served Wake Forest with his talents and means and exerted his best efforts to preserve the heritage of his alma mater as a Christian institution.

Immediately following his graduation, Branch returned to his home town of Enfield and entered the practice of law with an older lawyer, the late D. Mack Johnson. His legal career was interrupted for two years during World War II when he served in the U.S. Army. After his discharge from the army, he resumed his law practice in Enfield. Shortly thereafter, on 7 December 1946, he was married to Frances Jane Kitchin of Scotland Neck, North Carolina. His bride was a member of one of our state's most prominent families. Her father, A. Paul Kitchin, served in the State Senate; his brother W.W. Kitchin, a resident of Person County, served six terms in Congress from the state's Fifth District and served as Governor from 1909 to 1913; his brother Claude Kitchin, a resident of Halifax County, served eleven terms in Congress from the Second District and for four terms served as Democratic Majority Leader; and another brother, Dr. Thurman D. Kitchin, served as president of Wake Forest College for some twenty years. During the fifties and early sixties, Mrs. Branch's brother, A. Paul Kitchin, Jr., a resident of Anson County, served as congressman from the Eighth District.

Branch's law practice was quite varied. While he represented several sizeable businesses and handled numerous estates, he appeared in many criminal cases in the Superior and County courts of Halifax and surrounding counties. Because of his recognized integrity and winsome personality he was a very popular and successful attorney. The judges, prosecutors and even his adversaries at the bar liked and respected him. One of his adversaries was quoted as saying that he did not relish appearing in cases in which Branch was his adversary because it appeared to him that just about everybody involved in the cases was trying to help Joe Branch.

Although Branch was a very busy lawyer, he found time for public service. He served as chairman of the Halifax County

Democratic Executive Committee and then served with distinction in the state House of Representatives from 1947 through 1954. In those days local politics were rough in Halifax County, there being two Democratic factions that fought each other tooth and toenail. Although Branch was identified with one of the factions, many members of the other faction quietly voted for him, thereby making his elections relatively easy.

During the 1957 session of the General Assembly, Branch served as legislative counsel for Governor Luther Hodges. During the remainder of the Hodges Administration, Branch was a close and valuable advisor to the Governor.

Late in 1963, former Superior Court Judge Dan K. Moore, then a resident of Haywood County but a native of Jackson County, prevailed on Branch to manage his 1964 campaign for Governor. Although Moore was well and favorably known in the western part of the state, he knew very few people in the eastern section of North Carolina. He was the least known of the three major candidates for the Democratic nomination, but with Branch's able managership, Moore came in second on primary day. He was entitled to call for a second primary and did so. His nomination was assured when the third candidate actively supported Moore in the second primary and was able to carry his followers with him. Moore was an easy winner in the November general election.

During the 1965 session of the General Assembly, Branch served as Governor Moore's legislative counsel and was very effective in shepherding the Governor's program through the Assembly. In August 1965, a vacancy occurred on the Supreme Court and Governor Moore immediately offered the position to Branch. While Branch was interested in serving on the Court, he declined to accept the appointment and insisted that the Governor appoint another highly qualified person who was very instrumental in Moore's becoming governor. At that time Branch had no way of knowing that Governor Moore would have the opportunity to make another appointment to the Court.

As fate would have it, another vacancy occurred on the Supreme Court in 1966 when death claimed the highly respected Justice Clifton L. Moore. There was no doubt as to who would fill that vacancy. On 29 August 1966 Attorney Joseph Branch became an associate justice of the Court and began a distinguished twenty-year tenure on our state's highest tribunal. In November of 1966 he was elected to complete his predecessor's unexpired term and he was re-elected without opposition in 1968 and 1976.

As an associate justice Branch applied himself to the fullest in living up to the oath of office he had taken. While he did not always agree with the law he was sworn to uphold, he dutifully followed the law as written.

Upon the retirement of Chief Justice Susie Sharp in July of 1979, Governor Hunt appointed Branch chief justice and the following year Branch was elected to fill her unexpired term. Joseph Branch was the twentieth chief justice to serve our state. He was the fourth native of Halifax County to fill the position, the others being Chief Justices Walter Clark, M. V. Barnhill and R. Hunt Parker. Three of these chief justices were natives of Enfield, Chief Justice Clark being the exception.

The new chief was quite at home in his new role. He presided over sessions of the court with dignity and great patience. In like manner he presided over conferences of the justices with enduring patience in spite of the sharp differences of opinion that were often expressed.

Since the creation of a unified court system in our state in the nineteen sixties, the duties of the chief justice are much more extensive than just presiding over sessions and conferences of the Supreme Court. The person holding the office is now the chief justice of North Carolina with administrative duties extending to every lawyer of our judicial system. It was in this capacity that Chief Justice Branch truly excelled. He enjoyed the confidence and respect of judges and other personnel at every level, and he spent much of his time conferring with the many who sought his wise counsel.

Chief Justice Branch not only was interested in seeing our state have the best courts possible, he was anxious to have our courts perceived by the public as being tribunals that dispensed true justice. Consequently, during his years as chief justice he accepted as many invitations as he could to speak to groups all over the state. He also made himself easily accessible to the news media. In spite of the tendency of the public generally to criticize not only the courts but most other public institutions, he did much to instill confidence in our courts. His affable manner and his love for people made it easy for him to mingle at gatherings, and as he made friends for himself, he caused many people to increase their respect for the courts.

An indication of his success in making a favorable impression on groups and institutions are the numerous awards and honors

that were extended to him. Only a few will be mentioned. Wake Forest University bestowed many honors upon him, including the honorary degree of Doctor of Laws. Similar degrees were conferred by other schools including Campbell University and Elon College. The North Carolina Bar Association presented him with its highest award, the Judge John J. Parker award "In Recognition of Conspicuous Service to the Cause of Jurisprudence in North Carolina." The N.C. Academy of Trial Lawyers presented him with its Outstanding Appellate Judge Award, and the North Carolina Citizens for Business and Industry awarded him its citation for Distinguished Public Service.

Chief Justice Branch voluntarily retired from the Court on 31 July 1986. The many written opinions he authored for the Court are found in Volumes 268 through 313 of the Supreme Court Reports.

While he relished his work on the Court, he never lost his love for and his deep interest in the legal profession. During his tenure, he supported many progressive programs proposed by the State Bar. As Chief Justice he had the statutory duty to pass on proposals to amend the rules and bylaws of the State Bar. He admired good lawyers and it grieved him greatly to learn that a lawyer had breached his trust. He was a moving force in the creation of the Client Security Fund program by the State Bar, and at the time of his death he was serving as a member of the Client Security Fund Board.

To borrow a phrase much used in recent years, Chief Justice Branch had his priorities straight. I will comment briefly on a few of them.

He was a man with deep religious convictions. While living in Enfield he was an active member and leader of the Enfield Baptist Church. He served that church as a deacon and teacher of a men's Bible class. Immediately after he moved to Raleigh in 1966, he became a member of Hayes Barton Baptist Church where he served several terms as deacon and trustee. He also served Hayes Barton as one of the teachers of an adult Bible class. He was a genuine Christian in the true meaning of those words.

He was genuinely devoted to his family, not only to his wife, children and grandchildren but to his extended family as well. He was seldom too busy or too tired to spend evenings watching his high school son, and later his grandson, play basketball and join them in other wholesome activities.

In his public service he was never satisfied with anything less than the best that he was able to render. As a member of the Legislature, as a trusted adviser to governors, and as a member and leader of our state's highest court he applied those basic qualities of greatness, namely, honesty, integrity, patience, humility, and friendliness.

Lastly, he truly loved his fellow man. To borrow a line from a well known poem that most of us learned in grammar school, "he did not sit in the scorner's seat nor hurl the cynic's ban." On the contrary he appeared to find something good in just about every person he encountered. In my judgment, at the time of his death no person in North Carolina had more true friends than did Joseph Branch.

On 18 February 1991, death claimed this great leader. He in survived by his wife of forty-six years, Frances Kitchin Branch; his daughter, Jane Branch McRee, her husband, William R. McRee, and their children, Mary Branch Burns, Joseph Chadwick Burns and William Douglas McRee; his son, James C. Branch, his wife Lizbeth Elkins Branch, and their children, Laura Caroline Branch, Lizbeth Elkins Branch, Joseph Edwin Branch and Jamie Hansen Branch; and his brother, Harry Branch. His sister, Mrs. Virginia Branch Pope, died subsequent to the death of Chief Justice Branch.

Joseph Branch dearly loved his home county and town. He was appropriately buried close to his parents, deceased brothers and other loved ones in the Branch family plot in the Elmwood Cemetery in Enfield. More than a thousand people attended his last rites, and properly so, because in the death of Joseph Branch North Carolina lost one of its premier public servants.

The portrait which is about to be unveiled was painted several years before Chief Justice Branch retired by Artist Rebecca Patman Chandler of Raleigh. Artist Chandler studied at two of the better art schools in America and at three of the renowned art schools in Italy. During her thirty-three year career she has had numerous shows in this country and in Italy.

ACCEPTANCE OF CHIEF JUSTICE BRANCH'S PORTRAIT BY CHIEF JUSTICE EXUM

On behalf of the Court, I thank Justice Britt for his remarks on the life and work of Chief Justice Joseph Branch. I thank all of Chief Justice Branch's family for the gift of the portrait to the Court, a gift which the Court now gratefully accepts. Justice Britt's remarks will be spread upon the minutes of the Court and the portrait will be hung in this chamber together with the other portraits of former Chief Justices which you see hanging here.

All of us now on the Court knew Chief Justice Branch well, and several of us had the privilege of working here with him. To us he was not only an able colleague but also a loyal friend and a wise counselor. After he retired and while he lived, I continued to seek and rely often on his advice. And since he has been gone, I often ask myself in difficult situations, "What would Joe do?" His portrait hanging here will serve to remind us of his wit, his wisdom, his knowledge and his faith in and love of people. It will remind us of how much we enjoyed being in his presence. It will be a source of inspiration to all who knew of him, but most particularly to those of us who knew him, worked with him and loved him.

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IMPLEMENT A LAW PRACTICE ASSISTANCE PROGRAM

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX of the Rules of the North Carolina State Bar as appear in 329 N.C. 821 be amended as follows:

Amendments to Article IX of the Rules
of the North Carolina State Bar
(the Rules of Discipline and Disbarment)
to Implement a Law Practice Assistance Program

Section 3. Definitions

(Insert new subsections (C) and (D) as follows:)

C. Board: the Board of Continuing Legal Education.

D. Board of Continuing Legal Education: a standing committee of the council responsible for the administration of a program of mandatory continuing legal education and law practice assistance.

(Redesignate all succeeding subsections now designated C through NN.)

Section 5. Chairperson of the Grievance Committee: Powers and Duties

A. The chairperson of the grievance committee will have the power and duty:

(Add the words "or section 21(D)" following the reference to section 21(C) in subsection (A)(6)) as follows:

6. To notify a respondent that a grievance has been dismissed, and to notify the complainant in accordance with section 21(C) or section 21(D).

(Add new subsection (A)(16) as follows:)

16. In his or her discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with section 12(H) and to so notify the complainant.

Section 6. Grievance Committee: Powers and Duties

The grievance committee will have the power and duty:

(Add new section (K) as follows:)

K. In its discretion, to refer grievances primarily attributable to unsound law office management to the Board of Continuing Legal Education in accordance with section 12(H).

Section 12. Investigations: Initial Determination

(Add new sections (H) and (I) as follows:)

H. If at any time prior to a finding of probable cause, the chairperson of the grievance committee, upon the recommendation of the counsel, or the grievance committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the grievance committee may, with the respondent's consent, refer the case to the Board of Continuing Legal Education. The respondent will then be required to complete, under the supervision of the board, a course of training in law office management prescribed by the chairperson of the grievance committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the board will report the same to the chairperson of the grievance committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the board or fails to complete the prescribed training, that will be reported to the chairperson of the grievance committee and the investigation of the original grievance shall resume.

I. No reference of a case pursuant to the procedure set forth in section 12(H) can be made unless the respondent expressly waives any right that he or she might otherwise have to confidential communications with persons acting under the supervision of the Board of Continuing Legal Education in regard to the prescribed course of training.

Section 21. Notice to Complainant

(Add new section (D) as follows:)

D. If a grievance is referred to the Board of Continuing Legal Education, the chairperson of the grievance committee will advise the complainant of that fact and the reason for the referral. If the respondent successfully completes the prescribed training and the grievance is dismissed, the chairperson of the grievance

committee will advise the complainant. If the respondent does not successfully complete the prescribed course of training, the chairperson of the grievance committee will advise the complainant that investigation of the original grievance has resumed.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO THE CONTINUING LEGAL EDUCATION RULES TO IMPLEMENT A LAW PRACTICE ASSISTANCE PROGRAM

The following amendments to the rules, regulations and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules for the Continuing Legal Education program as appear in 331 N.C. 787 are hereby amended as follows:

Rule 1: PURPOSE AND DEFINITIONS

(Insert a new paragraph after the third paragraph as follows:)

(A) Purpose

. . . . .

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.

(B) Definitions

(Insert a new subsection (10) as follows:)

(10) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.

(All following definitions must be renumbered)

Rule 2: JURISDICTION: AUTHORITY

(Add the words "and a law practice assistance program" after the word "program")

Rule 3: OPERATIONAL RESPONSIBILITY

(Add the words "and the law practice assistance program" after the word "program")

Rule 12: SOURCE OF FUNDS

(Designate first paragraph as (A))

(Add the words "continuing legal education" between the words "the" and "program" in the first paragraph)

(Redesignate subsection (A) as (1))

(Redesignate subsection (B) as (2))

(Add new section (B) as follows:)

(B) Funding for the law practice assistance program shall be from user fees set by the board upon approval of the council and from such other funds as the council may provide.

Rule 16: POWERS AND DUTIES OF THE BOARD

(Add a new section (F) as follows:)

(F) The board shall administer a law office assistance program for the benefit of lawyers who request or are required to obtain training in the area of law office management.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO RULE 4 OF THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rule 4 of the Rules of Professional Conduct as appears in 312 N.C. 845 be and is hereby amended as follows:

Amendments to Rule 4 of the Rules of Professional Conduct

Rule 4 Preservation of Confidential Information

(Add "information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance" between the words "law" and "and" in the first sentence of Section (A), and add "and to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court" following the word "clients" in the last sentence of Section (A) as follows:

(A) "Confidential information" refers to information protected by the attorney-client privilege under applicable law, information received by a lawyer then acting as an agent of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court regarding another lawyer or judge seeking assistance and other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. For the purposes of this rule, "client" refers to present and former clients and to lawyers seeking assistance from lawyers' or judges' assistance programs approved by the North Carolina State Bar or the North Carolina Supreme Court.

Add a new subsection (C)(6) as follows:)

(C) A lawyer may reveal:

(6) Confidential information to the extent permitted by the rules of a lawyers' or judges' assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court.

Comment

(Insert a new paragraph after the fifth paragraph of the official comment as follows:)

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek help through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance, which may then result in harm to their professional careers and injury to their clients and the public. The rule therefore requires that any information received by a lawyer on behalf of an approved lawyers' or judges' assistance program be regarded as confidential and protected from disclosure to the same extent as information received by a lawyer in any conventional attorney-client relationship.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina

State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

RULES FOR APPROVAL OF INDEPENDENT CERTIFYING ORGANIZATIONS

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the rules for the North Carolina State Bar be amended by adding the Rules for Approval of Independent Certifying Organizations as follows:

RULES FOR APPROVAL OF INDEPENDENT CERTIFYING ORGANIZATIONS

I. POLICY STATEMENT

These guidelines for reviewing independent organizations which certify lawyers as specialists are designed to thoroughly evaluate the purpose and function of such certifying organizations and the procedures they use in their certification processes. These guidelines are not meant to be exclusive, but to provide a framework in which certifying organizations can be evaluated. The aim of this evaluation is to provide consumers of legal services a means of access to lawyers who are qualified in particular fields of law.

