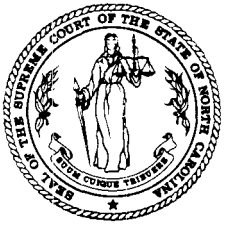
NORTH CAROLINA REPORTS

VOLUME 334

SUPREME COURT OF NORTH CAROLINA



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1. Appointed and sworn in 15 November 1993 to replace W. Allen Cobb, Jr. who went to Superior Court.
2. Appointed and sworn in 1 December 1993 to replace Philip W. Allen who retired 31 October 1993.

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

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

PETITION TO REHEAR

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GENERAL STATUTES CITED AND CONSTRUED

RULES OF EVIDENCE CITED AND CONSTRUED

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CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

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Applied from the State of New York
BRIAN JOHN REILLY ..... Raleigh
Applied from the State of New York
DEBORAH K. WRIGHT ..... Charlotte
Applied from the State of Texas

Given over my hand and seal of the Board of Law Examiners this the 12th day of November, 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 10th day of December, 1993, and said persons have been issued license certificates.

HERBERT WILLIAM AUGER ..... Oyster Bay, New York
BECKY A. BEANE ..... Goldsboro
JOHN BENNETT BRANSCOME ..... Hillsville, Virginia
KATHARINE D. GARNER ..... Charlotte
JANET R. DELAURA HARRISON ..... Raleigh
ALEC PHILIP LENENBERG ..... Charlotte
MELISSA M. TWOMEY ..... Raleigh
GLORIA LEONORA WOODS ..... Winston-Salem

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 10th day of December, 1993 and said persons have been issued certificates of this Board:

MICHAEL DAVID BARNES ..... Raleigh
Applied from the State of Indiana
EDWARD NEWMAN BRANDT, III ..... Sugar Land, Texas
Applied from the State of Texas
ANTHONY ROBERT BRASACCHIO ..... Wilmington
Applied from the State of Pennsylvania
RONALD REDD DAVIS ..... Dallas, Texas
Applied from the State of Texas

JOHN ERIC GRIFFIN ..... Charlotte
Applied from the State of Texas
RANDALL A. HANSON ..... Greensboro
Applied from the District of Columbia
MARTHA S. HENLEY ..... Huntington, New York
Applied from the State of New York
CLAYTON W. JONES ..... Durham
Applied from the State of Pennsylvania
CARL JAMES MILAZZO ..... Fayetteville
Applied from the State of Illinois
CHRISTOPHER C. O'DELL ..... Englewood, Colorado
Applied from the State of Colorado
JUDITH A. WARD ..... Chelsea, Michigan
Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners this the 3rd day of January, 1994.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DELLA D. BAXLEY v. NATIONWIDE MUTUAL INSURANCE CO.

DELLA D. BAXLEY v. NATIONWIDE MUTUAL INSURANCE CO.

No. 538PA91
No. 226PA92

(Filed 2 July 1993)

1. Insurance § 690 (NCI4th)— prejudgment interest—liability of UIM carrier

An underinsured motorist carrier is obligated by the terms of the policy to pay prejudgment interest on the compensatory damages award of the jury in the underlying tort action by its insured against the tortfeasor up to its policy limits where the policy obligates the underinsured motorist carrier to pay "damages" which a covered person is legally entitled to recover from an underinsured motorist because of bodily injury or property damage, since prejudgment interest is an element of "damages" as that term is used in the underinsured motorist portion of the policy.

Am Jur 2d, Automobile Insurance § 428.

2. Insurance § 530 (NCI4th)— UIM coverage—no credit for medical payments

An underinsured motorist carrier was not entitled by the terms of the policy to a credit under the underinsured motorist coverage section for a payment it made to its insured under the medical payments section of the policy where plaintiff insured paid separate premiums for the medical payments and underinsured motorist coverages and each has a separate limit of liability; there is no provision in the policy to the effect that a payment made under the medical payments section shall reduce the carrier's obligation under the underinsured motorist section; the "credit" section of the policy does not provide for credit to the carrier for payments made under the medical payments section; and an endorsement to the policy provides that the right of subrogation does not apply under the medical payments section. Furthermore, plaintiff insured is not prohibited from recovering under both the medical payments and underinsured motorist sections of the policy on the grounds of unjust enrichment or equitable subrogation since those defenses do not apply where the insurance contract itself provides for recovery under both the medical payments and underinsured motorist sections and waives any right to subrogation.

Am Jur 2d, Automobile Insurance § 322.

Uninsured motorist insurance: Reduction of coverage by amounts payable under medical expense insurance. 24 ALR3d 1353.

Justice MEYER dissenting.

Justice PARKER did not participate in the consideration or decision of these cases.

Case Number 538PA91 on discretionary review of a decision of the Court of Appeals, 104 N.C. App. 419, 410 S.E.2d 12 (1991), reversing the judgment entered by Brewer, J., at the 8 June 1991 Session of Superior Court, Robeson County. Discretionary review allowed 4 March 1992. Heard in the Supreme Court 9 September 1992.

Case Number 226PA92 on discretionary review prior to determination by the Court of Appeals of the superseding judgment entered by Gore, J., on 11 May 1992, after a hearing at the 6

April 1992 Session of Superior Court, Robeson County. Discretionary review prior to determination was denied 16 July 1992, then allowed by supplemental order 24 November 1992 and consolidated for decision with case number 538PA91. Case number 226PA91 determined in the Supreme Court upon briefs filed with the Court of Appeals and without oral argument.

H. Mitchell Baker, III, P.A., by H. Mitchell Baker, and Brent D. Kiziah for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Peter A. Kolbe, for defendant-appellant.

FRYE, Justice.

This case involves two issues. The first issue is whether the underinsured motorist (UIM) carrier in this case is obligated to pay prejudgment interest on the compensatory damages award of the jury in the underlying tort action by its insured against the tort-feasor. We conclude that the UIM carrier is obligated to pay prejudgment interest on the award up to its policy limits. The second issue is whether the UIM carrier is entitled to a credit under the UIM coverage section for a payment it made to its insured under the medical payments section of the insurance contract. We hold that under the terms of the policy the UIM carrier is not entitled to a credit for such payments.

On 17 January 1987, the automobile in which plaintiff, Ms. Della Baxley, was a passenger was struck by a vehicle driven by Ms. Anita Brown. Plaintiff suffered bodily injuries and incurred medical bills that have been stipulated to be in excess of $10,000. At the time of the accident, Allstate Insurance Company (Allstate) provided liability coverage for Ms. Brown in the amount of $25,000 per person. Defendant, Nationwide Insurance Company (Nationwide), provided plaintiff with UIM coverage in the amount of $100,000 per person and medical payments coverage up to $10,000.

On 22 August 1987, plaintiff filed a negligence action against the tort-feasor, Brown, seeking damages for the personal injuries plaintiff suffered in the automobile accident. On 11 September 1987, pursuant to the medical payments provision of plaintiff's policy issued by defendant Nationwide, plaintiff received from Nationwide the maximum medical payment of $10,000. Allstate paid $25,000, the policy limit under Brown's policy, to the clerk of court. In

order to preserve its subrogation rights against Brown, Nationwide tendered $25,000, which was deposited with the clerk of court on 12 February 1988.