II. GENERAL PROCEDURE

As contemplated in Rule 2.5 of the North Carolina Rules of Professional Conduct, the North Carolina State Bar, through its Board of Legal Specialization, shall, upon the filing of a completed application and the payment of any required fee, review the standards and procedures of any organization which certifies lawyers as specialists and desires the approval of the North Carolina State Bar. The Board of Legal Specialization shall prepare an application form to be used by certifying organizations and shall administer the application process.

III. FACTORS TO BE CONSIDERED IN REVIEWING CERTIFYING ORGANIZATIONS

A. Purpose of the Organization—The stated purposes for the original formation of the organization and any subsequent changes in those purposes shall be examined to determine whether the organization is dedicated to the maintenance of professional competence.

B. Background of the Organization—The length of time the organization has been in existence, whether the organization is a suc-

cessor of another, the requirements for membership in the organization, the number of members which the organization has, the business structure under which the organization operates, and the professional qualifications of the individuals who direct the policies and operations of the organization shall be examined to determine whether the organization is a bona fide certifying organization.

IV. STANDARDS FOR APPROVAL OF CERTIFYING ORGANIZATIONS

The following standards are to be considered by the Board of Legal Specialization in evaluating an application for approval of a certifying organization:

A. Uniform Applicability of Certification Standards—In general, the standards for certification in any specialty field must be understandable and easily applied to individual applicants. Certification by the organization must be available to any attorney who meets the standards, and the organization must not certify an attorney who has not demonstrably met each standard. The organization must agree to promptly inform the Board of Legal Specialization of any material changes in its standards, definitions of specialty fields or certifying procedures and must further agree to respond promptly to any reasonable requests for information from the Board of Legal Specialization.

B. Definitions of Specialty Fields—Every field of law in which certification is offered must be susceptible of meaningful definition and be an area in which North Carolina lawyers regularly practice.

C. Decision Making by Recognized Experts—The persons in a certifying organization making decisions regarding applicants shall include lawyers who, in the judgment of the Board of Legal Specialization, are experts in the subject areas of practice and who each have extensive practice or involvement in those areas of practice.

D. Certification Standards—A certifying organization's standards for certification of specialists must include, as a minimum, the standards required for certification set out in the North Carolina Plan of Specialization and in the rules, regulations and standards adopted by the Board of Legal Specialization from time to time. Such standards shall not unlawfully discriminate against any lawyer properly qualified for certification as a specialist, but shall provide a reasonable basis for a determination that an

applicant possesses special competence in a particular field of law, as demonstrated by the following means:

1. Substantial Involvement—Substantial involvement in the area of specialty during the five-year period immediately preceding application to the certifying agency. Substantial involvement is generally measured by the amount of time spent practicing in the area of specialty. In no event may the time spent in practicing the specialty be less than twenty-five percent (25%) of the total practice of a lawyer engaged in a normal full-time practice.

2. Peer Review—Peer recommendations from attorneys or judges who are familiar with the competence of the applicant in the area of specialty, none of whom are related to, engaged in legal practice with, or involved in continuing commercial relationships with the lawyer.

3. Written Examination—Objective evaluation of the applicant's knowledge of the substantive and procedural law in the area of specialty as determined by written examination.

4. Continuing Legal Education—At least 36 hours of approved continuing legal education credit in the area of specialty during the three years immediately preceding application to the certifying organization.

E. Applications and Procedures—Application forms used by the certifying organization must be submitted to the Board of Legal Specialization for review to determine that the requirements specified above are being met by applicants. Additionally, the certifying organization must submit a description of the process it uses to review applications.

F. Requirements for Recertification—The standards used by a certifying organization must provide for certification for a limited period of time, which shall not exceed five years, after which time persons who have been certified must apply for recertification. Requirements for recertification must include continued substantial involvement in the area of specialty, continuing legal education, and appropriate peer review.

G. Revocation of Certification—The standards used by a certifying organization shall include a procedure for revocation of certification. A certification shall be revoked upon a finding that the certificate holder has been disbarred or suspended from the practice of law. The standards shall require a certificate holder

to report his or her disbarment or suspension from the practice of law to the certifying organization.

H. The standards used by a certifying organization may provide for waiver of the peer review and written examination requirements set forth in subsections D.2. and 3. above for an applicant who was responsible for formulating and grading the organization's initial written examination in his or her area of specialty.

V. APPLICATION PROCEDURE

A. The organization may file an application seeking approval of the organization by the Board of Legal Specialization. Applications shall be on forms available from, and approved by, the Board of Legal Specialization. The application fee shall be $1000.

B. The organization which has been approved shall provide its standards, definitions and/or certifying procedures to the Board of Legal Specialization in January of each year and must pay an annual administrative fee of $100 to maintain its approved status.

C. When the Board of Legal Specialization determines that an approved certifying organization has ceased to exist, has ceased to operate its certification program in the manner described in its application, or has failed to comply with the requirements of Section V.B., its approved status shall be revoked. After such a revocation, no North Carolina lawyer may publicize a certification from the organization in question.

D. The appeal procedures of the Board of Legal Specialization shall apply to any application by an organization for approval as a certifying organization and any decision to revoke a certifying organization's approved status.

VI. EFFECT OF APPROVAL OF A CERTIFYING ORGANIZATION BY THE BOARD OF LEGAL SPECIALIZATION

When an organization is approved as a certifying organization by the Board of Legal Specialization, any North Carolina lawyer certified as a specialist by that organization may publicize that certification.

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 a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
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 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO RULE 2.5 OF THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rule 2.5 of the Rules of Professional Conduct as appears in 312 N.C. 845 be and is hereby amended as follows:

Amendments to Rule 2.5 of the Rules of Professional Conduct

Rule 2.5 Specialization

(Strike the existing rule and substitute the following in lieu thereof)

A lawyer may not communicate that the lawyer is a certified specialist or certified in a field of practice except as provided in this rule.

A lawyer may communicate that the lawyer is certified as a specialist or certified in a field of practice when the communication states the name of the certifying organization and is not false or misleading, and

(A) The certification is granted by the North Carolina State Bar, or

(B) The certification is granted by an organization which has been approved by the North Carolina State Bar, or

(C) The certification is granted by an organization which has been approved by the American Bar Association under procedures and criteria which have been approved by the ABA and which have been endorsed by the North Carolina State Bar.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENT TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR CHANGING THE NAME OF THE COMMITTEE ON UNAUTHORIZED PRACTICE TO THE COMMITTEE ON CONSUMER PROTECTION

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, e. be amended by striking the words, "Unauthorized Practice," and substituting in lieu thereof the words, "Consumer Protection," so that the entire subsection shall read as follows:

e. Committee on Consumer Protection of not less than three Councilors selected by the President.

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 a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
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 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENT TO RULE 10.3, INTEREST ON LAWYERS' TRUST ACCOUNTS, OF THE RULES OF PROFESSIONAL CONDUCT

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rule 10.3 of the Rules of Professional Conduct be and is hereby amended as follows:

(Deleting, in its entirety, section (C) and inserting in lieu thereof the following:)

> (C) The North Carolina State Bar shall periodically deliver to each nonparticipating lawyer a form whereby the lawyer may elect, by the ensuing January 31, not to participate in the IOLTA plan. If a lawyer does not so elect within the time provided, the lawyer shall be deemed to have opted to participate in the plan as of that date and shall provide to the North Carolina State Bar such information as is required to participate in IOLTA.

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 a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
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 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ELIMINATE INACTIVE STATUS IN CERTAIN CASES

The following amendments to the rules, regulations and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II, Section 4, of the Rules of the North Carolina State Bar be amended as follows:

Article II, Section 4—Order Placing Petitioner on Inactive List

(The final two paragraphs of Article II, Section 4, are deleted such that Article II, Section 4 reads, in its entirety, as follows:)

The Council may in its discretion order the petitioner to be placed on the inactive list of membership on the records of the Secretary and may in its discretion revoke such order at any time.

It is the policy of the Council from and after April 18, 1969, that:

Members of The North Carolina State Bar serving in the armed services whether in a legal or a nonlegal capacity will be exempt from payment of dues so long as they are on active duty in the military service.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the

Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO THE PLAN OF LEGAL SPECIALIZATION TO CREATE THREE NEW SUBSPECIALTIES

The following amendments to the rules, regulations and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Section 25 of the Plan of Legal Specialization, Appendix H of Rules of the North Carolina State Bar, be amended as follows:

Section 25—Areas of Specialty

(Subsection (A) is amended as follows to add two subspecialties:)

(A) Bankruptcy Law

1) Consumer Bankruptcy Law

2) Business Bankruptcy Law

(Subsection (E) is amended as follows to add one new subspecialty:)

(E) Criminal Law

1) Criminal Appellate Practice

2) State Criminal Law

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/ JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN BANKRUPTCY TO CREATE TWO SUBSPECIALTIES

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Standards for Certification as a Specialist in Bankruptcy of the Rules of the North Carolina State Bar be amended as follows:

Section 2—Definition of Specialty

(By adding at the conclusion of Section 2 the following:)

Subspecialties in the field are identified and defined as follows:

2.1 Consumer Bankruptcy Law: The practice of law dealing with consumer bankruptcy and the representation of interested parties in contested matters or adversary proceedings in individual filings of Chapter 7, Chapter 12, or Chapter 13.

2.2 Business Bankruptcy Law: The practice of law dealing with business bankruptcy and the representation of interested parties in contested matters or adversary proceedings in bankruptcy cases filed on behalf of debtors who are or have been engaged in business prior to an entity filing Chapter 7, Chapter 9, Chapter 11, or Chapter 12.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the

Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENT TO THE STANDARDS FOR CERTIFICATION AS A SPECIALIST IN CRIMINAL LAW TO CREATE A NEW SUBSPECIALTY

The following amendment to the rules, regulations and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Standards for Certification as a Specialist in Criminal Law of the Rules of the North Carolina State Bar be amended as follows:

Section 2—Definition of Specialty

(By adding a new Subsection 2.2 as follows:)

2.2 State Criminal Law:

The practice of criminal law in state trial and appellate courts.

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 a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
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 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO THE PLAN OF LEGAL SPECIALIZATION OF THE RULES OF THE NORTH CAROLINA STATE BAR TO PERMIT DISCRETION IN SATISFYING CERTAIN CERTIFICATION AND RECERTIFICATION CRITERIA

The following amendments to the rules, regulations and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Sections 20 and 21 of the Plan of Legal Specialization, Appendix H of the Rules of the North Carolina State Bar, be amended by adding new subsections as follows:

Section 20—Minimum Standards for Certification of Specialists

(By adding new subsection (H) as follows:)

(H) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the Board of Legal Specialization may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for certification for specialization. However, there shall be no waiver of the requirements that the applicant pass a written examination and be licensed to practice law in North Carolina for five years preceding the application.

Section 21—Minimum Standards for Continued Certification of Specialists

(By adding new subsection (D) as follows:)

(D) Upon written request of the applicant and with the recommendation of the appropriate specialty committee, the Board of Legal Specialization may for good cause shown waive strict compliance with the criteria relating to substantial involvement, continuing legal education, or peer review, as those requirements are set forth in the standards for continued certification.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amend-

ments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH STANDING COMMITTEES ON CONTINUING LEGAL EDUCATION, LAWYERS' TRUST ACCOUNTS, AND BUDGET, FINANCE AND AUDIT

The following amendments to the rules, regulations and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 16, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, of the Rules of the North Carolina State Bar be amended by adding new subsections "r.", "s.", and "t." as follows:

Article VI, Section 5—Standing Committees of the Council

(Add new Sections r., s., and t. as follows:)

r. Board of Continuing Legal Education.

A committee of not less than nine members appointed as set forth in the Continuing Legal Education Rules of the North Carolina State Bar. The Board of Continuing Legal Education shall have the responsibility for operating the continuing legal education program subject to the statutes governing the practice of law, the authority of the Council, and the rules of governance of the Board.

s. Lawyers' Trust Accounts Committee.

A committee the members of which shall be appointed by the President.

t. Budget, Finance, and Audit Committee.

A committee of not less than three members who shall be appointed by the President.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 16, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 6th day of May, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 6th day of May, 1993.

s/PARKER, J.
For the Court

AMENDMENT TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR CONCERNING THE APPOINTMENT OF COUNSEL TO PROTECT THE INTERESTS OF A MISSING OR INCAPACITATED LAWYER AND HIS OR HER CLIENTS

The following amendment to the rules, regulations, and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 9, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 22 A. be amended by striking the words, "personal representative" and "party", and substituting therefor the phrase, "member of the North Carolina State Bar", immediately following the word, "other"; and further by striking the words, "conducting the attorney's affairs", and by substituting therefor the phrase, "protecting the interests of the attorney's clients", so that the entire subsection shall read as follows:

> A. Whenever a member of the North Carolina State Bar has been transferred to disability inactive status, disappears, or dies and no partner or other member of the North Carolina State Bar capable of protecting the interests of the attorney's clients is known to exist, the senior resident judge of the superior court in the district of the member's most recent address on file with the North Carolina State Bar, if it is in this state, will be requested by the secretary to appoint an attorney or attorneys to inventory the files of the member and to take action to protect the interests of the member and his or her clients.

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 a regularly called meeting on July 9, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of July, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of September 1993.

s/JAMES G. EXUM, JR.
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 9th day of September 1993.

s/PARKER, J.
For the Court

AMENDMENT TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR RELATING TO THE PERFORMANCE OF TRUST ACCOUNT AUDITS

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 9, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IX, Section 28 A. be amended by striking the words, "the counsel's staff", at the end of the first sentence and substituting therefor "any auditor appointed by the counsel" so that the first sentence of that section shall read as follows:

> A. For reasonable cause, the chairperson of the grievance committee is empowered to issue an investigative subpoena to a member compelling the production of any records required to be kept relative to the handling of client funds and property by the Rules of Professional Conduct for inspection, copying, or audit by the counsel or any auditor appointed by the counsel.

BE IT FURTHER RESOLVED that Article IX, Section 28 B be amended by striking the words, "the counsel's staff", in the first sentence and substituting therefor "any auditor appointed by the counsel" in the first sentence; and further by striking the words, "the procedures and record keeping requirements established by", also in the first sentence; and that the section be amended further by striking the words, "in accordance with the procedures referred to above", from the second sentence; and that the section be further amended by adding the following language immediately after the section's third sentence: "The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the grievance committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the grievance committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit."; so that the entire section shall read as follows:

> B. The chairperson of the grievance committee may randomly issue investigative subpoenas to members compelling the production of any records required to be kept relative to the handling of client funds or property by the Rules of Professional Conduct for inspection by the counsel or any auditor

appointed by the counsel to determine compliance with the Rules of Professional Conduct. Any such subpoena will disclose upon its face its random character and contain a verification of the secretary that it was randomly issued. No member will be subject to random selection under this section more than once in three years. The auditor may report any violation of the Rules of Professional Conduct discovered during random audit to the grievance committee for investigation. The auditor may allow the attorney a reasonable amount of time to correct any procedural violation in lieu of reporting the matter to the grievance committee. The auditor shall have authority under the original subpoena for random audit to compel the production of any documents necessary to determine whether the attorney has corrected any violation identified during the audit.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 9, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 13th day of August, 1993.

s/L. THOMAS LUNSFORD
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 9th day of September 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports

as provided by the Act incorporating the North Carolina State Bar.

This the 9th day of September 1993.

s/PARKER, J.
For the Court

AMENDMENT TO ARTICLE VI 0F THE RULES OF THE NORTH CAROLINA STATE BAR TO ESTABLISH A STANDING COMMITTEE ON FEE ARBITRATION

The following amendment to the rules, regulations and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article IV, Section 5, of the Rules of the North Carolina State Bar be amended by adding a new section "q." as follows:

Article VI, Section 5—Standing Committees of the Council

(Add new section q.)

Fee Arbitration Committee

1. A committee of five councilors and four noncouncilors to supervise the administration of a program of fee arbitration which is to be administered by the several district bars of the North Carolina State Bar, hereinafter referred to as "district bars." The committee shall be appointed by the president. At least one councilor shall be appointed from each judicial division. The president shall also appoint a chairperson from among the nine members of the committee.

2. The committee shall implement a model plan for fee arbitration approved by the council and shall ensure that a plan of fee arbitration not substantively inconsistent with the model plan is adopted by each district bar not later than January 1, 1994. It is contemplated that fee arbitration plans will differ somewhat from district to district as a function of local conditions and that some district bars may wish to jointly administer fee arbitration programs. All district bar fee arbitration plans must be approved by the committee on behalf of the council.

3. If at any time following January 1, 1994, a district bar does not have in operation a fee arbitration plan approved by the committee, the committee shall have the responsibility of providing fee arbitration services through its own membership, through a fee arbitration committee from another judicial district or through a fee arbitration committee appointed from among persons residing in the subject district. In any such case, the body providing fee arbitration services shall be subject to the procedural requirements set forth in the model plan.

4. The Secretary-Treasurer of the North Carolina State Bar shall designate a member of his or her staff to serve as coordinator of fee arbitration under the supervision of the committee. The coordinator of fee arbitration shall assist in seeing that fee arbitration services are available in every district of the state. The coordinator shall also develop and make available for use forms for the administration of district bar fee arbitration programs, such forms to be approved by the committee. The coordinator shall also be responsible for maintaining records and statistics relating to the administration of the program and shall assist the chairperson of the committee in developing an annual report concerning the fee arbitration program to the council and the North Carolina Supreme Court.

5. Except for the coordinator of fee arbitration, all persons acting on behalf of the committee, on either the state or district bar levels, shall be volunteers and shall be compensated for their services and reimbursed for their expenses as though they were councilors of the North Carolina State Bar engaged in official business of the North Carolina State Bar.

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 a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 27th day of May, 1993

s/ L. THOMAS LUNSFORD, II
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3 day of June 1993.

s/ JAMES G. EXUM, JR.
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 3 day of June 1993.

s/ PARKER, J.
For the Court

MODEL PLAN FOR DISTRICT BAR FEE ARBITRATION

The following amendment to the rules, regulations and the certificate of organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the rules of the North Carolina State Bar be amended by adding the attached Model Plan for District Bar Fee Arbitration as follows:

MODEL PLAN FOR DISTRICT BAR FEE ARBITRATION

Note: For the purposes of this model plan, the constituent district bars of the North Carolina State Bar are referred to as "district bars."

I. Appointment of Committee Members

1. The Committee on Fee Arbitration (herein called the "committee") shall consist of _____ (not fewer than six nor more than eighteen) members to be appointed by the president of the _____ district bar for three-year terms. At least one committee member shall be appointed from each county in the district. Initially, one-third of the members of the committee shall be appointed for a period of one year, one-third for a period of two years and one-third for a period of three years. At least one-third but not more than one-half of the membership of the committee shall be responsible laypersons who reside within the _____ district. All other persons serving on the committee shall be members of this bar. As each member's term of office on the committee expires, his or her successor shall be appointed by the president for a period of three years. The term of a member which expires while an arbitration is pending before him or her or before a panel of which he or she is a member shall be extended until such arbitration is concluded, but such extension shall not interfere with the president's power to appoint a successor to the committee. The president shall appoint the chair of the committee each year from among the members, and the name of the chair shall be sent to the coordinator of fee arbitration with the North Carolina State Bar.

2. To the extent reasonably possible, the composition of the committee should reflect the ethnic and cultural diversity of the population of the district and should include members of minority groups, women and senior citizens. Lawyer members should have practiced for at least five (5) years.

II. Chair

The chair shall be charged with the responsibility of overseeing the work of the committee, reviewing recommendations for dismissal of cases, developing forms to implement the procedure prescribed herein and may formulate rules of procedure not inconsistent with these rules. The chair shall review recommendations for dismissal of cases within 30 days after any such recommendations are made.

III. Jurisdiction

The committee shall have jurisdiction over any disagreement concerning the fee paid, charged or claimed for legal services rendered by an attorney licensed to practice in this state and having his or her principal practice in the _____ district where there exists an express or implied contract establishing an attorney-client relationship. Disputes over which, in the first instance, a court or federal or state administrative agency or official has jurisdiction to establish the amount of the fee, or which involve services which constitute a violation of the Rules of Professional Conduct, are specifically excluded from the committee's jurisdiction, as are matters which are already the subject of litigation. Also excluded are disputes between lawyers concerning divisions of legal fees, disputes between lawyers and other service providers such as court reporters and expert witnesses, and disputes between lawyers and other persons in regard to the provision of nonlegal services. It shall be the duty of the committee to encourage the amicable resolution of fee disputes falling within its jurisdiction and, in the event such resolution is not achieved, to arbitrate such disputes.

IV. Processing Requests for Arbitration

1. Any client may submit a request for arbitration of a fee dispute. Lawyers who are parties to fee disputes may not independently request arbitration but are encouraged to advise clients with whom they have fee disputes of the existence of this procedure and its purpose. Such lawyers must also refrain from filing suit to collect disputed fees until their clients have had a reasonable opportunity to request arbitration after having been notified of the existence of this plan.

2. Requests for fee arbitration shall be submitted in writing to either the coordinator of fee arbitration addressed to the North Carolina State Bar, P.O. Box 25908, Raleigh, NC 27611

or the chair of the committee. In the event a request is submitted initially to the chair, the chair shall forward a copy of the request to the coordinator of fee arbitration to facilitate the maintenance of complete records and any necessary follow-up. No filing fee shall be required. The request should state with clarity and brevity the facts of the fee dispute and the names and addresses of the parties. It should also state that prior to requesting arbitration a reasonable attempt was made to resolve the dispute by agreement, that the matter has not already been adjudicated and that it is not presently the subject of litigation.

3. Upon receipt, a request shall be immediately acknowledged. If received initially by the coordinator of fee arbitration, the request shall be immediately forwarded to the chair of the committee of the district wherein the dispute arose for referral to an "assigned member" for investigation. The assigned member shall be disqualified from participating in any manner in the arbitration proceedings.

4. As soon as possible after receiving the case, the assigned member shall notify the subject lawyer of the request for arbitration and provide the lawyer with a copy of the request for arbitration. The assigned member shall personally contact both parties for the purpose of explaining the arbitration procedure and exploring with the parties the possibility of resolving the dispute by agreement prior to a hearing. If settlement does not occur, the assigned member shall undertake to investigate the matter.

5. Upon the completion of any preliminary investigation deemed appropriate, the assigned member shall determine whether a matter suitable for arbitration has been presented. If the assigned member determines that a matter should not be arbitrated, because it appears to be frivolous or moot, or because jurisdiction is, or becomes unwarranted, he or she shall prepare a brief written report setting forth the facts and a recommendation of dismissal for submission to the chair.

6. If the chair concurs in the assigned member's recommendation, the matter shall be closed and the parties so advised. If the chair disapproves the assigned member's recommendation, he or she may proceed as hereinafter provided.

7. If, following the preliminary investigation, the assigned member concludes that a matter suitable for arbitration has

been stated, he or she shall notify the parties that the committee has assumed jurisdiction but will delay any further steps until the expiration of a thirty (30) day period during which the parties shall be urged to exert their best efforts to reach an amicable resolution of their dispute.

8. If the parties do not themselves settle the dispute within the thirty (30) day period, the assigned member shall invite the parties to execute a consent to binding arbitration. If either party desires not to execute such consent, the matter shall be arbitrated with the understanding that the result will be nonbinding. At anytime thereafter the parties may agree that the results will be binding.

V. Arbitration Proceedings

1. After ascertaining whether the arbitration will be binding or nonbinding, the chair shall assign the matter to a hearing panel composed of one (1) [lawyer] member of the committee if the amount in dispute is $2,000 or less, or to a three (3) member panel, containing at least one lawyer and at least one layperson selected by the chair if the amount in dispute is more than $2,000. The chair shall designate a lawyer member of a panel to serve as chair of the panel.

2. It shall be the obligation of any member so designated to serve as arbitrator to disclose to the chair of the committee any reasons why he or she cannot ethically or conscientiously serve. In the event that a member so designated to serve declines or is unable to serve, the chair shall select another committee member who may be eligible. In the designation of panel members, the chair shall strive to rotate selection of panel members in an equitable manner.

3. If at the time set for a hearing before a three (3) member panel, all three (3) members are not present, the chair of the panel, or in the event of his or her unavailability, the chair of the committee, in his or her sole discretion, shall decide either to postpone the hearing, or, with the consent of the parties, to proceed with the hearing with one (1) member of the panel as the sole arbitrator, in which case he or she shall also designate the member of the panel who will hear the case as sole arbitrator. In no event will a hearing be conducted by or proceed with two (2) arbitrators.

4. If any member of a three (3) member panel becomes unable to continue to act while the matter is pending and before

a decision has been made, the proceedings to that point shall be declared null and void and the matter assigned to a new panel for rehearing unless the parties, with the consent of the panel chair, or in the event of his or her unavailability, the chair of the committee, consent to proceed with the hearing with one (1) of the remaining members of the panel as the sole arbitrator.

5. If the parties to a controversy agree, they may waive an oral hearing and submit their contentions in writing to the arbitrator(s) assigned who may then determine the controversy. However, the arbitrator(s) may require oral testimony from any party or witness after due notice to all parties.

6. The members of the committee selected as arbitrator(s) of any dispute shall be vested with all the powers and shall assume all the duties granted and imposed upon neutral arbitrators by the Uniform Arbitration Act as adopted in North Carolina (GS 1-567.1 et seq.) not in conflict with these rules.

7. The single arbitrator or panel assigned shall hold a hearing within thirty (30) days after the receipt of the assignment and shall render a decision within thirty (30) days after the close of the hearing. The decision of the panel shall be made by a majority of the panel where heard by three (3) members, or by the one (1) member of the panel who was designated as sole arbitrator, as provided herein.

8. The chair of the panel or the single arbitrator, as the case may be, shall fix a time and place for the hearing and shall cause written notice thereof to be sent to the other members of the panel and served personally or by registered or certified mail on the parties to the arbitration not less than seven (7) days before the hearing. A party's appearance at a scheduled hearing shall constitute a waiver on his or her part of any deficiency with respect to the giving of notice of the hearing.

9. The term "party" as used in these rules refers to a party to an arbitration and shall include the person(s) or entity requesting arbitration and any lawyer with whom that person(s) or entity is in disagreement regarding a legal fee.

10. The parties to the arbitration are entitled to be heard, to present evidence and to cross-examine witnesses appearing at the hearing. Any party to an arbitration has the right to be represented by an attorney at any stage of the arbitra-

tion proceeding. The chair of the committee shall have the discretion to appoint an attorney member of the committee to represent the nonlawyer party on a pro bono basis. Any party may also have a hearing reported by a court reporter at his or her expense by written request presented to the chair of the committee and other parties to the arbitration at least three (3) days prior to the date of the hearing. In the event of such request, any other party to the arbitration shall be entitled to acquire at his or her own expense a copy of the reporter's transcript of the testimony by arrangements made directly with the reporter. It shall be the duty and responsibility of the party requesting that a hearing be reported to make the necessary arrangements to have the court reporter present at the hearing.

11. All parties and counsel shall have an absolute right to attend all hearings. The exclusion of other persons or witnesses waiting to be heard shall rest in the discretion of the arbitrator(s).

12. Adjourned dates for the continuation of any hearing which cannot be completed on the first day shall be fixed for such times and places as the arbitrator(s) may select with due regard to the circumstances of all the parties and the desirability of a speedy determination. Upon request of a party for good cause, or upon its own determination, the arbitrator(s) may postpone the hearing from time to time.

13. The sole arbitrator or the chair of a panel, as the case may be, shall preside at the hearing. The sole arbitrator or the chair of the panel shall rule on the admission and exclusion of evidence and on questions of procedure and shall exercise all powers relating to the conduct of the hearing. In conducting the hearing and in making rulings concerning evidence and procedure, the arbitrator(s) shall endeavor to afford all parties a fair and reasonably informal opportunity to be fully heard and shall disregard procedural and evidentiary rules or technicalities tending to frustrate that purpose.

14. The arbitrator(s) may request opening statements and may prescribe the order of proof. In any event, all parties shall be afforded full opportunity for the presentation of any material evidence. In the interests of time and economy, the panel may examine witnesses and refuse to hear testimony which is deemed redundant or irrelevant.

15. On request of any party to the arbitration or any arbitrator, the testimony of witnesses shall be given under oath. When so requested, the sole arbitrator or the chair of the panel shall administer oaths to witnesses testifying at the hearing.

16. If either party, having agreed to binding arbitration and having been duly notified of a hearing, fails to appear, the arbitrator(s) may hear and determine the controversy upon the evidence produced, notwithstanding such failure to appear and enter a binding decision. If a party, not having agreed to binding arbitration, but having been duly notified of a hearing, fails to appear, the arbitrator(s) may terminate the arbitration. For good cause shown, the arbitrator(s) may also excuse a party's failure to appear and reschedule a hearing. If the lawyer/party's failure to appear results in termination, the chair of the committee shall report that fact to the coordinator of fee arbitration and the counsel of the North Carolina State Bar who may treat the matter as a grievance against the lawyer. If the client/party's failure to appear results in termination, the chair of the committee shall likewise inform the coordinator of fee arbitration and advise the lawyer that he or she may proceed, if desired, with other means of collecting the legal fee in question.

17. Before closing the hearing, the arbitrator(s) shall specifically inquire of all parties whether they have further evidence to submit in whatever form. If the answer is negative, the hearing shall be declared closed and a notation to that effect made by the arbitrator(s) as well as the date for submission of memoranda or briefs, if requested by the arbitrator(s).

18. In the sole discretion of the arbitrator(s) and for good cause shown, the hearing may be reopened at any time before the decision is signed and filed.

19. In the event of the death or incompetency of a party to the arbitration proceeding, prior to the close of the hearing, the proceeding shall abate without prejudice to either party to proceed in a court of proper jurisdiction to seek such relief as may be warranted. In the event of death or incompetency of a party after the close of the hearing but prior to a decision, a decision shall nevertheless be rendered. If the parties have agreed to binding arbitration, the decision shall be binding upon the heirs, administrators or executors

of the deceased and on the estate or guardian of the incompetent.

VI. The Decision

1. The purpose of arbitration under these rules is to resolve the underlying dispute by determining the proper charge for the legal services rendered. In making that determination the arbitrators may consider all factors they deem relevant, but should give special consideration to the intentions and understandings of the parties at the time the representation was undertaken, as well as the provisions of Rule 2.6 of the North Carolina Rules of Professional Conduct. Of particular significance should be any written fee agreement executed by the parties.

2. The result of the arbitration shall be expressed in a written decision signed by a majority of the arbitrators. A dissent shall be signed separately. A decision may also be entered on consent of all the parties. Once a decision is signed and filed, the hearing may not be reopened except upon consent of all parties.

3. While it is not required that a decision be in any particular form, it should in general consist of a preliminary statement reciting the jurisdictional facts and the decision. It shall include a determination of all questions submitted to the arbitrator(s), the decision of which is necessary in order to determine the controversy.

4. The original and four copies of the decision shall be signed by the sole arbitrator or, if the matter is heard by a three (3) member panel, by the members of the panel concurring therein.

5. The sole arbitrator or the chair of the panel shall forward the decision, together with the entire file, to the chair of the committee who shall thereupon, for and on behalf of the arbitrator(s), serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail. The chair shall also send a copy of the decision to the coordinator of fee arbitration.