On 15 August 1988, Judge Robert H. Hobgood entered an order whereby Allstate, the liability carrier, and its attorney were released from any further obligation to defend Brown in the lawsuit between Baxley and Brown. Nationwide, plaintiff's UIM carrier, retained counsel for defendant Brown and assumed primary responsibility for her defense.

On 22 August 1988, the underlying negligence action between plaintiff and Brown proceeded to trial. The jury returned a compensatory damage verdict in favor of plaintiff in the amount of $100,000. On 14 September 1988, a judgment was entered against Brown for that amount plus costs and prejudgment interest from the date of the filing of the complaint, 20 August 1987, but excluding interest on the $25,000 that was tendered by Nationwide on 12 February 1988. On 13 December 1988, Nationwide, as plaintiff's UIM carrier, paid plaintiff an additional $65,000. Following the trial, the $25,000 that was paid by Allstate to the clerk of court was paid to Nationwide.

Plaintiff then filed a declaratory judgment action against Nationwide seeking a determination as to whether Nationwide was entitled to a credit against its UIM coverage limit for the $10,000 payment made under its medical payments coverage. Plaintiff also sought to have the court determine whether Nationwide, her UIM carrier, or Allstate, the tort-feasor's primary liability carrier, was liable to plaintiff for court costs, including prejudgment interest, in the original action.

On 8 June 1990, Superior Court Judge Coy E. Brewer entered the following judgment:

> 1. That there was a contract obligation between Plaintiff and Defendant Nationwide Mutual Insurance Company regarding medical payment coverage and that, since there was not [a] special jury verdict at the trial level regarding compensation for medical expenses incurred by the Plaintiff, Defendant Nationwide Mutual Insurance Company is not entitled to a credit for the medical payment made to Plaintiff under its underinsured motorist coverage. Therefore, Defendant Nationwide Mutual Insurance Company is obligated to pay an additional $10,000 to Plaintiff.

> 2. Defendant Nationwide Mutual Insurance Company as the underinsured motorist carrier, is not obligated to pay any portion of the interest awarded to Plaintiff Della D. Baxley against Anita Brown . . . because the obligation fails [sic] on the primary carrier, Allstate Insurance Company, and the original defendant, Anita Brown.

Plaintiff and defendant appealed to the Court of Appeals from the judgment.

On the issue of prejudgment interest, the Court of Appeals held:

> Here, as in *Ensley* [v. Nationwide Mut. Ins. Co., 80 N.C. App. 512, 342 S.E.2d 567, *cert. denied*, 318 N.C. 414, 349 S.E.2d 594 (1986)], coverage is provided for *damages which the plaintiff is legally entitled to recover* from the owner or operator of the uninsured motor vehicle, and the plaintiff's claim is based in tort, despite the fact that recovery is derivative and conditional. The defendant assumed up to its policy limits the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist. *Ensley*, 80 N.C. App. at 515, 342 S.E.2d at 569.

Baxley v. Nationwide Mut. Ins. Co., 104 N.C. App. at 424-25, 410 S.E.2d at 15. The Court of Appeals remanded the case to the superior court to apply the prejudgment interest provisions of N.C.G.S. § 24-5(b) to the $65,000 paid by Nationwide on 13 December 1988. Regarding the credit issue, the Court of Appeals observed that in the record on appeal the parties stipulated that the $10,000 medical expenses incurred by plaintiff and paid by Nationwide were reasonable, were proximately caused by Brown and were specifically included on a dollar for dollar basis in the judgment of $100,000 in the tort action. The Court of Appeals held that the parties may stipulate to such facts and that plaintiff is therefore bound by that stipulation. *Id.* at 422, 410 S.E.2d at 14.

On 4 March 1992, this Court allowed Nationwide's petition for discretionary review of the prejudgment interest issue. The issue regarding credit for the medical payments coverage that was remanded was heard before Judge William C. Gore, Jr., at the 6 April 1992 session of Civil Superior Court, Robeson County. The court entered judgment on 20 April 1992. On 11 May 1992 the trial court entered a superseding judgment, holding that Nationwide was not entitled to a credit for the payment made

under the medical payments section of the policy. Nationwide appealed to the Court of Appeals. Plaintiff petitioned this Court for discretionary review prior to determination by the Court of Appeals. Plaintiff's petition was denied on 16 July 1992, then allowed by supplemental order on 24 November 1992. The supplemental order consolidated the two issues for decision and both are now before us. We note that the issue of Allstate's liability for prejudgment interest as the liability carrier is not before us.

I.

[1] We first consider the prejudgment interest issue. It has been established by this Court that when a statute is applicable to the terms of a policy of insurance, the provisions of that statute become terms of the policy to the same extent as if they were written in it, and if the terms of the policy conflict with the statute, the provisions of the statute prevail. *Sutton v. Aetna Cas. & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

N.C.G.S. § 20-279.21, which defines "motor vehicle liability policy," is silent on the issue of prejudgment interest. We have previously held that the prejudgment interest statute, N.C.G.S. § 24-5, is not a part of the Financial Responsibility Act so as to be written into every liability policy. *Sproles v. Greene*, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991). In so holding, we observed that, in the absence of a statutory provision, a liability insurer's obligation to pay interest *in addition* to its policy limits is governed by the language of the policy. *Id.* at 612-13, 407 S.E.2d at 502-03. This case is different in that the question raised by the parties is whether the UIM carrier, Nationwide, is obligated to pay prejudgment interest *up to* its policy limits. We hold that under the terms of its policy it is so obligated. Because we find that the policy itself provides for such coverage, we do not reach the issue of whether the Financial Responsibility Act itself mandates such coverage within the policy limit.

The contractual language that supports our holding is Nationwide's promise to pay, up to its UIM policy limit,

> damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

1. Bodily injury sustained by a covered person and caused by an accident; and

2. Property damage caused by an accident.

In interpreting this language we must determine what "damages" the insured is "legally entitled to recover" from the tort-feasor because of bodily injury.

We believe the insured is *legally entitled to recover* the total amount of money that the judgment says she is entitled to recover from the tort-feasor. In this case, the judgment awarded the insured $100,000 in compensatory damages *and* prejudgment interest on $75,000. Nationwide has promised to pay the insured all the "damages" awarded to her, up to its policy limit. The parties admit that the insurance contract does not define "damages." Thus, we must determine what is meant by that word as it is used in the UIM section of this contract of insurance.

Nationwide does not argue that it has contractually limited the definition of damages to mean only the compensatory damage amount awarded by the jury. Where the insurance contract does not limit the definition of the word, this Court certainly should not step in to do so. Any ambiguity in the contract must, in fact, be construed against Nationwide, the drafter of the contract. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989).

Black's Law Dictionary defines "damages" as: "A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered . . . injury . . . through the . . . negligence of another." *Black's Law Dictionary* 389 (6th ed. 1990). Here plaintiff-insured has obtained a judgment in a negligence case against the tort-feasor which includes prejudgment interest. The UIM carrier has agreed to pay the insured the "damages" she is legally entitled to recover from the tort-feasor as a result of bodily injury. Plaintiff is entitled to recover the prejudgment interest from the tort-feasor but is unable to do so since the tort-feasor is underinsured. Thus, the UIM carrier must step in to pay the insured these damages up to its policy limits.