VII. Enforcement of the Decision

In any case in which both parties signed a consent to binding arbitration, any award rendered may be enforced by any

court of competent jurisdiction. In all other cases, the parties are strongly encouraged to abide by the decision.

VIII. Record Keeping

The coordinator of fee arbitration shall keep a log of each request for arbitration filed, which log shall contain the following information:

(a) The client's name,

(b) Date of the request,

(c) The lawyer's name,

(d) The district in which the lawyer resides,

(e) How the dispute was resolved (heard by panel, no merit, fee justified, attorney/client agreement, etc.); and

(f) The time necessary to resolve the dispute.

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 a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD, II
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of June, 1993.

s/JAMES G. EXUM, JR.
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 3 day of June 1993.

s/PARKER, J.
For the Court

AMENDMENTS TO RULE 2.6 OF THE RULES OF PROFESSIONAL CONDUCT

The following amendments to the rules, regulations, and the certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 15, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Rule 2.6 of the Rules of Professional Conduct as appears in 312 N.C. 845 be and is hereby amended as follows:

Amendments to Rule 2.6 of the Rules of Professional Conduct

(Add a new section (E) as follows:)

E. Any lawyer having a dispute with a client regarding a fee for legal services must:

1) Make reasonable efforts to advise his or her client of the existence of the North Carolina State Bar's program of nonbinding fee arbitration at least 30 days prior to initiating legal proceedings to collect the disputed fee; and

2) Participate in good faith in nonbinding arbitration of the fee dispute if such is subject to the jurisdiction of any duly constituted fee arbitration committee of the North Carolina State Bar or any of its constituent district bars if the client submits a proper request for fee arbitration.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 15, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 2nd day of March, 1993.

s/L. THOMAS LUNSFORD, II
L. Thomas Lunsford, II,
Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that

the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3d day of June, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 3 day of June 1993.

s/PARKER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ACCORD AND SATISFACTION

§ 1 (NCI4th). Generally; definitions and elements

There was sufficient evidence to submit to the jury the defenses of accord and satisfaction and compromise and settlement in an action for breach of a personal services contract. **Hassett v. Dixie Furniture Co.**, 307.

APPEAL AND ERROR

§ 75 (NCI4th). Appeal to appellate division; defendant entering plea of guilty

A defendant who pled guilty waived all nonjurisdictional errors insofar as they might have affected the guilt proceedings. **State v. Heatwole**, 156.

§ 118 (NCI4th). Appealability of orders; summary judgment denied

The denial of a motion for summary judgment based on the defense of res judicata is immediately appealable. **Bockweg v. Anderson**, 486.

§ 149 (NCI4th). Parties entitled to object

There was no plain error in a first degree murder prosecution where the court instructed the jury that the State must prove that defendant did not act in self-defense. Defendant failed to object and derived the benefit of an instruction to which he was not entitled. **State v. Jordan**, 431.

§ 150 (NCI4th). Preserving constitutional issues

Where defendant did not object at trial to the admission of a tape recording on the basis of a "suggestive" identification procedure, he will not be allowed to challenge the admission of the recording on that ground for the first time on appeal. **State v. Glenn**, 296.

§ 210 (NCI4th). Service of notice of appeal in civil actions

Notice of appeal served on the attorney for plaintiffs' underinsured motorist carrier was sufficient to serve the defendants. **Beaver v. Hampton**, 455.

§ 439 (NCI4th). Effect of failure to attach appendix or failure to include necessary material in appendix

Defendant's assignments of error to the exclusion of testimony by certain witnesses were dismissed for failure to comply with Appellate Procedure Rule 28(d) where defendant did not identify the specific questions or answers which he wants the appellate court to review, has not included portions of the transcript containing those questions or answers in the appendix, and has not included a verbatim recitation of those questions or answers in his brief. **State v. Glenn**, 296.

§ 447 (NCI4th). Issues first raised on appeal

The issue of the allocation of liability for prejudgment interest between the liability and underinsured motorist carriers was not properly within the scope of the appeal where this issue was not before the trial court. **Beaver v. Hampton**, 455.

§ 504 (NCI4th). Invited error

Where defense counsel asked defendant's daughter on cross-examination why she so disliked her father and whether he had ever beaten her, the daughter's response about an occasion when defendant had beaten her was invited error, and defendant cannot complain of such error on appeal. **State v. Syriani**, 350.

APPEAL AND ERROR — Continued

The trial court did not err in a first degree murder prosecution by failing to instruct on second degree murder where defendant foreclosed any inclination by the trial judge to give that instruction. **State v. Williams**, 719.

ARBITRATION AND AWARD

§ 34 (NCI4th). Fees and expenses of arbitration

Where the arbitration section of a stock purchase agreement contained no reference to counsel fees, G.S. 1-567.11 prohibited the award of counsel fees for work performed in the arbitration proceeding. **Nucor Corp. v. General Bearing Corp.**, 148.

Since G.S. 6-21.2 is a statute of general applicability while G.S. 1-567.11 is a specific statute relating solely to arbitration, G.S. 6-21.2 does not apply to arbitration proceedings, and the arbitrators and the superior courts upon confirmation are limited to applying G.S. 1-567.11 in determining whether counsel fees should be or were properly awarded in an arbitration proceeding. **Ibid.**

There is no authority in G.S. 1-567.11 or elsewhere in the Arbitration Act allowing a court to increase an arbitration award by adding counsel fees not contained in the award. **Ibid.**

ARREST AND BAIL

§ 69 (NCI4th). Particular circumstances showing probable cause; other identifying characteristics

A homicide defendant's arrest was made with probable cause where the information possessed by officers was sufficient to warrant a cautious man in believing the accused to be guilty. **State v. Medlin**, 280.

ARSON AND OTHER BURNINGS

§ 13 (NCI4th). Attempting to burn dwelling houses and certain other buildings

The evidence was sufficient to support defendants' conviction of attempted first degree arson even though it failed to show that a murder victim found in the dwelling was alive at the time of the attempted burning. **State v. Barnes**, 666.

§ 29 (NCI4th). Identity of defendant as culprit; sufficiency in particular cases

The evidence was sufficient to support defendant's conviction of attempted first degree arson under the theory of acting in concert. **State v. Barnes**, 666.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 48 (NCI4th). Certificates of deposit

The trial court erred by granting summary judgment for defendant bank in an action for the value of a certificate of deposit plus interest where the certificate was to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr. Agent" and the bank paid the certificate after Crisp's death to Timmy's mother, who was also the executrix of Crisp's estate. The only legally permissible option was to pay the funds to a legally appointed guardian for Timothy, who was a minor when the certificate was paid. No court had appointed Timothy's mother as Timothy's guardian with authority to receive funds. **Holloway v. Wachovia Bank and Trust Co.**, 94.

BURGLARY AND UNLAWFUL BREAKINGS

§ 59 (NCI4th). Sufficiency of evidence of first degree burglary in conjunction with multiple other crimes

The evidence was sufficient to support defendant's conviction of first degree murder, first degree burglary and attempted first degree arson under the theory of acting in concert. **State v. Barnes**, 666.

CONSPIRACY

§ 14 (NCI4th). Requisite elements; two or more persons

A murder defendant's conspiracy conviction was not set aside where the charge against the only co-conspirator was subsequently dismissed pursuant to a plea bargain. **State v. Gibson**, 29.

§ 33 (NCI4th). Sufficiency of evidence of conspiracies to commit robbery

The evidence was sufficient to establish a criminal conspiracy on the part of defendant and his girlfriend to rob the victim. **State v. Rannels**, 644.

CONSTITUTIONAL LAW

§ 262 (NCI4th). Right to counsel generally

There was no authority for applying Article I, Section 23 of the North Carolina Constitution differently from the pertinent sections of the federal Constitution. **State v. Medlin**, 280.

§ 277 (NCI4th). Waiver of right to counsel; particular circumstances

A trial court did not err in a murder and robbery prosecution by refusing to suppress defendant's statements on the ground that his waiver of counsel was not knowing, intelligent, and voluntary. **State v. Medlin**, 280.

§ 344 (NCI4th). Presence of defendant at proceedings; voir dire

Defendant's unwaivable right to be present at all stages of his capital trial was not violated by the trial court's excusal of jury pool members after private, unrecorded bench conferences before defendant's case had been called for trial. **State v. Rannels**, 644.

§ 370 (NCI4th). Death penalty; generally

Neither the North Carolina death penalty statute generally nor the aggravating circumstance that a murder was especially heinous, atrocious, or cruel was unconstitutional. **State v. Jennings**, 644.

§ 374 (NCI4th). Prohibition on cruel and unusual punishment; life imprisonment

The mandatory imposition of a life sentence for first degree murder, tried noncapitally, was not cruel and unusual punishment and did not require a proportionality review or a sentencing hearing with the same guidelines as other felonies. **State v. Bronson**, 67.

CONTRACTORS

§ 7 (NCI4th). Classification of licenses

The trial court erred by granting summary judgment for defendants in an action by a general contractor to collect money due under a construction contract where defendants contended that plaintiff was barred from recovery because its

CONTRACTORS — Continued

general contractor's license was classified for public utilities and not for highway construction, which plaintiff had subcontracted to general contractors holding licenses classified for highway construction. **Baker Construction Co. v. Phillips**, 441.

CONTRACTS

§ 96 (NCI4th). Modification or waiver generally

The trial court did not err in an action for breach of a personal services contract by not submitting to the jury the defenses of waiver, estoppel and ratification where plaintiff contended that he was entitled to payments under the original contract. **Hassett v. Dixie Furniture Co.**, 307.

§ 154 (NCI4th). Instructions as to damages generally

The trial court erred in an action for breach of a personal services contract by instructing the jury that, if defendant breached the contract, it could find that plaintiff was entitled to recover the total amount of payments due as if performance had been rendered where there was evidence that plaintiff would have had a considerable amount of expense had he performed. **Hassett v. Dixie Furniture Co.**, 307.

The trial court did not err in an action for breach of a personal services contract by instructing the jury that defendant could recover on its counterclaim only in the amount that the expenditure by defendant to replace plaintiff exceeded the amount defendant would have paid plaintiff. **Ibid.**

CORPORATIONS

§ 133 (NCI4th). Availability of shareholders' names in advance of meetings

A corporation was not required to provide a shareholder with a list of non-objecting beneficial shareholders where the corporation did not have such a list in its possession. **Parsons v. Jefferson-Pilot Corp.**, 420.

§ 151 (NCI4th). Actions to inspect corporate books and records generally

A shareholder's common law rights of inspection, including the right to make reasonable inspections of the accounting records of a public corporation for proper purposes, are preserved by G.S. 55-16-02(e)(2); furthermore, a shareholder who seeks to exercise her common law right to examine corporate records also has a common law right to utilize the mandamus power of the courts to compel disclosure; and, in this case, the shareholder seeking inspection described both her purpose and the desired record with reasonable particularity. **Parsons v. Jefferson-Pilot Corp.**, 420.

CRIMINAL LAW

§ 105 (NCI4th). Information subject to disclosure by state; reports of examinations and tests

The results of blood grouping tests performed on samples taken from an automobile were not required to be excluded from evidence because all the blood taken from the automobile was consumed by the State's testing and none was left for testing by defendants. **State v. Barnes**, 666.

CRIMINAL LAW — Continued

§ 455 (NCI4th). Argument of counsel; comment on deterrent effect of death penalty

The prosecutor's jury argument that "the only way to insure he won't kill again is the death penalty" was not improper. **State v. Syriani**, 350.

§ 460 (NCI4th). Argument of counsel; permissible inferences

The prosecutor's jury arguments concerning defendant's intent to kill his daughter as well as his wife were reasonable inferences based on the evidence. **State v. Syriani**, 350.

§ 468 (NCI4th). Argument of counsel; miscellaneous comments

The prosecutor's jury argument that the small amount of blood recovered from a car had nothing to with the accuracy of the tests performed on the blood samples but only limited the number of tests that could be performed merely rebutted a contention by defendant that the tests were inaccurate due to the limited amount of blood and was not improper. **State v. Barnes**, 666.

There was no prejudicial error in a murder prosecution where the prosecutor implied in his closing argument that defendant could have pled not guilty by reason of insanity and the State would not have had to prove all the elements of the crime. **State v. Beach**, 733.

§ 491 (NCI4th). Permitting jury to view scene or evidence out of court generally

There was no error in a murder prosecution where the murder was committed inside a house and the jury was permitted to roam freely through the house during a jury view rather than being held together as a body. **State v. Harris**, 543.

§ 553 (NCI4th). Securing a mistrial; particular testimony generally

There was no abuse of discretion in a murder prosecution where the court denied defendant a mistrial after the admission of noncorroborative statements which indicated that defendant wanted to set up a false claim of self-defense. **State v. Williamson**, 128.

§ 560 (NCI4th). Circumstances in which mistrial may be ordered; prejudice to defendant; hearsay

There was no error in denying a motion for a mistrial in a murder prosecution where the out-of-court statement on which the motion was based was properly admitted. **State v. Williams**, 719.

§ 685 (NCI4th). Tender of written instructions; requests for instructions

The trial court did not err in a murder prosecution by not giving a curative instruction after denying defendant's motion for a mistrial following noncorroborative statements where defendant made no request for such an instruction. **State v. Williamson**, 128.

§ 720 (NCI4th). Correction or cure of misstatement or other error generally

There was harmless error in a first degree murder prosecution in the omission from the jury charge of one of the five essential elements of first degree murder where the court promptly corrected the error. **State v. Jennings**, 579.

§ 750 (NCI4th). Instructions on reasonable doubt; presumption of innocence

The trial court did not err in a first degree murder prosecution by instructing the jury that the highest aim of a criminal trial is the ascertainment of the truth

where the court instructed on the reasonable doubt standard throughout the charge. **State v. Sweatt**, 407.

§ 775 (NCI4th). Instructions; voluntary intoxication

There was harmless error in a prosecution for murder, burglary, and kidnapping where defendant requested that the court instruct on the defense of voluntary intoxication and the court limited its instruction to the murder charge. **State v. Kyle**, 687.

§ 794 (NCI4th). Acting in concert instructions appropriate under the evidence, generally

The evidence in a murder and assault prosecution supports the submission to the jury of acting in concert with George Robinson where Robinson was at the scene, the men met because of a debt Robinson owed to one victim, Robinson drove the four men in his automobile, and Robinson said, after the two men were shot, "[d]amn, I didn't mean for you to do this in my car." **State v. Jefferies**, 501.

The evidence in a murder prosecution supported an instruction on acting in concert where defendant's admission that, at the least, he knew that another man intended to shoot one of the victims and that he directed this other man to the location of the pistol is ample evidence of active encouragement and assistance to the perpetrator, as was his questioning of the other man's decision not to kill a witness. **State v. Williams**, 719.

§ 823 (NCI4th). Instructions on state's witnesses; police officers or undercover agents

The trial court did not err in a murder prosecution by refusing to give an instruction on the credibility of law enforcement officers. **State v. Williams**, 719.

§ 838 (NCI4th). Instructions on defense witnesses generally

The trial court did not err in a murder prosecution in its instruction regarding defendant's expert clinical psychologist where defendant did not object to the instructions and the assignment of error was considered under the plain error rule. **State v. Bronson**, 67.

§ 888 (NCI4th). Form and sufficiency of objection to jury instructions

The State's request for a pattern jury instruction, approved by defendant and agreed to by the court, preserved for appellate review the propriety of the different instruction actually given by the court. **State v. Keel**, 52.

§ 964 (NCI4th). Motion for appropriate relief in the appellate division

Defendant's motion for appropriate relief must first be determined in the superior court where the motion was filed in the trial court after his notice of appeal was given but the jurisdiction of the trial court had not been divested under G.S. 15A-1448(a)(3). **State v. Rannels**, 644.

§ 1100 (NCI4th). Prohibiting same evidence to support more than one aggravating factor

The trial court erred when sentencing defendant for kidnapping and burglary by finding as aggravating factors that defendant was armed with a deadly weapon and that he used a deadly weapon to commit the offenses. **State v. Kyle**, 687.

CRIMINAL LAW — Continued

§ 1101.1 (NCI4th). Nonstatutory aggravating factors generally

The trial court did not err when sentencing defendant for felonious assault by finding as a nonstatutory aggravating factor that defendant's motive in shooting the victim was to eliminate him as a witness. **State v. Jefferies**, 501.

§ 1102 (NCI4th). Permissible use of nonstatutory aggravating factor

The evidence was sufficient to support the trial court's finding as a nonstatutory aggravating factor for attempted arson that such crime was committed to cover up a murder. **State v. Barnes**, 666.

§ 1126 (NCI4th). Aggravating factor of course of criminal conduct; joinable offense

The rule that a sentence for one offense may not be aggravated by defendant's acts which form the gravamen of contemporaneous convictions of joined offense was not violated by the trial court's finding as an aggravating factor for attempted arson that such crime was committed to cover up a first degree burglary and a first degree murder for which defendants were also convicted. **State v. Barnes**, 666.

§ 1156 (NCI4th). Aggravating factor of use or armed with deadly weapon; other offenses

The trial court did not err in finding as an aggravating factor for first degree burglary that defendant was armed with a deadly weapon where there was evidence that defendant or a person with whom he was acting in concert used a gun and a knife during the crime. **State v. Barnes**, 666.

§ 1273 (NCI4th). Mitigating factors under Fair Sentencing Act; honorable discharge from armed services

The trial court did not err when sentencing defendant by not finding the statutory mitigating factor that defendant had been honorably discharged from military service where contradictory evidence had been presented in a pretrial hearing. **State v. Heatwole**, 156.

§ 1315 (NCI4th). Capital sentencing hearing; evidence of character or reputation

Where a defendant on trial for first degree murder of his wife presented evidence during the sentencing phase of his character for nonviolence and requested submission of the statutory mitigating circumstance that he had no significant history of prior criminal activity, the State was entitled to impeach him with rebuttal testimony by his daughter concerning four specific instances of misconduct by defendant toward her mother and herself. **State v. Syriani**, 350.

§ 1320 (NCI4th). Capital sentencing hearing; instructions on consideration of evidence

The trial court did not err in failing to instruct the jury at the penalty phase of a capital trial that prior bad acts evidence received at the guilt phase and on rebuttal in the penalty phase could not be used by the jury to support an aggravating circumstance in the penalty phase where the evidence of bad acts toward the victim was relevant to the existence of the especially heinous, atrocious, or cruel aggravating circumstance submitted to the jury. **State v. Syriani**, 350.

The trial court did not err in the sentencing phase of a murder prosecution when it allowed consideration of evidence of the victim's good character introduced during the guilt phase or when it instructed the jury that it could consider all evidence heard at both the guilt and penalty phases. **State v. Jennings**, 579.

CRIMINAL LAW — Continued

§ 1323 (NCI4th). Aggravating and mitigating circumstances generally

The trial court did not err in a murder prosecution in its instructions on how to proceed if the mitigating circumstances are of equal value and weight to the aggravating circumstances. **State v. Jennings**, 579.

§ 1326 (NCI4th). Aggravating and mitigating circumstances; burden of proof

The trial court did not err in a murder prosecution by instructing the jury that defendant had the burden of proving mitigating circumstances by a preponderance of the evidence. **State v. Jennings**, 579.

§ 1333 (NCI4th). Consideration of aggravating circumstances generally

There was no error in a murder prosecution in the denial of defendant's motion for a bill of particulars disclosing the statutory aggravating circumstances relied upon in seeking the death penalty. **State v. Jennings**, 579.

§ 1339 (NCI4th). Aggravating circumstances; capital felony committed during commission of another crime

There was no plain error in a murder prosecution where the court submitted the aggravating circumstance that the murder was committed while defendant was engaged in the commission of or while attempting to penetrate the anus with an object. **State v. Jennings**, 579.

The trial court did not err in a murder prosecution by submitting the aggravating circumstance that the murder was committed during a sex offense and that it was especially heinous, atrocious, or cruel where there was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the murder was committed during the sex offense. **Ibid.**

§ 1341 (NCI4th). Aggravating circumstances; pecuniary gain

The trial court did not err in a prosecution for the murder of a husband by a wife by instructing the jury on the aggravating circumstance of pecuniary gain even though defendant contended that the language "stood to benefit" applies to the surviving spouse of virtually every marriage. **State v. Jennings**, 579.

§ 1343 (NCI4th). Especially heinous, atrocious, or cruel aggravating circumstance; instructions

The trial court's Pattern Jury Instructions on the "especially heinous, atrocious, or cruel" aggravating circumstance provided constitutionally sufficient guidelines to the jury. **State v. Syriani**, 350.

§ 1344 (NCI4th). Especially heinous, atrocious, or cruel aggravating circumstance; submission of circumstance to jury

The trial court did not err in a murder prosecution by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel where defendant was convicted on the basis of torture and premeditation and deliberation. **State v. Jennings**, 579.

§ 1345 (NCI4th). Evidence sufficient to support finding of especially heinous, atrocious, or cruel aggravating circumstance

The trial court did not err in submitting the aggravating circumstance that defendant's first degree murder of his wife was "especially heinous, atrocious, or cruel" because the evidence and inferences therefrom supported a finding that the level of brutality exceeded that normally found in first degree murder cases

CRIMINAL LAW — Continued

and that the killing was physically and psychologically agonizing, conscienceless, pitiless and unnecessarily torturous to the victim. **State v. Syriani**, 350.

The trial court did not err in a murder prosecution by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel and that it was committed during a sex offense where there was substantial evidence of the especially heinous, atrocious, or cruel nature of the killing apart from the evidence as to whether the killing was committed during the sex offense. **State v. Jennings**, 579.

§ 1348 (NCI4th). Consideration of mitigating circumstances; definition

The trial court did not err in a first degree murder prosecution by denying defendant's request that it instruct the jury that "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." **State v. Jennings**, 579.

§ 1352 (NCI4th). Procedure for determining sentence in capital cases; consideration of mitigating circumstances; unanimous decision

There was prejudicial McKoy error in a murder prosecution where the court instructed the jurors that they must unanimously find each mitigating circumstance. **State v. Heatwole**, 156.

§ 1360 (NCI4th). Impaired capacity mitigating circumstance; instructions

The trial court was not required to submit the impaired capacity mitigating circumstance to the jury in a prosecution of defendant for the first degree murder of his wife based upon defendant's testimony that his judgment was affected by his emotional disturbance caused by the prospect of losing his wife and family through divorce proceedings. **State v. Syriani**, 350.

§ 1373 (NCI4th). Death penalty held not excessive or disproportionate

A sentence of death imposed on defendant for the first degree murder of his wife is not excessive or disproportionate, considering both the crime and the defendant, where the murder was preceded by many years of physical abuse of the wife and threats to her, the murder resulted from a calculated plan of attack by the defendant, and the killing was a brutal stabbing in front of other people. **State v. Syriani**, 350.

A sentence of death imposed on a young, healthy wife for the vicious first degree murder of her frail and elderly husband was not disproportionate or excessive. **State v. Jennings**, 579.

§ 1688 (NCI4th). Imposition of sentence identical to original sentence

The trial court erred when resentencing defendant by imposing a more severe sentence where the court resentenced defendant to the same total number of years on fewer indictments. **State v. Hemby**, 331.

DEATH

§ 23 (NCI4th). Wrongful death actions; effect of negligence of sole beneficiary

Where a mother's allegedly negligent operation of an automobile caused her son's death and the mother was the son's sole heir, the mother's purported renunciation of her right to inherit from her son in favor of the son's two sisters did not permit a wrongful death recovery against the mother in favor of the sisters. **Evans v. Diaz**, 774.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 124 (NCI4th). Violations of sedimentation law; enforcement; remedies

The one-year statute of limitations of G.S. 1-54(2) does not apply to the assessment of a civil penalty by the Secretary of the Department of E.H.N.R. pursuant to the Pollution Sedimentation Control Act. **Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.**, 318.

EVIDENCE AND WITNESSES

§ 90 (NCI4th). Prejudice as outweighing probative value

The trial court did not err in a murder prosecution by permitting the jury to hear an audio tape recording of defendant's telephone conversation with the sheriff and to read transcripts of that recorded conversation where the evidence was probative of defendant's mental state and, although it prejudiced defendant, was not unduly prejudicial. Evidence is unfairly prejudicial only if it unduly tends to suggest a decision on an improper basis. **State v. Daniel**, 756.

§ 162 (NCI4th). Threats made by defendant generally

The trial court did not err in a murder prosecution by overruling defendant's objection and by denying his request for a voir dire when the prosecutor asked defendant's brother "What, if anything, threatening did your brother do to you about whether or not you were to tell the truth or testify about this matter?" **State v. Hicks**, 467.

§ 264 (NCI4th). Character or reputation of persons other than witness, generally; victim

There was no error in a murder prosecution in the admission of testimony about the victim's good character which was admitted to rebut prior evidence elicited by defendant upon cross-examination that the victim suffered from dementia and that he displayed behavior characteristic of dementia. **State v. Jennings**, 579.

§ 268 (NCI4th). Character of persons other than witness; evidence as to specific instances of conduct

Where defendant put his character in issue by having one witness testify about his reputation for peacefulness and another testify that defendant was not the kind of person he would expect to kill his wife, the prosecutor was properly permitted to cross-examine these witnesses about specific instances of misconduct by defendant toward his wife and children to rebut their prior testimony. **State v. Syriani**, 350.

§ 294 (NCI4th). Suggestion or implication of other crimes, wrongs, or acts

Testimony in a murder and robbery case by Virginia police officers involved in defendant's apprehension that defendant was charged with driving while impaired and that defendant refused a breathalyzer test tended to show the circumstances under which defendant's confession was made and was admissible on the issues of the voluntariness and credibility of the confession. **State v. Rannels**, 644.

Evidence of defendant's theft of the car in which he was riding and beating of his girlfriend for leaving her purse in a murder and robbery victim's truck was admissible to show defendant's consciousness of guilt. **Ibid.**

EVIDENCE AND WITNESSES — Continued

§ 339 (NCI4th). Admissibility of other crimes, wrongs, or acts to show malice, premeditation, or deliberation

Testimony by defendant's children about defendant's frequent arguments with, violent acts toward, separations from, and threats to his wife were admissible in a prosecution for the murder of his wife to prove lack of accident, intent, malice, premeditation and deliberation, notwithstanding that some of the incidents dated back to the beginning of the marriage. **State v. Syriani**, 350.

The State's cross-examination of defendant with regard to defendant's specific and general misconduct toward the victim was proper under Rule of Evidence 404(b) where the State proffered the evidence to establish lack of accident, intent, malice, premeditation and deliberation. **Ibid.**

There was no error in a murder prosecution in the admission of evidence of a prior assault on the victim by defendant where defendant had not conceded his guilt of second degree murder at the time the evidence was offered. **State v. Kyle**, 687.

§ 368 (NCI4th). Admissibility of other crimes, wrongs, or acts; theft offenses generally

Evidence of defendant's theft of the murder weapon was admissible to prove not only that he possessed it but the circumstances under which he acquired it. **State v. Rannels**, 644.

§ 403 (NCI4th). Identification evidence; opportunity to observe defendant prior to offense

A witness had the opportunity, attention and certainty required at the time of her initial viewing of defendants near the crime scene to support her in-court identification of one defendant. **State v. Barnes**, 666.

§ 631 (NCI4th). Suppression hearing held in connection with prior trial

The trial court in a Durham County murder case did not err by considering the transcript of a suppression hearing in a Wake County murder case in ruling on defendant's motion to suppress in-custody statements and a gun found by police as a result of those statements and by incorporating the findings of fact in the Wake County order in its order denying defendant's motion to suppress. **State v. Pope**, 106.

§ 632 (NCI4th). When request for suppression hearing must be made

The trial court did not err in the denial of defendant's motion for a hearing on a witness's in-court identification of defendant where the motion was made after the witness had identified defendant before the jury. **State v. Barnes**, 666.

§ 672 (NCI4th). Introduction of like evidence without objection as waiver

There was no plain error in a murder prosecution where the trial court allowed inadmissible hearsay from two witnesses but defendant elicited virtually identical testimony. **State v. Bronson**, 67.

Defendant waived any benefit of a prior objection to testimony of a prior assault by defendant upon a murder victim by not objecting to an account of the same incident by a defense witness upon cross-examination. **State v. Kyle**, 687.

§ 688 (NCI4th). Assignments of error; abandonment

A contention that a prior consistent statement was improperly admitted for impeachment purposes was not properly presented on appeal because the assign-

ment of error dealing with the testimony was based solely on noncorroboration. **State v. Williamson**, 128.

§ 728 (NCI4th). Ownership or possession of firearms or other weapons; harmless or prejudicial error

Any error in the trial court's failure in a first degree murder case to overrule defendant's objection to the prosecutor's question implying that defendant might have been involved in the purchase of guns was not prejudicial. **State v. Locke**, 118.

§ 732 (NCI4th). Prejudicial error in the admission of evidence; statements by defendant

The burden was on the State to establish that the admission of a murder defendant's initial confession, which he made without benefit of Miranda warnings, was harmless beyond a reasonable doubt, and the State carried that burden where defendant admitted his guilt in a properly admitted second confession, gave a more detailed description of the crime, showed officers where he had hidden the gun used to kill the victim, drew a map showing officers where he had hidden the gun case and ammunition, and defendant's brother gave a detailed statement consistent with defendant's second confession. **State v. Hicks**, 467.

There was no prejudicial error in a murder prosecution where defendant made an oral statement, officers told defendant that he was not telling the truth, defendant said he had nothing more to say, an SBI agent assured defendant that he wanted defendant's side of the story, and defendant gave the agent a detailed statement. Assuming that defendant invoked his right to silence, there was no prejudice given the incriminating nature of the initial statement and other testimony at trial. **State v. Harris**, 543.

§ 736 (NCI4th). Prejudicial error in the admission of evidence; statements of conclusion or opinion

There was no prejudicial error in admitting testimony that the magistrate, when issuing a search warrant, asked if the officer wanted a warrant for murder. **State v. Jennings**, 579.

§ 758 (NCI4th). Cure of prejudicial error by admission of other evidence; statements of opinion or conclusion

There was no prejudicial error in a murder prosecution from the introduction of a paramedic's testimony identifying the wounds on the body of the deceased as an entrance and exit wound where defendant waived the assignment of error. **State v. Williamson**, 128.

§ 765 (NCI4th). Where party opposing admission of evidence had opened door

Where defense counsel asked defendant's daughter on cross-examination why she so disliked her father and whether he had ever beaten her, the daughter's response about an occasion when defendant had beaten her was invited error, and this question opened the door to redirect testimony by the daughter about another specific act of misconduct toward her by defendant to explain her response as to why she so disliked her father and to rebut the implication that her father had beaten her only the one time. **State v. Syriani**, 350.

A defendant on trial for the first degree murder of his wife opened the door to cross-examination regarding specific instances of misconduct toward both his wife and children when he testified on direct examination that he was a loving and supportive husband and father, and that he did not intend to hurt his wife

but unintentionally, or in self-defense, struck back at her with a screwdriver. **Ibid.**

§ 775 (NCI4th). Exclusion of particular evidence as harmless

There was no prejudicial error in a murder and assault prosecution where one of the State's theories was that defendant and George Robinson acted in concert, there was testimony that Robinson had been arrested, but the court excluded evidence that the charges had been dismissed. Evidence as to the disposition of a co-defendant's case is peripheral to the question of defendant's guilt. **State v. Jefferies**, 501.