Prejudgment interest in negligence cases is a statutory creature in this state. Thus, in determining whether it is an element of the damages suffered by a plaintiff, we must also look to the specific statute allowing prejudgment interest. N.C.G.S. § 24-5 provides, in part, that:

> (b) In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

N.C.G.S. § 24-5(b) (1991).

In an early case discussing a previous version of this statute, section 530 of the Code, this Court discussed how it changed the common law. "At common law a judgment did not carry interest when an execution or *sci. fa.* was issued upon it. In an action upon the judgment the plaintiff could recover interest **by way of damages** for the detention of the money." *McNeill v. R.R.*, 138 N.C. 1, 3, 50 S.E. 458, 459 (1905) (emphasis added). More recently, this Court has acknowledged that prejudgment interest may reasonably serve "to further important and legitimate public purposes, including compensation of a plaintiff for loss-of-use value of a damage award." *Lowe v. Tarble*, 312 N.C. 467, 472, 323 S.E.2d 19, 22 (1984), *aff'd on reh'g*, 313 N.C. 460, 329 S.E.2d 648 (1985). The United States District Court for the Eastern District of North Carolina, interpreting N.C.G.S. § 24-5, has reached the conclusion that prejudgment interest is an element of compensatory damages. *See Hartford Acc. & Indem. Co. v. U.S. Fire Ins. Co.*, 710 F.Supp. 164, 167 (E.D.N.C. 1989), *aff'd*, 918 F.2d 955 (4th Cir. 1990) ("[T]he award of **pre-judgment interest** in this case is **clearly an element of damages**. Clearly the purpose of the award is to compensate a worthy plaintiff for the loss of the use of money that he or she has incurred due to the wrongful acts of another party."). We conclude that interest paid to compensate a plaintiff for loss-of-use of the money during the pendency of a lawsuit is an element of that plaintiff's damages.

Even if it is not clear from a reading of § 24-5(b) alone that the legislature intended prejudgment interest to be treated as an element of compensatory damages, such an intent is revealed if one reads further in Chapter 24. For example, N.C.G.S. § 24-6 provides that upon certain default judgments, "the clerk of the court shall ascertain the interest due by law . . . and the amount shall be included in the final judgment of the court *as damages* which judgment shall be rendered therein in the manner prescribed by § 24-5." *Id.* (emphasis added). This provision allows the clerk to assess the amount of interest to which the plaintiff is entitled

"as damages" where the principal obligation to be paid is not in question. This Court has recognized that N.C.G.S. § 24-5(a) authorizes interest from the date of a breach of contract "in the nature of damages for the retention of the principal of the debt." *Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 568, 364 S.E.2d 129, 132 (1988). Where a jury determines the amount to which a plaintiff in a tort action is entitled, the statutorily imposed prejudgment interest is likewise at least "in the nature of damages." In both instances the plaintiff has been deprived of the use of funds to which plaintiff was entitled from the time of the injury resulting from the wrong giving rise to the claim for relief. The prejudgment interest statute merely recognizes this entitlement and provides for its recovery (in the case of a tort) from the date the plaintiff judicially demands payment by filing suit.

Requiring the UIM carrier to pay prejudgment interest up to its policy limit is not a harsh result since the UIM carrier has had the opportunity to invest the money during the pendency of the suit. In addition, it is within the UIM carrier's power to stop the accrual of prejudgment interest by offering (or posting) its policy limit.

In this case, Nationwide, plaintiff's UIM carrier, retained counsel who assumed primary responsibility for the defense of the tort-feasor. Now Nationwide is responsible, up to its policy coverage limit, for the amount of damage it caused plaintiff by delaying the payment due under its UIM coverage. *See* John Alan Appleman, *Insurance Law and Practice* § 4894.25, at 97 (1981) ("[I]t is unfair and misleading for the insurer to fail to cover any liability of the insured for [prejudgment] interest for two reasons: First, it had prepared the instrument . . . which purports to restrict its liability, and by its terms introduced a retention factor never contemplated by the insured; Second, it controls the litigation and permitted interest to accrue which could not have accumulated had the claim been settled prior to litigation. Unless the insurer is held to such responsibility, the policyholder, in effect, retains a deductible never contemplated by him.").

We note that our decision is in accord with the position taken by a majority of other jurisdictions. At least two states have held that an insurer is liable for prejudgment interest *in excess of its limit* of liability in absence of an express policy provision to the contrary. *See Burton v. Foret*, 498 So.2d 706 (La. 1986); *Matich*

v. Modern Research Corp., 430 Mich. 1, 420 N.W.2d 67 (1988). However, most courts have held that prejudgment interest is an element of damages and, as such, it is added to the verdict and the entire amount is paid by the insurer under the coverage portion of the policy up to the policy limits. *See Houselog v. Milwaukee Guardian Ins.*, 473 N.W.2d 52, 55 (Iowa 1991) (Supreme Court of Iowa held that "prejudgment interest on judgment for damages against tort-feasor was included in underinsurance coverage for damages 'for bodily injury' or 'because of bodily injury' "); *Allstate Ins. Co. v. Starke*, 797 P.2d 14, 19 (Colo. 1990) (Colorado Supreme Court noted that "[t]he overwhelming majority of other jurisdictions . . . likewise hold that prejudgment interest is an element of compensatory damages, thus limiting an insurer's liability for prejudgment interest to the policy's damages coverage"); *Factory Mut. Liability Ins. Co. of America v. Cooper*, 106 R.I. 632, 637, 262 A.2d 370, 373 (R.I. 1970) (Rhode Island Supreme Court held that an insurer's promise to pay "all sums which the insured shall become legally obligated to pay as damages" because of bodily injury encompassed statutorily imposed prejudgment interest up to the policy limit); *Guin v. Ha*, 591 P.2d 1281 (Alaska 1979) (Alaska Supreme Court based its ultimate holding on recognition that prejudgment interest is an element of compensatory damages); *Brinkman v. Aid Ins. Co.*, 115 Idaho 346, 354, 766 P.2d 1227, 1235 (Idaho 1988) (Because UIM carrier contracted to insure plaintiff for "all injuries and losses suffered at the hands of an underinsured tort-feasor," the UIM carrier is liable for prejudgment interest on a jury award within the policy limit).

Nationwide argues that the reference to prejudgment interest in the supplementary payments provision under the liability section of the policy would be superfluous if interest is included in the term "damages" as used in the UIM section of the policy. However, the specific provision in the liability section of the Allstate and Nationwide policies requiring payment of prejudgment interest is not rendered superfluous by our holding because the supplemental payments provision requires payment of prejudgment interest *in excess* of the stated liability limits. The supplementary payments provision therefore seems to obligate the liability carrier to pay prejudgment interest *in addition to* its policy limit, with its duty to pay interest ending only when the liability insurer pays its part of the judgment within its limit of liability coverage. As an obligation to pay *more* than the liability coverage limit, this specific

prejudgment interest provision is not rendered "superfluous" by a finding that prejudgment interest is also an element of a plaintiff's damages (i.e., payable up to the coverage limit).