§ 781 (NCI4th). Cure of prejudicial error by admission of other evidence; basic rules

There was no prejudicial error in a murder prosecution in the admission of testimony about the victim's good character where similar evidence was admitted without objection. **State v. Jennings**, 579.

§ 788 (NCI4th). Other evidence of same import admitted

There was no prejudice in a murder prosecution in allowing a paramedic to testify that deceased had been in cardiac arrest for more than 15 minutes when he arrived in light of similar, more damning testimony given by the county medical examiner and the pathologist who performed the autopsy. **State v. Jennings**, 579.

§ 959 (NCI4th). State of mind exception to hearsay rule

Testimony by a witness that a murder victim told him that she wanted to move in with him because defendant had attacked her, pinned her to the bed, and attempted to stab her was admissible under the state of mind exception to the hearsay rule set forth in Rule of Evidence 803(3) to show the victim's fear of defendant. **State v. Glenn**, 296.

§ 1064 (NCI4th). Flight as implied admission; jury instructions generally

The trial court did not err in a first degree murder prosecution in its instruction on flight. **State v. Sweatt**, 407.

§ 1070 (NCI4th). Jury instructions; sufficiency of evidence to support instruction on flight

The trial court did not err in a murder prosecution by giving the pattern jury instruction on flight where defendant took steps after the killing to avoid detection and apprehension and flight was a part of this effort. **State v. Jefferies**, 501.

§ 1081 (NCI4th). Admissibility of evidence that defendant refused to waive constitutional rights

Any error in a murder prosecution in the admission of testimony from an officer that defendant had exercised her right to remain silent was invited by defendant. **State v. Jennings**, 579.

Testimony in a murder prosecution that defendant refused to allow a search of her hotel room and car was harmless error where there was other testimony that defendant was not trying to hide anything, defendant did not unequivocally refuse the search, and the challenged testimony was but a tiny fraction of the case. **Ibid.**

EVIDENCE AND WITNESSES — Continued

§ 1088 (NCI4th). Silence of defendant as implied admission in face of statement by codefendant

The trial court did not err in a murder prosecution by admitting into evidence testimony that a statement had been made out of court in defendant's presence that defendant had participated in the shooting and defendant did not respond until some minutes later. **State v. Williams**, 719.

§ 1227 (NCI4th). Matters affecting admissibility or voluntariness of confession; impropriety of prior or subsequent confession

The trial court properly admitted evidence concerning a murder defendant's second confession, made voluntarily after a waiver of rights, where a first confession was taken in violation of Miranda. **State v. Hicks**, 467.

The test applied by the Supreme Court of the United States in *Oregon v. Elstad*, 470 U.S. 298, is adopted for determining whether Article I, sections 19 and 23 of the North Carolina Constitution require the suppression of a defendant's second confession, made after proper warnings and the defendant's voluntary waiver of his constitutional rights, when that confession follows an earlier confession which must be excluded under Miranda. **Ibid.**

§ 1235 (NCI4th). Custodial interrogation defined

There was no custodial interrogation where the trial court's findings that defendant was free to go and that he subsequently volunteered to stay and repeatedly sought interviews with the officers are supported by competent and substantial evidence. **State v. Medlin**, 280.

The trial court did not err in a first degree murder prosecution by denying defendant's motion to suppress his statement to an officer while being treated for injuries sustained in an automobile accident. **State v. Sweatt**, 407.

§ 1240 (NCI4th). Statements made during general investigation at place other than crime scene; at police station

A confession made before Miranda warnings were given should have been suppressed in a murder prosecution where, under the totality of the circumstances, a reasonable person in defendant's position would feel that he was compelled to stay, not that he was free to leave. **State v. Hicks**, 467.

§ 1250 (NCI4th). Invocation of right to counsel generally; absence of counsel

Where defendant had invoked his right to counsel during custodial interrogation on two occasions, his subsequent inculpatory statements made without counsel as a result of interrogation initiated by the police were inadmissible in his trial for murder and armed robbery even though defendant waived his rights and his request for an attorney involved interrogation about a break-in during which a handgun used in the murder and robbery was stolen. **State v. Pope**, 106.

§ 1264 (NCI4th). Waiver of constitutional rights; particular statement or conduct as waiver

Assuming that a murder and robbery defendant was in custody and had a right to counsel, he waived that right during questioning and preserved the right to an attorney at trial when, in response to a question concerning his desire for counsel, he said, "Yes, I know you can't get one now but I want to talk to you. I'll get a lawyer for my trial," and later repeated that he did not want a lawyer for questioning, but wanted one at trial. **State v. Medlin**, 280.

EVIDENCE AND WITNESSES — Continued

§ 1619 (NCI4th). Propriety of deletion of incompetent portion of tape recorded statement

Any error was harmless where the trial court in a murder prosecution allowed into evidence unedited audio tape and a transcript of conversations in which defendant confessed to the crime and made reference to other acts and murders where the State introduced overwhelming competent evidence of guilt. **State v. Gibson**, 29.

§ 1694 (NCI4th). Photographs showing location and appearance of victim's body

The trial court in a first degree murder prosecution did not err in the admission of seven photographs of the victim's body for the purpose of illustrating testimony by the victim's brother, a police crime technician, and the examining pathologist. **State v. Locke**, 118.

The trial court did not abuse its discretion in the admission of sixteen color photographs of a murder victim's body where (1) six photographs depicted the victim shortly after her arrival at the hospital, intubated, connected to a ventilator, and these photographs illustrated a neighbor's testimony about the nature of the wounds and the prolonged manner of the killing, and (2) ten photographs were submitted in conjunction with a pathologist's testimony about the autopsy and illustrated the pathologist's testimony regarding the likely weapon, the multiple stab wounds, and the cause of death. **State v. Syriani**, 350.

A photograph showing the location of a murder victim's body when found and an autopsy photograph depicting a five-inch wound to the victim's neck were properly admitted to prove premeditation and deliberation even though defendant did not contest the identity or cause of death of the victim. **State v. Barnes**, 666.

§ 2049 (NCI4th). Opinion testimony by lay persons; opinion as to ultimate issue; invasion of province of jury

There was no plain error in a murder prosecution in allowing a witness to testify that defendant's wife constantly complained and belittled him. **State v. Bronson**, 67.

§ 2068 (NCI4th). Particular subjects of lay testimony; characterizations of actions or behavior

The trial court did not err in a murder prosecution by allowing the victim's financial advisor to testify about the emotions displayed by defendant toward her husband and her husband's responses, as manifested by a change in his physical aspect, where the testimony was rationally based on the witness's perceptions and was helpful to a clear understanding of his testimony or a fact in issue. **State v. Jennings**, 579.

§ 2209 (NCI4th). Expert testimony about blood; grouping and typing

Defendant waived any right he may have had to a voir dire hearing to establish the reliability of blood grouping procedures used by a forensic serologist where the serologist had been accepted by defendant as an expert and had already testified without objection about the experiments she had conducted to determine blood types when defendant objected to her testimony. **State v. Barnes**, 666.

The inability of a serologist to perform additional testing due to the limited amounts of blood samples went to the weight and not the admissibility of her testimony as to the results of blood grouping tests. **Ibid.**

EVIDENCE AND WITNESSES — Continued

§ 2264 (NCI4th). Particular subjects of expert testimony; cause or circumstances of death; opinion or conclusion on ultimate issue to be determined

The trial court did not err in a first degree murder prosecution by admitting the opinion of the forensic pathologist who performed the autopsy that the victim had been tortured where the witness gave his expert medical opinion about the pattern and types of injuries he observed during the autopsy and did not testify that defendant tortured the victim. **State v. Jennings**, 579.

The trial court did not err in a murder prosecution by allowing the forensic pathologist who performed the autopsy to testify that there had been a sexual assault upon the victim where the challenged testimony relates to a pattern of injuries about which the pathologist had testified and constitutes a medical conclusion which he was fully qualified to render. **Ibid.**

§ 2299 (NCI4th). Particular subjects of expert testimony; formation of criminal intent generally

There was no prejudicial error in a murder prosecution where the court sustained an objection to a defense attorney asking the State's psychiatrist on cross-examination whether defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. **State v. Beach**, 733.

§ 2302 (NCI4th). Particular subjects of expert testimony; specific intent; malice; premeditation

There was prejudicial error in a prosecution for murder and assault with a deadly weapon with intent to kill inflicting serious injury in the exclusion of testimony that defendant suffered from chronic and acute alcohol dependence, that his ability to think, plan, or reflect was impaired, and that he was unable to form the specific intent to kill at the time of the shootings. **State v. Daniel**, 756.

§ 2330 (NCI4th). Child abuse, rape, and sexual abuse of children; testimony relating to physical examination of alleged victim

The trial court did not err in a prosecution for taking indecent liberties by admitting medical opinion evidence that the victim had been penetrated even though the child's testimony did not mention penetration. **State v. Baker**, 325.

§ 2516 (NCI4th). Other person's state of mind

Where a witness testified that defendant had asked him to be a lookout while defendant raped an elderly woman, any error in the trial court's refusal to permit defense counsel to ask the witness certain questions concerning whether defendant was serious about raping the woman did not affect the outcome of defendant's murder trial and was harmless error. **State v. Farmer**, 172.

§ 2633 (NCI4th). Attorney-client privilege; requirement that attorney be acting in professional capacity

There was no error in a murder prosecution where the prosecutor was allowed to question both the defendant and a judge, who had known the victim for thirty years, about how close doctors performing an autopsy could come to determining how long a person had been dead since there was no attorney-client relationship. **State v. Jennings**, 579.

EVIDENCE AND WITNESSES — Continued

§ 2641 (NCI4th). Attorney-client privilege; waiver of privilege; testimony of client

A defendant in a murder prosecution waived the attorney-client privilege when he did not object and voluntarily answered the prosecutor's questions regarding communications with his attorney. **State v. Bronson**, 67.

§ 2783 (NCI4th). Questions containing incompetent or inadmissible matters, generally

The trial court's prompt sustention of defendant's objections to questions asked by the prosecutor during cross-examination of defendant in a first degree murder trial concerning his purported expulsion from high school and the court's curative instruction to "disregard" were sufficient to cure any prejudice from the allegedly improper questions. **State v. Locke**, 118.

§ 2786 (NCI4th). Counsel's questioning of witness; questions assuming existence of facts

The trial court did not err in a murder prosecution by allowing the prosecutor to ask a pathologist whether three wounds on the victim's body could have been caused by a sharp object such as a hypodermic needle being moved around and rotated where there had been testimony that a hypodermic needle was found inside defendant's cosmetic bag. **State v. Jennings**, 579.

§ 2797 (NCI4th). Counsel's questioning of witness; impertinent or insulting questions

There was no error in a murder prosecution where defendant contended that the prosecutor continually interrupted her during cross-examination and attempted to humiliate her by asking impertinent and insulting questions but the record does not disclose that the prosecutor asked the questions in bad faith. **State v. Jennings**, 579.

§ 2845 (NCI4th). Refreshing memory by writings or other objects; foundation requirements

The trial court did not err in a murder prosecution by allowing a State's witness to use notes made immediately following his first conversation with defendant. G.S. 8C-1, Rule 612 entitles an adverse party to production of the writing or object used to refresh memory but nowhere imposes the requirement that the witness state that he cannot sufficiently recall a matter before using the writing. This witness's use of notes falls under the category of "present recollection refreshed" and the foundational questions raised by "past recollection recorded" are never reached. **State v. Gibson**, 29.

§ 2873 (NCI4th). Scope and extent of cross-examination; generally; relevant matters

There was no reversible error and no abuse of discretion in a murder prosecution where the prosecutor asked defendant's priest whether the last rites sometimes produced a sense of peace which was denied victims killed in their sleep. **State v. Bronson**, 67.

§ 2898.5 (NCI4th). Cross-examination as to particular matters; conviction

There was no error in a murder prosecution in the cross-examination of defendant regarding prior convictions where the record contained no indication of bad faith on the part of the prosecutor. **State v. Gibson**, 67.

EVIDENCE AND WITNESSES — Continued

§ 3023 (NCI4th). Basis for impeachment; specific instances of conduct generally

The State was properly permitted to cross-examine defendant about threats, arguments, and acts of violence toward both his wife and children to explain and rebut defendant's direct testimony that he was a loving and supportive husband and father, and that he did not intend to hurt his wife but unintentionally, or in self-defense, struck back at her with a screwdriver. **State v. Syriani**, 350.

§ 3025 (NCI4th). Witnesses subject to impeachment

The trial court did not err in a murder prosecution where a State's witness testified concerning conversations with defendant in jail by limiting defendant's cross-examination of that witness about prior bad acts to questions under G.S. 8C-1, Rule 609 concerning prior convictions. **State v. Jordan**, 431.

§ 3106 (NCI4th). Corroboration and rehabilitation; inclusion of new facts

The trial court did not err in a murder prosecution by allowing an emergency room nurse, a medical examiner, and a police detective to testify about statements made to them by prior witnesses where the testimony tended to strengthen and add weight to the original witness. **State v. Jennings**, 579.

§ 3157 (NCI4th). Opinion evidence; expert opinion as to veracity

There was no plain error in a murder prosecution in permitting defendant's clinical psychologist to express an opinion on defendant's credibility where defendant did not object to the form of the questions or to the answers given by the psychologist. **State v. Bronson**, 67.

§ 3161 (NCI4th). Corroboration and rehabilitation; prior consistent statements generally

There was no error in a murder prosecution in allowing the introduction of an SBI Agent's testimony containing statements made by a witness to the agent where defendant contended that the testimony was noncorroborative. **State v. Williamson**, 128.

§ 3174 (NCI4th). Opinion as to consistency of statements

The trial court did not err in allowing an officer to testify that statements made by a witness prior to trial were consistent with her trial testimony where the purpose of the officer's testimony was to show why the State had made a plea bargain with the witness. **State v. Barnes**, 666.

§ 3191 (NCI4th). Corroboration; law enforcement officials testifying to statement by State's witness

Assuming that a witness's written statement to an officer contradicted her trial testimony as to who defendant told her suggested breaking into a murder victim's home and was thus not corroborative, the admission of this statement was harmless where the witness's testimony supported conviction of the defendant on a theory of concerted action regardless of who first suggested breaking into the home. **State v. Farmer**, 172.

FOOD

§ 2 (NCI3d). Liability of retailer to consumer

Admissions by defendant Wendy's in its answer established that it is a merchant and the foods it sells are subject to the implied warranty of merchantability. **Goodman v. Wenco Foods, Inc.**, 1.

FOOD — Continued

When a substance in food causes injury to the consumer of the food, it is not a bar to recovery against the seller on the basis of implied warranty of merchantability that the substance was "natural" to the food provided the substance is of such a size, quality or quantity, or the food has been so processed, or both, that the presence of the substance should not reasonably have been anticipated by the consumer. **Ibid.**

Proof of compliance with government food standards and regulations is no bar to recovery on a breach of warranty theory for an injury from a substance in food. **Ibid.**

Plaintiff's evidence was sufficient for the jury on the issue of breach of warranty of merchantability by defendant Wendy's in plaintiff's action to recover for injuries received when he bit down on a bone fragment in a hamburger purchased from a Wendy's restaurant. **Ibid.**

A directed verdict was properly entered for defendant Wendy's on the issue of its negligence in selling plaintiff a hamburger containing a bone fragment. **Ibid.**

The trial court erred in entering summary judgment for defendant meat supplier on the issue of breach of the warranty of merchantability of ground beef allegedly supplied by defendant to a Wendy's restaurant in plaintiff's action to recover for injuries received when he bit down on a bone fragment in a hamburger purchased at the Wendy's restaurant. **Ibid.**

The trial court erred in entering summary judgment for defendant meat supplier on plaintiff's claim for negligence in supplying ground beef containing a bone fragment to a Wendy's restaurant. **Ibid.**

FOOD, DRUGS, AND COSMETICS

§ 8 (NCI4th). Adulterated or misbranded food

The N.C. Pure Food, Drug and Cosmetic Act imposed upon a restaurateur the general duty not to sell adulterated food, which might include beef bone in hamburger, if the quantity of the bone ordinarily rendered it injurious to health, and the standard of care by which to comply with that duty would be imposed by state regulations. **Goodman v. Wenco Foods, Inc.**, 1.