Next, Nationwide looks to *Lowe v. Tarble*, 313 N.C. 460, 329 S.E.2d 648 (1985), for support. However, *Lowe* does not answer the question raised in this case. *Lowe* dealt with a supplementary payments provision in the liability section of a policy in which the insurer agreed to pay "*all* costs" taxed against the insured "*in addition to* the applicable limit" of the policy. *Lowe*, 313 N.C. at 463, 329 S.E.2d at 651 (emphasis added). The Court held that "under the contract in the present case" prejudgment interest is a cost included in that obligation.[1] *Id.*

We also note that Nationwide's reliance on *Aames v. Commissioner*, 94 T.C. 189 (1990), is misplaced. Not only are our decisions not controlled by decisions of the United States Tax Court, but the issue before that court was far different from the issue now before us. That decision concerned only the *taxability* of prejudgment interest. Even so, the decision itself notes that "[b]y statute [in Massachusetts], plaintiffs are now **entitled to interest as an item of damages**." *Id.* (Emphasis added.)

For the above-stated reasons, we hold that prejudgment interest on the jury verdict in the underlying tort action is included within the term "damages" as that term is used in the UIM portion of the plaintiff's policy. Since Nationwide promised to pay plaintiff's resulting damages, it must now do so, up to, but not in excess of, its UIM policy limits.

II.

[2] We turn now to the issue of whether Nationwide is entitled to a credit of $10,000 against its UIM coverage limit for the payment made under the medical payments provision of plaintiff's policy. We observe initially that Nationwide has paid plaintiff a total of $90,000 under the UIM section of its policy. The limit of liability under the UIM section is $100,000. In addition to the UIM pay-

1. In addressing the argument that *Lowe* supported a finding that prejudgment interest was an item of "costs" and not "damages," the United States District Court for the Eastern District of North Carolina noted that "the facts and issues in the present case are different from the facts in *Lowe* to a sufficient degree as to justify a contrary holding." *Hartford Acc. & Indem. Co.*, 710 F. Supp. at 167. We believe the same holds true here.

ment, Nationwide has paid plaintiff $10,000 under the medical payments section of its policy. If it is entitled to a credit on its UIM payments for this $10,000 payment, Nationwide will be deemed to have paid $100,000 under its UIM coverage. If it is not entitled to a credit, then $10,000 of UIM coverage remains.

The Court of Appeals addressed this issue by holding that the parties are bound by their stipulations in the record on appeal. *Baxley*, 104 N.C. App. at 422, 410 S.E.2d at 14. On remand, the trial judge admitted confusion as to the proper application of the Court of Appeals' holding. The trial judge noted in the superseding order that at a hearing on the matter held on 7 May 1992 the parties stipulated that the stipulation in the record on appeal was "for the purpose of bringing before the Court of Appeals the issue of whether an underinsured motorist carrier is entitled to receive a credit for payments made under its Medical Payments coverage." Since the issue did not appear to be fully resolved by the Court of Appeals' holding, the trial court assumed that "the remand was for this Court [the trial court] to decide whether an underinsured motorist carrier is entitled to credit for payment under its Medical Payments coverage." The trial judge then concluded from the file that:

> the parties contemplated the situation wherein a person receiving compensation of the medical payments coverage of the contract might also receive payment from one or more additional sources. The Court also concludes as a matter of law that Defendant, Nationwide Mutual Insurance Company, in clear and unequivocal terms waived its right of subrogation. Further, from review of the policy, it appears that Plaintiff paid to Defendant, Nationwide Mutual Insurance Company, separate premiums for the Medical Payments Coverage and is, accordingly allowed under the Collateral Source Rule to recover under both. The Court, therefore, concludes that Defendant, Nationwide Mutual Insurance Company, as the Underinsured Motorist carrier for the Plaintiff, is not entitled to credit for payments made under its Medical Payments Coverage.

We agree with the trial court and hold that Nationwide is not entitled to a $10,000 credit against its UIM coverage limit for the amount paid under the medical payments provision.

In *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 243 S.E.2d 894 (1978), we held that "[w]here there is no ambiguity in the language used

in the [insurance] policy, the courts must enforce the contract as the parties have made it." *Id.* at 43, 243 S.E.2d at 897.

In this case the policy provides for coverage under the medical payments section and such payment was made. The policy also provides for separate coverage under the UIM section of the policy. Nowhere in the policy is there any provision to the effect that a payment made under the medical payments section shall reduce Nationwide's obligation under the UIM section. In fact, plaintiff paid separate premiums for the medical payments and UIM coverages and each had a separate limit of liability.

Part C of the policy in this case provides for payment of medical expenses incurred by the insured as a result of an accident up to the limit of liability ($10,000). Part D of the policy, the UIM coverage section, provides that:

> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury . . . by or on behalf of persons or organizations who may be legally responsible. This includes all sums paid under Part B.

As noted above, the $10,000 payment made by Nationwide to plaintiff was under Part C of the policy for medical bills incurred by plaintiff as a result of the accident. No payments were made by Nationwide to plaintiff under Part B of the policy, the liability coverage section. Thus, the "credit" section in Part D of the policy, quoted above, does not provide for credit to Nationwide for payments made under Part C of the policy. In addition, an endorsement to the policy amends Nationwide's right to subrogation by stating that the "Right to Recover Payment" section does not apply under Part C, the medical payments section.

Nationwide does not argue that it is entitled to credit or subrogation under any specific provision of the policy. Rather, Nationwide contends that plaintiff is prohibited from recovering under both the medical payments and UIM sections of the policy on the grounds of unjust enrichment and equitable subrogation. Defendant first relies on *Moore v. Beacon Ins. Co.*, 54 N.C. App. 669, 670-71, 284 S.E.2d 136, 138 (1981), *disc. rev. denied*, 305 N.C. 301, 291 S.E.2d 150 (1982), for the proposition that plaintiff would be unjustly enriched by recovery under both sections. Defendant then argues that this Court has expressed a reluctance to allow compensation in excess

of a claimant's actual loss, citing *Tart v. Register*, 257 N.C. 161, 125 S.E.2d 754 (1962). Lastly, defendant argues that the doctrine of equitable subrogation precludes double recovery in this case.

We are not persuaded by defendant's arguments. The defenses raised by defendant have no merit where, as here, the contract itself provides for recovery under both the medical payments and the UIM sections and waives any right to subrogation. *See Allis v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 363 S.E.2d 880 (1988) (UIM section of policy did not provide for coverage to be reduced by sums paid out under the section dealing with medical payments); *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989) (insurance company waived its right to subrogation under the terms of the insurance contract). In addition, *Tart* is not controlling because the Court in that case did not have the provisions of the policy before it for review. *Tart*, 257 N.C. at 174, 125 S.E.2d at 763. We do have the policy before us in this case and are thus better able to determine what was within the contemplation of the contracting parties. The policy clearly does not provide for credit or subrogation on these facts. We hold that Nationwide is not entitled to a credit against its UIM coverage limit for the $10,000 it paid plaintiff under the medical payments section of the policy.

We therefore affirm both the Court of Appeals' decision regarding the payment of prejudgment interest and the trial court's judgment regarding the credit issue.

Case Number 538PA91—AFFIRMED.

Case Number 226PA92—AFFIRMED.

Justice PARKER did not participate in the consideration or decision of these cases.

Justice MEYER dissenting.

Believing that the majority has erred on both issues it addresses, I respectfully dissent.

The majority clearly concedes (1) that N.C.G.S. § 20-279.21, which defines "motor vehicle liability policy," is silent as to the issue of prejudgment interest; and (2) that the prejudgment interest statute, N.C.G.S. § 24-5, is not a part of the Financial Responsibility

Act and thus is not written into the policy in question.[1] It follows that any obligation of Nationwide to pay prejudgment interest is governed entirely by, and only by, its contract of insurance with its insured.

The majority concludes that Nationwide's obligation under its UIM coverage to pay "damages" that its insured is entitled to recover from the tort-feasor includes prejudgment interest. I disagree.

Part D of the Nationwide policy, as well as a subsequent endorsement, both pertaining to uninsured/underinsured motorists' coverage, provide that Nationwide

> will pay damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:
>
> 1. Bodily injury sustained by a covered person and caused by an accident; and
>
> 2. Property damage caused by an accident.

(Emphasis added.) Under the plain language of the UIM coverage provisions, Nationwide's obligation is limited to paying damages suffered by reason of bodily injury and property damage. Interest cannot be said to arise from bodily injury or property damage. No supplemental payment provisions are found under Part D of the policy. Thus, Part D of plaintiff's policy constituting uninsured/underinsured coverage clearly does not contain any provision requiring Nationwide to pay the costs of interest or defense costs.

The issue of whether prejudgment interest is included in the term "damages" has been examined by the United States Tax Court in *Aames v. Commissioner*, 94 T.C. 189 (1990). Though Tax Court decisions are, of course, not binding on this Court, the reasoning of those decisions can be informative and sometimes persuasive. Section 104(a)(2) of the Tax Code excludes from gross income "the amount of any damages received . . . on account of personal injuries

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1. While acknowledging that N.C.G.S. § 24-5 is not a part of our Financial Responsibility Act and thus is not read into automobile insurance policies, it nevertheless spends several pages analyzing the provisions of that statute and the cases that interpret it in order to arrive at its conclusion that interest is to be treated as an element of compensatory damages.

or sickness." 26 U.S.C.S. § 104(a)(2) (Law. Co-op. Supp. 1992). In that case, Mr. Aames did not report the prejudgment interest awarded to him in a malpractice action, asserting the provisions of section 104. The Tax Court held that the prejudgment interest was taxable and did not come within the term "damages" under section 104. *Aames*, 94 T.C. at 189. The Tax Court noted that a statute in the taxpayer's state of Massachusetts entitled him to "interest as an item of damages," *id.* at 192, but nevertheless held that it was not " 'damages received . . . on account of personal injuries,' " *id.* at 192 (quoting 26 U.S.C.S. § 104(a)(2)). This is virtually the same as the language of Nationwide's policy here.

If the contract relating to UIM coverage was intended to cover prejudgment interest, it would have included language well known and customarily used in contracts of insurance to accomplish that purpose. For instance, Part B of the Nationwide policy here, which deals with liability coverage, in an amendatory endorsement (which, incidentally, is identical to the liability portion of Brown's Allstate policy in the underlying tort action), contains a supplementary payments provision which provides that:

> In addition to our limit of liability, we will pay on behalf of a covered person:
>
> . . . .
>
> 3. Interest accruing after any suit we defend is instituted. Our duty to pay interest ends when we pay our part of the judgment which does not exceed our limit of liability for this coverage.

Thus, under the supplementary payments provisions of the liability insurance section of the Nationwide policy promising to pay benefits in addition to the stated policy limits, there is a specific reference to "interest accruing after any suit . . . is instituted" (prejudgment interest). This is the type of language employed when the intent is to pay prejudgment interest. I believe the majority errs in finding such an intent within a promise to pay "damages," a very nonspecific term at best.

The majority should adhere in this case to the well-established rule that in interpreting policies of insurance, "courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term [here, the term "damages"], rewrite the contract

or impose liabilities on the parties not bargained for and found therein." *Woods*, 295 N.C. at 506, 246 S.E.2d at 777 (emphasis added). Here, the language of plaintiff's UIM policy did not obligate Nationwide to pay prejudgment interest on the judgment in the underlying tort action.

The trial judge was correct in saying in the judgment that the payment of prejudgment interest falls on defendant Brown and her liability carrier. Brown paid premiums to her liability carrier to pay compensatory damages up to its policy limits and, in addition thereto, to provide a defense, to pay defense costs and interest on the judgment. Our statute, allowing a liability carrier to pay its liability coverage into court and be released, was never intended to release that carrier from its obligation to pay interest on the judgment taken against its insured, if doing so means placing that burden on the injured party's UIM carrier. The premium for coverage of the interest was paid by the tort-feasor to her own liability carrier. If that expense is borne by the injured party's UIM carrier, the tort-feasor loses the benefit of her bargaining with her liability carrier.

I also believe that the majority has erred in not allowing a credit for Nationwide's previous payment of $10,000 under its medical payments coverage. First, the majority makes much of the fact that separate premiums were paid for the medical payments coverage. The separate premiums were paid, *inter alia*, for coverage of medical expenses even in the event they result from situations where the insured person has no liability for the event that caused them to be incurred. The fact that separate premiums were paid does not dictate that the contracting parties contemplated double payment of medical expenses to the extent of the medical payments coverage.

Second, and most important, the majority has completely overlooked the contract language relating to the limit of liability under the UIM coverage as it appears in "Part D Uninsured Motorists Coverage" of the Nationwide policy. The pertinent provision is as follows:

> LIMIT OF LIABILITY
>
> The limit of bodily injury liability shown in the Declarations for "each person" for Uninsured Motorists Coverage is our

maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. . . .

. . . .

Any amount otherwise payable for damages under this [uninsured] coverage shall be reduced by all sums:

1. Paid because of the bodily injury . . . by or on behalf of persons or organizations who may be legally responsible.

(Emphasis added.) This provision contemplates a credit against amounts due under the UIM coverages for any amount previously paid "for bodily injury" by Nationwide under its medical payments coverage. Such payments were paid by Nationwide "on behalf of" the tort-feasor because the tort-feasor's coverage had been exhausted.

I vote to reverse the decision of the Court of Appeals and remand the case to that court for further remand to the Superior Court, Robeson County, for the entry of judgment as originally entered with regard to Nationwide's liability for prejudgment interest and allowing Nationwide a credit for the $10,000 it previously paid plaintiff under its medical payment coverage.