FRAUDULENT CONVEYANCES

§ 39 (NCI4th). Bulk transactions; notice to creditors

Defendant Card Care, Inc. was not liable under the Bulk Sales Act for an injury received in a machine manufactured by the partnership which preceded it where plaintiffs argued that Card Care is liable because it did not provide the required notice to creditors and that the transfer is therefore void. **Pendergrass v. Card Care, Inc.**, 233.

GIFTS OR DONATIONS

§ 12 (NCI4th). Gifts inter vivos; deposited funds

The essential elements of a gift inter vivos were present in a certificate of deposit issued to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr., Agent" where Timmy was a six-year-old minor and Crisp's grandson. **Holloway v. Wachovia Bank and Trust Co.**, 94.

GRAND JURY

§ 10 (NCI4th). Racial composition; selection of foremen

The trial court did not err in a murder prosecution by holding that defendant had made a prima facie case of racial discrimination in the selection of grand jury foremen, or by holding that the State had successfully rebutted that prima facie case. **State v. Jefferies**, 501.

HOMICIDE

§ 39 (NCI4th). Specific intent to kill generally

To show the specific intent to kill required to prove first degree murder, the State must show that the defendant intended for his action to result in the victim's death. **State v. Keel**, 52.

§ 43 (NCI4th). Felony murder; presumption of premeditation and deliberation; constitutionality

The North Carolina felony murder rule is not unconstitutional on the ground that it relieves the State of proving mens rea at the time of the killing. **State v. Sweatt**, 407.

§ 136 (NCI4th). Effect of compliance with short-form indictment to support convictions or pleas of other crimes

The trial court did not err in a first degree murder prosecution by refusing to give an instruction on the lesser included offense of assault where defendant was charged with a short form indictment. Although the State has the exclusive power to word the indictment and may deprive defendant of the opportunity to have the jury consider a lesser included offense, the State takes a risk in using the short form indictment because the State is prohibited on double jeopardy grounds from retrying defendant on the lesser included crimes if the defendant is pronounced not guilty on the indicted offense. **State v. Gibson**, 29.

§ 211 (NCI4th). Sufficiency of evidence; effect of other possible causes of death

The trial court did not err by denying defendant's motion to dismiss a first degree murder prosecution for insufficient evidence that the shooting of the victim was the proximate cause of death where defendant contended that the victim's family and doctor determined that they would not pursue medical options available to them to keep the victim alive. **State v. Jordan**, 431.

§ 232 (NCI4th). First degree murder; eyewitness and other corroborative evidence

The State's evidence, including testimony by an eyewitness placing defendant near the murder scene, was sufficient to support defendant's conviction of first degree murder under the theory of acting in concert. **State v. Barnes**, 666.

§ 244 (NCI4th). Malice, premeditation, and deliberation; intent to kill; generally

The trial court did not err in a first degree murder prosecution by denying defendant's motion to dismiss where there was testimony that defendant planned revenge against the victim for calling him a cripple; multiple lethal and lesser blows were struck against the victim, who was elderly and intoxicated at the time; a substantial number of the blows were struck after the victim was disabled; and evidence that the victim had called defendant a cripple was insufficient to negate premeditation and deliberation. **State v. Sweatt**, 407.

HOMICIDE — Continued

§ 250 (NCI4th). Malice, premeditation, and deliberation; prior altercations, threats, and the like, along with other evidence

There was sufficient evidence that defendant killed his wife with malice, premeditation, and deliberation to support his conviction of first degree murder by stabbing her with a screwdriver. **State v. Syriani**, 350.

§ 251 (NCI4th). Malice, premeditation, and deliberation; effect of statements of intent to kill victim

There was sufficient evidence of premeditation and deliberation in a first degree murder prosecution where defendant repeatedly expressed his intent to kill the victim. **State v. Williamson**, 128.

§ 256 (NCI4th). Malice, premeditation, and deliberation; evidence concerning planning and execution of crime

The State's evidence was sufficient to support defendant's conviction of first degree murder on the theory of premeditation and deliberation, although defendant stated in his confession offered into evidence by the State that he shot the victim in a fit of anger because the victim fondled defendant's girlfriend, where the State presented further evidence tending to show that the killing was not suddenly provoked but was carefully planned and executed. **State v. Rannels**, 644.

§ 258 (NCI4th). Intentional use of deadly weapon

The trial court did not err in a murder prosecution by not giving the instruction on intentional use of a deadly weapon as requested by defendant where the substance of the requested instruction was given more clearly by the trial court. **State v. Williams**, 719.

§ 427 (NCI4th). Proximate cause of death; necessity for instruction on intervening agency

There was no prejudicial error in a first degree murder prosecution where the trial court instructed the jury erroneously on intervening causation and correctly on contributing causation and concerted action. Defendant was convicted of the separate offenses of conspiracy to commit first degree murder and robbery with a dangerous weapon in addition to first degree murder and it is logically implausible that the jury could have found that defendant acted independently for the purpose of the first degree murder while, on the same facts, finding an agreement with a co-conspirator in convicting defendant on the conspiracy to murder charge. **State v. Gibson**, 29.

§ 476 (NCI4th). Propriety of instructions on intent

The trial court's instruction in a first degree murder case that "the phrase intentionally killed refers not to the presence of a specific intent to kill; the sense of the expression is that the act that resulted in death is intentionally committed" erroneously relieved the State of its burden of proving the specific intent required for first degree murder and violated defendant's due process rights. **State v. Keel**, 52.

§ 480 (NCI4th). Propriety of instructions on use of deadly weapon

The trial court did not err in a murder prosecution by giving a deadly weapon instruction to the jury where the evidence was that defendant had kicked or stomped the victim in the abdomen while wearing cowboy boots. **State v. Jennings**, 579.

§ 487 (NCI4th). Propriety of instructions; murder by poisoning, lying in wait, starvation, or torture

The trial court did not err in a murder prosecution by instructing jurors that premeditation, deliberation, and intent to kill are not essential elements of first degree murder on the basis of torture. **State v. Jennings**, 579.

§ 488 (NCI4th). Instructions on necessity that intent to kill be formed before victim shot

The trial court in a first degree murder prosecution did not err in refusing to give defendant's requested instruction that "the intent to kill cannot occur simultaneously with the killing" where the court's charge distinguished an intent to kill formed under the influence of some suddenly aroused violent passion from the intent to kill formed after premeditation and deliberation and thus conformed in substance with that requested by defendant. **State v. Rannels**, 644.

§ 489 (NCI4th). Premeditation and deliberation; use of examples in instructions

There was sufficient evidence of lack of provocation in a first degree murder case to support the trial court's instruction that evidence of lack of provocation by the decedent could be considered in determining whether there was premeditation and deliberation by defendants. **State v. Barnes**, 666.

§ 493 (NCI4th). Instructions on matters considered in proving premeditation and deliberation; lack of just cause, excuse, or justification

The trial court's instructions on premeditation and deliberation in a first degree murder prosecution did not place the burden on defendant to produce evidence of provocation. **State v. Sweatt**, 407.

§ 498 (NCI4th). Propriety of instructions on particular matters; use of term "felony murder"

The trial court did not err in a first degree murder prosecution by using the term "felony murder" in its instructions to the jury where the jury returned a verdict of guilty of first degree murder under the first degree felony murder rule with robbery with a dangerous weapon and arson being the underlying felonies. **State v. Sweatt**, 407.

§ 552 (NCI4th). Instructions; second degree murder as lesser included offense of first degree murder; lack of evidence of lesser crime

The trial court in a first degree murder case did not err in failing to instruct the jury on second degree murder as to one defendant where the evidence showed that each of the defendants either did all the acts necessary to be guilty of first degree murder or acted in concert or as an aider and abettor in doing such acts. **State v. Barnes**, 666.

§ 705 (NCI4th). Cure of error in instructions; effect of alternate theory to support conviction of first degree murder

Even if the trial court erred in failing to give defendant's requested instruction that the mere existence of grossly excessive force or brutal circumstances would not, standing alone, be sufficient to support a finding of premeditation, defendant was not prejudiced by this omission where the jury returned a verdict finding defendant guilty of first degree murder both under the felony murder theory and under the theory of premeditation and deliberation, and it would not have

HOMICIDE — Continued

been reversible error for the court to have failed to give any instructions concerning premeditation and deliberation. **State v. Farmer**, 172.

§ 727 (NCI4th). Propriety of additional punishment for underlying felony as independent criminal offense on conviction for felony murder; merger

Where the jury specified in its verdict that it found defendant guilty of first degree murder on theories of both felony murder and premeditation and deliberation, and the jury also found defendant guilty of the underlying felony of armed robbery, the merger rule did not apply and it was proper for the court to sentence defendant on both the murder conviction and the armed robbery conviction. **State v. Rannels**, 644.

INDIGENT PERSONS

§ 19 (NCI4th). Entitlement to expert witnesses generally; psychologists and psychiatrists

The trial court's denial of an indigent defendant's motion for an ex parte hearing of evidence supporting his request for the assistance of a psychiatrist or psychologist to aid in his defense violated defendant's privilege against self-incrimination and his right to the effective assistance of counsel. **State v. Ballard**, 515; **State v. Bates**, 523.

§ 27 (NCI4th). Investigators

The trial court did not err in the denial of defendant's motion for funds to hire a private investigator in a first degree murder case where defendant's evidence constituted a mere hope or suspicion that favorable evidence was available. **State v. Barnes**, 666.

INSURANCE

§ 528 (NCI4th). Extent of underinsured motorist coverage

A person who was named in an automobile policy as a driver and lived in the same household with the insured but was not married or related to the insured and who was injured while a passenger in a vehicle covered by the policy was a Class II insured who could not stack the UIM coverages on the two vehicles covered by the policy. **Bailey v. Nationwide Mutual Ins. Co.**, 458.

§ 533 (NCI4th). Underinsured motorist statutes where policy fails to provide underinsured coverage

Where plaintiff had in effect at the time of a collision a policy providing liability coverage of $5,000,000 on each of two buses he operated under an interstate commerce commission certificate of convenience and plaintiff was required to have this amount of liability coverage in order to receive the certificate, G.S. 20-279.21(b)(4) did not require that the liability policy provide plaintiff with UIM coverage in the amount of his liability coverage when he did not reject UIM coverage. **Watson v. American National Fire Insurance Co.**, 338.

JUDGES, JUSTICES AND MAGISTRATES

§ 36 (NCI4th). Censure or removal; particular conduct prejudicial to the administration of justice

A district court judge is censured for conduct prejudicial to the administration of justice based upon his improper convictions of defendants for reckless driving when they were charged with impaired driving. **In re Martin**, 242.

A district court judge is censured by the Supreme Court for conduct prejudicial to the administration of justice that brings the judicial office into disrepute for barring an attorney from sessions of juvenile court over which she would be presiding because he had initiated an investigation by the Judicial Standards Commission of allegations that the judge had engaged in improper ex parte communications with potential witnesses in pending juvenile cases. **In re Bissell**, 766.

§ 43 (NCI4th). Censure or removal; review by Supreme Court of recommendations

A written minority opinion filed with the Judicial Standards Commission by one or more of its members is not confidential and should be filed in the Supreme Court with the Commission's recommendation. **In re Bissell**, 766.

JUDGMENTS

§ 215 (NCI4th). Res judicata and collateral estoppel; judgments of federal courts in particular cases

Where the parties stipulated in a federal court action to the voluntary dismissal of allegations regarding defendants' negligence in diagnosing and treating the female plaintiff's pelvic infection, and the only remaining issue presented by the pleadings in the federal court action was plaintiffs' claim based on defendants' negligent failure to provide the female plaintiff with the appropriate nutrition, the judgment on the jury verdict in the federal court action is not res judicata to the present state court action involving defendants' alleged negligent diagnosis and treatment of the pelvic infection. **Bockweg v. Anderson**, 486.

§ 294 (NCI4th). Preclusion of relitigation of issues; personal injury and medical malpractice

Even if it is assumed that the two actions pursued by plaintiffs for negligent failure to provide adequate nutrition and negligent diagnosis and treatment should be treated as raising the same claim under the transactional approach, defendants consented to the separation of plaintiffs' claim into two actions when they signed the stipulated dismissal of the pelvic infection allegations in a federal court action and may not now be heard to complain that the federal judgment constitutes res judicata in a state court action involving defendants' alleged negligent diagnosis and treatment. **Bockweg v. Anderson**, 486.

§ 661 (NCI4th). Prejudgment interest; effect of award in excess of liability insurance

The trial court erred in failing to award prejudgment interest on the full amount of the judgment of $30,000 and in awarding prejudgment interest only on the $5,000 remaining due after the policy limit of $25,000 paid into court by defendants' liability carrier was subtracted from the judgment. **Beaver v. Hampton**, 455.

JURY

§ 42 (NCI4th). Prejudice created by pretrial publicity

The trial court did not abuse its discretion by denying a motion for a venire from another county on the grounds of pretrial publicity and that the county was racially unbalanced. **State v. Kyle**, 687.

§ 79 (NCI4th). Excusing jurors generally

Defendant was not denied an impartial jury when the trial court excused a prospective juror but required him to sit on the front row as a spectator during the trial after the juror expressed reservations about jury duty because of his concern that the trial might interfere with his plans to begin school at the end of the month even though he was assured that the trial would not take that long. **State v. Rannels**, 644.

§ 127 (NCI4th). Voir dire examination; questions relating to juror's qualifications generally

Defendant failed to show an abuse of discretion or prejudice when the trial court sustained the State's objection to a question as to whether a prospective juror has pretty strong opinions and sticks to them or is easily swayed. **State v. Syriani**, 350.

§ 133 (NCI4th). Voir dire examination; questions relating to opinions or feelings about defendant or case; defendant's guilt

The trial court did not abuse its discretion in refusing to allow defendant to ask prospective jurors whether any of them had any expectation that defendant was going to be proven guilty where the court sustained an objection to the form of the question and immediately allowed defendant to ask two almost identical questions. **State v. Syriani**, 350.

Defendant failed to show an abuse of discretion or prejudice when the trial court sustained the State's objection to a question as to whether any member of the second panel of jurors passed by the State felt that, because defendant was charged with a crime, he may be guilty of something. **Ibid.**

§ 140 (NCI4th). Voir dire examination; elements of crime or defense

There was no prejudice in a prosecution for murder, kidnapping, and burglary in sustaining the prosecutor's objections to questions concerning the death penalty and drinking where defendant did not receive the death penalty. **State v. Kyle**, 687.

§ 150 (NCI4th). Propriety of rehabilitating jurors challenged for cause due to opposition to death penalty

Any error by the trial court's refusal to permit the defendant in a capital trial to attempt to rehabilitate a juror who was excused for cause because of his views on capital punishment after having given ambiguous responses to voir dire questioning about the death penalty was harmless because defendant received a life sentence. **State v. Rannels**, 644.

§ 201 (NCI4th). Challenges for cause; prejudice and bias generally

The trial court in a first degree murder prosecution erred in the denial of defendant's challenge for cause to a juror whose voir dire colloquy demonstrated confusion about, or a fundamental misunderstanding of, the principles of the presumption of innocence or a simple reluctance to apply those principles should the defense fail to present evidence of defendant's innocence. **State v. Cunningham**, 744.

JURY — Continued

§ 223 (NCI4th). Effect and application of Witherspoon decision

The improper excusal of a juror in violation of the principles of *Witherspoon v. Illinois* and *Wainwright v. Witt* affects only the sentencing proceeding and not the determination of defendant's guilt. **State v. Rannels**, 644.