STATE OF NORTH CAROLINA v. PHILLIP NOVELL WIGGINS

No. 342A91

(Filed 2 July 1993)

1. **Criminal Law § 91 (NCI4th)— probable cause hearing—refusal to hold—no prejudicial error**

There was no prejudicial error in a first-degree murder and robbery prosecution where defendant was arrested pursuant to a warrant on 11 April, his initial appearance was on 12 April and counsel was appointed, a probable cause hearing was set for 26 April but was not held, defendant filed two motions requesting a probable cause hearing on 10 August, both motions were denied, and the grand jury returned true bills on 17 August. Although there is no constitutional right to a probable cause hearing, N.C.G.S. § 15A-606 requires a judge to schedule a probable cause hearing not later than

15 working days following the initial appearance. Assuming that this statute provides additional rights which were violated in this case, that violation was not prejudicial because defendant was arrested upon a warrant and tried upon true bills of indictment, so that both the magistrate and the grand jury had the duty to determine the existence of probable cause, and defendant points to no evidence to support a finding of prejudice other than the passage of time following his arrest, but does not explain how he was prejudiced by this passage of time.

Am Jur 2d, Criminal Law §§ 411-420.

2. Evidence and Witnesses § 1235 (NCI4th)— statement to S.B.I. agent—Miranda warnings not given—no custodial interrogation

The trial court did not err in a prosecution for first-degree murder and robbery by denying defendant's motion to suppress his statement to an S.B.I. agent where defendant was interviewed by the agent on the day the victim's body was found; the interview was part of police efforts to gather information from persons who had visited the victim's home the day before; officers had spoken with Jeffrey Moore and Stephon Marshburn before speaking with defendant; Moore and Marshburn told officers that they had been at the victim's home on the previous day with defendant and about fifteen others and that the victim was alive when Moore, Marshburn and defendant left; the police had no evidence implicating defendant in the murder at the time of the interview and they considered him a potential witness rather than a suspect; there was nothing to suggest that defendant was in custody or that defendant was deprived of his freedom of action in any significant way; and the totality of the circumstances suggests that defendant's statement to the agent was not involuntary.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

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. Constitutional Law § 344 (NCI4th)— first-degree murder—voir dire—judge's private communication with prospective alternate juror—harmless error

The State met its burden of showing that the trial court's error was harmless beyond a reasonable doubt where the judge conferred with a prospective juror during jury selection, the prospective juror asked that she be excused from jury duty because she was due to begin university classes, the court told her that she should inform the parties of her situation and allow them to take care of it, she was called to the jury box during the selection of alternate jurors, and she was excused by consent of both parties. The trial court immediately reconstructed its conversation for the record, there is nothing to raise any doubt as to the completeness or accuracy of the trial court's reconstruction, the prospective juror was ultimately excused by consent of both the State and defendant, and it did not become necessary for any alternate juror to serve on defendant's jury.

Am Jur 2d, Criminal Law §§ 695, 696.

4. Appeal and Error § 147 (NCI4th)— first-degree murder—excusal of prospective alternate juror for cause—no objection—no request to rehabilitate

Defendant in a first-degree murder and robbery prosecution waived the issues of whether the trial court erred by excusing a prospective alternate juror upon its own motion and in refusing to allow defendant to rehabilitate that juror where defendant did not object to the excusal for cause and did not make a request to rehabilitate the prospective juror. Moreover, it did not become necessary for any alternate juror to serve on defendant's jury and any possible error could not have been harmful to defendant.

Am Jur 2d, Appeal and Error §§ 545 et seq.

5. Jury § 252 (NCI4th)— first-degree murder—jury selection—peremptory challenges—black jurors excluded—no error

A first-degree murder defendant's *Batson* challenge was properly denied by the trial court where the State used peremptory challenges against four black prospective jurors; the State voluntarily proffered explanations for the exercise of each peremptory challenge; the explanations offered by the State,

if not offered as a pretext, constitute valid non-racial reasons for the exercise of peremptory challenges; the record supports the conclusion that the explanations were not a pretext in that the prosecutor's concerns about the four prospective jurors arose from their uncertainties about the death penalty or their potential bias resulting from prior contact with defense counsel, defendant, the victim, or his family members; and defendant offered no evidence to show that any reason offered by the State was a pretext.

Am Jur 2d, Jury §§ 265 et seq.

6. Evidence and Witnesses § 1942 (NCI4th)— first-degree murder—letter written by defendant—authentication

There was sufficient evidence to support the trial court's admission of a letter into evidence where the letter was purportedly written by defendant and received by a witness while the witness was in prison, the letter was printed rather than written in cursive lettering, and defendant contends that it is impossible to reliably identify printing, so that the letter was not properly authenticated. The witness testified on voir dire and again before the jury that he recognized defendant's handwriting, having received another letter from defendant and having seen some songs which defendant had written, all of which were printed. N.C.G.S. § 8C-1, Rule 901, N.C.G.S. § 8C-1, Rule 104(e).

Am Jur 2d, Evidence §§ 878-883.

7. Robbery § 4.3 (NCI3d)— armed robbery—evidence sufficient

There was sufficient evidence that defendant committed a robbery with a dangerous weapon where there was evidence that defendant was in possession of money apparently belonging to the victim when Moore and Mewborn entered the victim's home; defendant said that he "already had it" when Mewborn asked where the money was; the victim appealed to his attackers to take the money and the beer and leave while Mewborn was attempting to get the money from defendant; and there was evidence that defendant was in possession of a gun at that time.

Am Jur 2d, Robbery §§ 5, 63.

8. Homicide § 256 (NCI4th)— murder—premeditation and deliberation—evidence sufficient

There was sufficient evidence of first-degree murder based on premeditation and deliberation where there was evidence that defendant was present when Mewborn first shot the victim; that defendant said "Man, you got to kill him . . ." after Mewborn shot the victim with his single shot rifle; defendant complied with Mewborn's demand for more bullets by obtaining bullets from Moore after threatening him by pointing a gun in his face; and Moore heard two more shots as he was running from the scene. There was direct evidence that defendant was present at the scene at the time of the initial assault, advocated the killing, and stood ready to support Mewborn in completing the homicide, and circumstantial evidence to suggest that two guns were fired, permitting an inference that defendant fired one of the fatal shots.

Am Jur 2d, Homicide §§ 437 et seq.

9. Homicide §§ 558, 571 (NCI4th)— first degree murder—refusal to charge on manslaughter—no error

There was no error in a first-degree murder prosecution where the court charged on second-degree murder at defendant's request but refused to charge the jury on voluntary and involuntary manslaughter. All of the State's evidence, if believed, tended to establish first-degree murder and not manslaughter, there was no evidence of self-defense, and defendant's evidence, if believed, would show that he was not guilty of any crime. Moreover, any error was harmless because the jury was instructed on second-degree murder and still found defendant guilty of first-degree murder.

Am Jur 2d, Homicide §§ 525 et seq.

10. Criminal Law § 959 (NCI4th)— murder—motion for appropriate relief—newly discovered evidence—known at time of trial

The trial court did not abuse its discretion in denying defendant's motion for appropriate relief based on newly discovered evidence in a murder prosecution where the trial court's findings, which were supported by sufficient evidence, were that defendant and Mewborn were both housed in the Common Jail of Lenoir County awaiting trial for the murder, defendant informed Mewborn that he did not want him to

testify in his case since Mewborn could then face the death penalty, defendant informed Mewborn during the trial that he was being railroaded, defendant's attorneys interviewed Mewborn during the trial to see if he had any information which would assist defendant, and Mewborn responded in the negative, although he later testified at the hearing that he knew at the time that defendant was not involved in the killing. The trial court concluded that the information was known and available to defendant at the time of trial.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies § 50.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Barefoot, J., at the 13 May 1991 Criminal Session of Superior Court, Lenoir County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals as to an additional judgment imposed for robbery with a dangerous weapon was allowed 12 February 1992. Heard in the Supreme Court 7 October 1992.