§ 227 (NCI4th). Exclusion of veniremen based on opposition to capital punishment; effect of equivocal, uncertain, or conflicting answers

The trial court did not err in excusing a prospective juror for cause because of his views on the death penalty where he gave equivocal and conflicting responses to questions by the trial court and the prosecutor, but those responses nonetheless revealed that he thought his views on the death penalty would interfere with the performance of his duties at both the guilt and sentencing phases of the trial. **State v. Syriani**, 350.

The trial court did not err by excusing a prospective juror for cause in a murder prosecution where the prospective juror initially indicated that she could vote for the death penalty but, upon further questioning, felt that she would be trying to find ways to vote against the death penalty and would be predisposed or biased in some respect. **State v. Jennings**, 579.

§ 257 (NCI4th). Peremptory challenges; sufficiency of evidence to establish prima facie case of racial motivation

Defendant failed to establish a prima facie case that the prosecutor peremptorily challenged a prospective juror in a capital trial solely on the basis of race where the prosecutor stated that he challenged the juror because of his statement that he would let the death penalty be the last alternative. **State v. Glenn**, 296.

There was no error in the prosecution of a white defendant for killing two white victims in the prosecutor's use of peremptory challenges to excuse black veniremen. **State v. Beach**, 733.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 14 (NCI4th). Sufficiency of evidence; degree of crime

There was a factual basis for defendant's plea of guilty to first degree kidnapping where the victim was released to officers who were outside the house to which defendant had taken the victim. Releasing a kidnap victim when the kidnapper is aware that he is cornered and outnumbered by law enforcement officials is not voluntary and sending her out into the focal point of their weapons is not release in a safe place. **State v. Heatwole**, 156.

§ 20 (NCI4th). Sufficiency of evidence; confinement for purpose of facilitating felony or flight

The trial court did not err by not dismissing a kidnapping charge where the indictment charged that defendant confined, restrained, and removed the victim for the purpose of facilitating murder, burglary and defendant's subsequent flight and the evidence showed that restraining the victim and her son by backing them against a wall and standing between them and the door made it easier to carry out the intent of the burglary, and defendant removed the victim for the purpose of killing her in that he dragged her from the apartment after shooting her and while she was still living and subsequently shot her, disposing of the body in a ditch. **State v. Kyle**, 687.

KIDNAPPING AND FELONIOUS RESTRAINT — Continued

§ 26 (NCI4th). Instructions to the jury; lesser offenses

The trial court did not err in a prosecution for kidnapping by denying defendant's request to instruct the jury on the lesser included offense of false imprisonment. **State v. Kyle**, 687.

LIENS

§ 26 (NCI4th). Discharge of record lien

Plaintiff subcontractor's voluntary dismissal of its action to perfect a lien did not discharge the lien under G.S. 44A-16(4), and plaintiff could refile its action to perfect the lien pursuant to Rule 41(a)(1) within one year after the voluntary dismissal was taken. **Newberry Metal Masters Fabricators v. Mitek Industries**, 250.

MASTER AND SERVANT

§ 68 (NCI3d). Occupational diseases

The Industrial Commission properly denied plaintiff's claim for workers' compensation benefits where it was clear that testimony referring to plaintiff's exposure to cotton dust referred to the impairment of his lungs and not the impairment of his capacity for work. It must be shown that an aggravation itself was causally related to the incapacity for work for the incapacity to be compensable on the theory that conditions of the workplace aggravated a non-occupational disease. **Wilkins v. J.P. Stevens & Co.**, 449.

§ 69 (NCI3d). Workers' compensation; amount of recovery generally

The two components of an award under the Workers' Compensation Act are (1) payment for the cost of medical care, now denominated "medical compensation," and (2) general "compensation" for financial loss other than medical expenses, including payment to compensate for an employee's lost earning capacity and payment of funeral expenses. **Hyler v. GTE Products Co.**, 258.

§ 75 (NCI3d). Medical and hospital expenses

The Industrial Commission is permitted by G.S. 97-25 to order the employer to pay new or additional medical expenses even if there has been no material change in the employee's condition and even though the Commission had previously approved the parties' final agreement for compensation. **Hyler v. GTE Products Co.**, 258.

§ 87 (NCI3d). Claim under Compensation Act as precluding common law action

A negligence claim against defendant Texfi was properly dismissed where a plaintiff injured when his arm was caught in a textile machine brought a negligence rather than a workers' compensation claim, contending that Texfi was acting in a dual capacity as plaintiff's employer and as a manufacturer of textile machinery when it modified the machine in which plaintiff was injured. **Pendergrass v. Card Care, Inc.**, 233.

Plaintiffs did not have a Woodson claim for an injury suffered when plaintiff's arm was caught in a textile machine where the negligence does not rise to the higher level of substantial certainty of injury as defined in Woodson. **Ibid.**

MASTER AND SERVANT — Continued

§ 89.1 (NCI3d). Remedies against third-person tortfeasors generally; fellow employee as third person

The motion of two defendants to dismiss was properly allowed in a negligence action arising from an injury received by plaintiff in a textile machine without safety guards where the negligence alleged does not support a claim independently of the Workers' Compensation Act. **Pendergrass v. Card Care, Inc.**, 233.

MORTGAGES AND DEEDS OF TRUST

§ 25 (NCI3d). Foreclosure by exercise of power of sale in the instrument

The Clerk of Superior Court had the authority to determine who had legal title to property about to be foreclosed. Although the party instituting the foreclosure contended that a right to a release is not a proper legal defense and that the proper procedure for resolution of the dispute over the release should have been a separate action, G.S. 45-21.16(d) provides a more appropriate process to resolve who is the equitable or legal owner of a property sought to be sold under foreclosure. **In re Foreclosure of Michael Weinman Associates**, 221.

A purchaser of land was denied its right to a release of a portion of the land from a deed of trust where a small portion of the ad valorem taxes were not paid. **Ibid.**

NEGLIGENCE

§ 34 (NCI3d). Sufficiency of evidence to require submission of issue of contributory negligence to jury

The Court of Appeals erred in a medical malpractice action by holding that the trial court erred in submitting the issue of contributory negligence to the jury on the ground that the verdict of negligence could only have been based upon failure to inform plaintiff of his cancer, so that contributory negligence by plaintiff in not keeping appointments was impossible. **McGill v. French**, 209.

§ 34.1 (NCI3d). Sufficiency of evidence to require submission of issue of contributory negligence to jury; particular cases where evidence is sufficient

There was sufficient evidence to submit contributory negligence to the jury in a medical malpractice action where the jury could have found that, had plaintiff followed the advice of defendant and either returned for follow-up care or called, his treatment could have begun earlier and thus the rate of spread of his disease might have lessened. **McGill v. French**, 209.

PARTNERSHIP

§ 9 (NCI3d). Dissolution of partnership

The continuation of business rule did not apply to a negligence action by a plaintiff injured by a textile machine where defendant Card Care was not incorporated until after the accident occurred, the entity which sold the machine to the textile manufacturer was a partnership, the principals in the partnership formed a corporation which continued the business of the partnership, and it is undisputed that the members of the partnership had no knowledge of the accident at the time Card Care was incorporated. **Pendergrass v. Card Care, Inc.**, 233.

PARTNERSHIP — Continued

Card Care, Inc. was not liable under G.S. 59-71(d) for an injury suffered by plaintiff in a textile machine manufactured by a partnership which was the predecessor of Card Care because Card Care did not promise to pay the creditors of the dissolved partnership. **Ibid.**

PENSIONS

§ 1 (NCI3d). Generally

There is nothing in the statute giving plaintiff the right to purchase retirement credits based on military service which states the time the right remains open and it is not inconsistent for another statute to require that the right be exercised within three years. **Osborne v. Consolidated Judicial Retirement System**, 246.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 17.1 (NCI3d). Failure to inform patient of risks or side effects of treatment

There was sufficient evidence to submit contributory negligence to the jury in a medical malpractice action where plaintiff alleged that defendant was negligent in not informing him of his prostate cancer and defendant contended that plaintiff was contributorily negligent in not keeping appointments. **McGill v. French**, 209.

PLEADINGS

§ 34 (NCI3d). Amendment as to parties

The trial court did not abuse its discretion in an action for breach of a personal services contract by denying plaintiff's motion to amend his complaint to add a new party where the motion was heard thirteen months after the action was instituted and only three months before the case was calendared for trial. **Hassett v. Dixie Furniture Co.**, 307.

RETIREMENT SYSTEMS

§ 4 (NCI4th). Contributions

A State employee became eligible to purchase retirement credit for his military service at the reduced rate on 31 October 1987 after becoming a member of the State system on 1 November 1977 and transferring credits for prior service in the Local System in 1980. **Worrell v. N.C. Department of State Treasurer**, 528.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The evidence was sufficient to support defendant's conviction of armed robbery of a murder victim although defendant's confession contained no mention of the robbery. **State v. Rannels**, 644.

RULES OF CIVIL PROCEDURE

§ 56.2 (NCI3d). Summary judgment; burden of proof

A defendant moving for summary judgment must first meet the burden of proving that an essential element of plaintiff's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense. **Goodman v. Wenco Foods, Inc.**, 1.

SALES

§ 22.1 (NCI3d). Defective goods or materials; seller's liability

Defendant meat supplier was not entitled to summary judgment on plaintiff's claim for breach of warranty of merchantability of ground beef containing a bone fragment which it allegedly supplied to a Wendy's restaurant on the ground that the action was barred by two sections of the Products Liability Act where there was no forecast of evidence that any alteration in the ground beef after the product left defendant's control was not in accord with its instructions or specifications. **Goodman v. Wenco Foods, Inc.**, 1.

The trial court erred in entering summary judgment for defendant meat supplier on plaintiff's claim for negligence in supplying ground beef containing a bone fragment to a Wendy's restaurant. **Ibid.**

SEARCHES AND SEIZURES

§ 12 (NCI3d). Stop and frisk procedures; investigatory stops

Defendant was not "detained" or "seized" within the meaning of the Fourth Amendment to the U.S. Constitution or Art. I, § 20 of the N.C. Constitution during an encounter with officers on a public street, the officers had probable cause to arrest defendant for murder when they received additional information, and physical evidence seized at the time of defendant's arrest and during the later execution of a search warrant was properly admitted in defendant's trial for first degree murder. **State v. Farmer**, 172.

§ 21 (NCI3d). Application for warrant; tips from informers

Defendants did not show that an affidavit filed to support the issuance of a search warrant contained deliberate falsehoods or exhibited a reckless disregard for the truth concerning information from an informant or that the affiant was not acting in good faith so as to require suppression of the evidence seized pursuant to the warrant. **State v. Barnes**, 666.

§ 32 (NCI3d). Scope and conduct of search and seizure in general; items which may be searched for and seized

A handgun found by police as a result of an unlawful interrogation and the results of ballistic and fingerprint tests performed on it were admissible under the inevitable discovery exception to the exclusionary rule. **State v. Pope**, 106.

TAXATION

§ 28.4 (NCI3d). Refunds

The Refund Anticipation Loan Act does not violate either the Supremacy Clause or the Commerce Clause of the U.S. Constitution. **N.C. Assn. of Electronic Tax Filers v. Graham**, 555.

UNIFORM COMMERCIAL CODE

§ 13 (NCI3d). Implied warranties; merchantability; particular cases

Admissions by defendant Wendy's in its answer established that it is a merchant and the foods it sells are subject to the implied warranty of merchantability. **Goodman v. Wenco Foods, Inc.**, 1.

UNIFORM COMMERCIAL CODE — Continued

§ 28 (NCI4th). Commercial paper; definitions; execution

A certificate of deposit issued by a bank was not a negotiable instrument under the UCC because it was not payable to "order" or to "bearer" and because it was assignable only by registration, terms which preclude transfer. Had it been negotiable, the certificate of deposit would have been wrongfully paid under the UCC because it was to "Timmy S. Holloway, Jr., by Rountree Crisp, Sr., Agent" and the Bank had to pay the proceeds to Timothy or his guardian. His mother, who received the proceeds, had not been appointed as guardian with authority to receive the funds and, while she was executrix of Crisp's estate, Crisp's status as agent ended with his death. **Holloway v. Wachovia Bank and Trust Co.**, 94.

UTILITIES COMMISSION

§ 32 (NCI3d). Property included in rate base

The Utilities Commission, having erred by ordering that a currently unused connection to another sewage system be treated as an extraordinary property retirement and amortized, further erred by directing that the unamortized balance be included in the rate base. **State ex rel. Utilities Commission v. Public Staff**, 195.

§ 35 (NCI3d). Overadequate facilities

The Utilities Commission erred by finding and concluding that an investment cost in physical plant that is not used and useful should be charged to expense and recovered through amortization as an extraordinary property retirement. **State ex rel. Utilities Commission v. Public Staff**, 195.

The Utilities Commission erred in its determination of the appropriate "capacity allowance" in the rate base of a portion of a new sewage treatment plant not presently in service but held for future use. **Ibid.**

VENUE

§ 1 (NCI3d). *Definition* and nature of venue

A forum selection clause in a software purchase contract which specified Los Angeles, California as the forum for any related action was valid. A plaintiff who executes a contract that designates a particular forum for the resolution of disputes and then files suit in another forum seeking to avoid enforcement of the forum selection clause carries a heavy burden and must demonstrate that the clause was the product of fraud or unequal bargaining power or that enforcement of the clause would be unfair or unreasonable. **Perkins v. CCH Computax, Inc.**, 140.

WATERS AND WATERCOURSES

§ 7 (NCI3d). Marsh and tidelands

The 1992 amendment to the remedial provisions of CAMA set forth in G.S. 113A-126(a) was intended to clarify, not change, the meaning of that statute. **State ex rel. Cobey v. Simpson**, 81.

Where there has been unauthorized development in coastal wetlands sufficiently inconsistent with CAMA and the Coastal Resources Commission rules to have warranted denial of a permit had defendant applied to the Commission for a permit, CAMA and the Commission rules require restoration of the resources to the predevelopment condition. **Ibid.**

WATERS AND WATERCOURSES — Continued

The Coastal Resources Commission rule requiring restoration to the "fullest extent practicable" consistent with the need to avoid additional damages to the resources means practicable in an environmental and engineering sense, not an economical one. **Ibid.**

Where the trial court determined that fill materials, a retaining wall and a bulkhead addition placed in coastal wetlands violated CAMA, the court should have ordered that defendant remove all of the fill, retaining wall and bulkhead addition instead of requiring defendant to remove only a portion of the fill and the retaining wall. **Ibid.**

There was no merit to defendant's contention that restoration of her property to predevelopment condition was not required because the unauthorized filling of wetlands on her property covered an area of only 5,000 square feet and did not significantly disrupt the adjacent marshlands. **Ibid.**

WILLS

§ 35.1 (NCI3d). Time of vesting of estates; distinctions between vested and contingent interests

Where testator's will devised all of his lands "in equal portions" to two nephews "for and during the terms of their natural lives," provided that "upon their deaths I give and devise their respective shares thereof in fee simple to their respective issue, who survive them, per stirpes," and further provided that if either nephew "shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee simple, per stirpes," the testator intended the contingent remainders to the surviving issue to vest upon the death of each of the life tenants rather than only upon the death of both life tenants. **Hollowell v. Hollowell**, 706.

§ 35.2 (NCI3d). Contingent interests

The doctrine of implied cross remainders was inapplicable where the testator intended to devise his property so that as each life tenant died leaving issue the contingent remainder would vest in the surviving issue of that life tenant. **Hollowell v. Hollowell**, 706.

§ 53 (NCI3d). Whether devise taken common or in severalty

Testator's use of the phrase "equal portions" evidenced an intent to create a tenancy in common in life tenants rather than a joint tenancy, and use of "respective shares" and "respective issue" emphasized testator's intent that the vesting of future interests should occur at the death of each life tenant rather than upon the death of both tenants. **Hollowell v. Hollowell**, 706.

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