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

William D. Spence and T. Dewey Mooring, Jr., for defendant.

FRYE, Justice.

Defendant, Phillip Novell Wiggins, was indicted for first-degree murder, robbery with a dangerous weapon, and as a habitual felon. Defendant was tried capitally to a jury, which returned a verdict of guilty of first-degree murder based on malice, premeditation and deliberation. Defendant was also found guilty of robbery with a dangerous weapon. The jury found defendant not guilty of first-degree murder under the felony murder rule. After finding that there were no statutory aggravating circumstances to be submitted to the jury, the trial court imposed the mandatory sentence of life imprisonment for the first-degree murder conviction. Defendant admitted habitual felon status and was sentenced as a habitual felon to life imprisonment for robbery with a dangerous weapon.

Defendant gave written notice of appeal to this Court on 24 May 1991. After filing his record on appeal and brief with this Court, defendant filed a motion for appropriate relief with this

Court claiming newly discovered evidence that would entitle him to a new trial. By Order dated 18 December 1992, this Court remanded the cause to the Superior Court, Lenoir County, for an evidentiary hearing on defendant's motion. By Order filed 22 January 1993, after an evidentiary hearing, Judge James D. Llewellyn denied defendant's motion. Both defendant and the State filed supplemental briefs with this Court addressing whether the trial court correctly denied defendant's motion for appropriate relief. After reviewing the transcript of the hearing and considering their supplemental briefs, we conclude that the trial court properly denied defendant's motion for appropriate relief. On his direct appeal, we conclude that defendant received a fair trial, free from prejudicial error.

I.

Richard Ivey Sutton was murdered in the early morning hours on 10 April 1990 at his home on Orion Street in Kinston. Sutton operated a "liquor house" from his home which defendant and friends had visited on the evening of 9 April 1990 and the morning of 10 April 1990.

Jeffrey Moore, who was in custody as a result of charges against him relating to the murder of Sutton, was the main witness for the State and testified to the following facts at trial. Moore lived with Stephon Marshburn in a mobile home in April of 1990. William Mewborn, Renee Croom and defendant Phillip Novell Wiggins also lived there. The mobile home was located close to the victim's home.

On the evening of 9 April 1990 Moore, Marshburn, Mewborn and defendant spent time at the victim's home drinking beer. They left around 11:00 p.m. and returned to Marshburn's home to watch television. Soon thereafter an argument between Mewborn and his girlfriend Gloria developed into an altercation. During the altercation, Gloria cut Mewborn on the arm. She then left Marshburn's home with defendant accompanying her.

Defendant later returned to Marshburn's home and warned the others that Gloria was going to "get her ex-boyfriend" who was "coming back to the trailer." Marshburn left his home to visit his neighbor "Champ" who was in possession of various firearms. Marshburn and Champ returned to Marshburn's home with six .22 caliber rifles and one sawed-off shotgun. Each gun was loaded

and held only one bullet. The men waited outside for the anticipated attackers, but no one ever arrived. The group eventually abandoned their guard and retreated inside the mobile home.

At about 3:30 a.m. the men visited the victim's home again for a short time and then returned to Marshburn's home. Around 4:00 a.m., defendant went to the store at Moore's request to buy cigarettes for Moore. Defendant took his gun with him. After defendant had been away for about an hour, Moore and Mewborn decided to go out to look for him. They also took their guns with them.

They went to the victim's home and knocked on the door. After a delay, the victim answered. They walked in and proceeded to the kitchen. Defendant was there and his gun was nearby on the kitchen counter. Moore asked the victim to get a beer for him and Mewborn. The victim did not respond. However, defendant picked up a bag from the counter and told Moore and Mewborn that "he already had it." Mewborn then asked "where the money was." Defendant reached in his pocket and pulled out loose money and said he "already had it." Mewborn demanded that defendant give him the money. Defendant did not respond, so Mewborn grabbed him by the collar and again demanded that defendant give him the money. In the meantime, the victim told the men to "take the beer and the money and leave." Mewborn told the victim to shut up and pointed the gun at his face. Mewborn then shot the victim between the eyes.

Mewborn then told Moore and defendant that "he couldn't leave [the victim] like this; that the victim was going to tell on" them. Mewborn asked defendant to give him more bullets. Defendant had none, so defendant obtained some from Moore who was on his way out the door. Moore testified that defendant "pointed his gun in my face and told me to give him some more bullets." Moore gave him about fifteen bullets and then ran out of the victim's home. He heard two more shots, "a couple of seconds apart," on his way out.

Moore went to Marshburn's home and told Marshburn what had happened. Mewborn and defendant arrived about five minutes later. Mewborn was yelling at defendant about the money. Defendant finally gave Mewborn the money. At various points both Mewborn and defendant threatened to kill Moore because he might "say something."

Moore left Marshburn's home but returned around 6:00 a.m., at which time Mewborn was asleep. Marshburn said he wanted to see the victim, so Moore accompanied Marshburn to the victim's home. While they were there, a man who identified himself as the victim's cousin arrived and asked to see the victim. Moore and Marshburn informed him that Sutton was dead. After a few minutes, the three men drove to the police station to alert the authorities. A policeman arrived on the scene shortly thereafter. Moore informed the police that he and Marshburn visited the victim's home in order to buy beer and that they found the victim dead upon their arrival. On 11 April 1990, police visited Marshburn's home and told Moore, Marshburn, Mewborn, Croom and defendant that they needed to talk to them. On that day, Moore told the police everything that had happened. He was arrested shortly thereafter.

William L. Slaughter, Special Agent with the State Bureau of Investigation (S.B.I.), testified that, on the evening of 10 April 1990, he located defendant at Marshburn's residence and transported him to the Kinston Police Department. Defendant gave a statement in which he claimed that, following Mewborn's argument with his girlfriend, he had remained at Marshburn's home for the rest of the morning.

Stephon Marshburn testified that early on 10 April 1990, while Mewborn and defendant were arguing, Moore told him that Moore, Mewborn and defendant had been at the victim's home and that Mewborn had shot the victim. Marshburn "laughed it off" because he did not believe Moore. Later, Marshburn followed Mewborn and defendant into the bedroom where he saw one- and five-dollar bills all over the bed. Defendant repeatedly asked Mewborn to give him the money but Mewborn refused. Defendant told Marshburn that Mewborn asked the victim for money, the victim refused and the gun accidentally went off in the victim's face. Defendant said he told Mewborn, "Man, you got to kill him because the guy is suffering." Defendant told Marshburn that he then left. Marshburn testified that he and defendant then decided to take the guns apart and throw them out.

Defendant testified that late on 9 April 1990 until early on 10 April 1990 he was at the victim's home. Thereafter he returned to Marshburn's home. He stated that while watching television he fell asleep between 4:30 and 5:00 a.m. on 10 April 1990 and

did not awake until 8:00 or 9:00 a.m. He said that he knew nothing about the killing other than what he had heard since he had been in police custody.

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

II.

[1] Defendant first contends that the trial court erred by refusing to require the State to conduct a probable cause hearing. Defendant was arrested pursuant to a warrant on 11 April 1990. Defendant's initial appearance was held on 12 April 1990 and counsel was appointed at that time to represent him. A probable cause hearing was set for 26 April 1990, in accordance with N.C.G.S. § 15A-606. However, the scheduled probable cause hearing was not held. On 10 August 1990, defendant filed two motions requesting a probable cause hearing, both of which were subsequently denied. On 17 August 1990, the grand jury returned true bills of indictment upon which defendant was tried.

We have held that there is no constitutional right to a probable cause hearing. *See State v. Oliver*, 302 N.C. 28, 38, 274 S.E.2d 183, 190 (1981); *State v. Lester*, 294 N.C. 220, 224, 240 S.E.2d 391, 396 (1978). However, N.C.G.S. § 15A-606 requires a judge to schedule a probable cause hearing not later than fifteen working days following the initial appearance. N.C.G.S. § 15A-606 (1988). Assuming without deciding that this statute was designed to provide a defendant with additional rights, and that those rights were violated in this case, *see State v. Siler*, 292 N.C. 543, 555, 234 S.E.2d 733, 741 (1977), we hold that defendant has failed to show prejudicial error.

Prejudicial error in regard to rights arising other than under the Constitution of the United States is shown "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]" N.C.G.S. § 15A-1443(a) (1988). Defendant was arrested upon a warrant and was tried upon true bills of indictment. Both the magistrate and the grand jury had the duty to determine the existence of probable cause. *See State v. Hudson*, 295 N.C. 427, 430-31, 245 S.E.2d 686, 689 (1978); N.C.G.S. § 15A-304(d); N.C.G.S. § 15A-628. As in *State v. Hudson*, "in the case *sub judice*, probable cause that a crime was committed and that defendant committed it was twice established." *Hudson*, 295 N.C. at 430, 245 S.E.2d at 689.

Defendant points to no evidence in the record to support a finding of prejudicial error other than the passage of time following his arrest. He does not explain how he was prejudiced by this passage of time. Thus, we find no prejudicial error in the denial of defendant's motions for a probable cause hearing.

[2] Defendant next contends that the trial court erred in denying defendant's motion to suppress his statement to S.B.I. Special Agent William Slaughter. Defendant contends that the statement was inadmissible because he had not been properly advised of his *Miranda* rights before it was given and because his statement was involuntary. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); *Rogers v. Richmond*, 365 U.S. 534, 5 L. Ed. 2d 760 (1961). We reject this assignment of error because the record fails to reveal any evidence to support defendant's contentions.

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*, 384 U.S. at 444, 16 L. Ed. 2d at 706; *State v. Perry*, 298 N.C. 502, 506, 259 S.E.2d 496, 499 (1979). Whether or not *Miranda* warnings are required or given, the Fourteenth Amendment requires that a statement be voluntary in order to be admissible. *Rogers v. Richmond*, 365 U.S. at 540, 5 L. Ed. 2d at 766. In order to determine the voluntariness of a statement, we must assess the "totality of all the surrounding circumstances[.]" *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 36 L. Ed. 2d 854, 862 (1973).

The State presented evidence at the pretrial hearing on defendant's motion to suppress which tended to show the following. Defendant was interviewed by Agent Slaughter on 10 April 1990, the day the victim's body was found. The interview was part of police efforts to gather information from persons who had visited the victim's home on 9 April 1990. Prior to speaking with defendant, police officers had spoken with Jeffrey Moore and Stephon Marshburn. Moore and Marshburn told the officers that they had been at the victim's home on 9 April 1990 with defendant and approximately fifteen other persons and that the victim was alive when Moore, Marshburn and defendant left. At the time of the interview, the police had no evidence implicating defendant in the murder, and they considered him to be a potential witness rather than a suspect. The interview lasted approximately thirty minutes, after which time defendant left the police station.

Defendant offered no evidence at the hearing.

We find nothing in the evidence to suggest that defendant was "in custody" as that term has been interpreted by this Court. *See State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986) (defendant was not in custody when he voluntarily accompanied law enforcement officers in order to be questioned about a crime to which he later confessed); *State v. Martin*, 294 N.C. 702, 242 S.E.2d 762 (1978) (defendant was not in custody when he voluntarily went to the police station and made a statement). Nor was there evidence tending to show that defendant was deprived of his freedom of action in any significant way. Furthermore, the totality of the circumstances suggests that defendant's statement to Agent Slaughter was not involuntary. *See State v. Wilson*, 322 N.C. 91, 366 S.E.2d 701 (1988) (statement was not involuntary where the officer did not frighten defendant, overcome his will, or make promises to him); *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984) (inculpatory statements which were not made as a result of any fear or hope of reward were voluntary and admissible). Thus, there was no error in denying defendant's motion to suppress.

[3] In his third assignment of error, defendant contends that the trial court erred by talking to a potential juror outside the presence of defendant, his attorneys, and the district attorney. Defendant argues that his unwaivable right to be present at all stages of his capital trial was infringed upon when the trial judge conferred with a prospective juror (Ms. B.) during jury selection.

The record shows that after the judge spoke with Ms. B. during jury selection, defendant moved for a mistrial on that basis. In ruling on defendant's motion for a mistrial, the trial judge said:

> All right. Let the record reflect that the juror requested that she be excused from jury duty because she is enrolled at East Carolina University and is to begin her classes at 5:00 Monday afternoon. The court disallowed her request and told her that if she were to be called on this jury, that she should inform both parties that was her situation. And then I would let you take care of it. Your motion is denied.

Later, during selection of alternate jurors, Ms. B. was called to the jury box and was excused by consent of both parties.

This Court has recognized that a capital defendant has an unwaivable right to be present at all stages of his capital trial.

State v. Payne, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987). The capital defendant's right to be present during all stages of his trial attaches to "preliminary questioning in open court at, during and in the context of defendant's trial of newly summoned prospective jurors called specifically for service in defendant's trial." *State v. Payne*, 328 N.C. 377, 388, 402 S.E.2d 582, 588 (1991) (citing *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990)). Thus, defendant's right to be present was clearly violated in this case when the trial court communicated privately with Ms. B. However, whether a violation of defendant's right to be present constitutes prejudicial error is subject to harmless error analysis. *State v. Hudson*, 331 N.C. 122, 135, 415 S.E.2d 732, 738 (1992).

We find that the State has met its burden in this case by showing that the trial court's error was harmless beyond a reasonable doubt. The trial court immediately reconstructed its conversation with Ms. B. for the record. *See Hudson*, 331 N.C. at 137, 415 S.E.2d at 739 (error, if any, was harmless where trial court recounted *ex parte* communications with jurors for the record). The conversation related to a scheduling problem faced by the prospective juror. As in *Hudson*, we find nothing to raise any doubt as to the completeness or accuracy of the trial court's reconstruction. *Id.* at 137, 415 S.E.2d at 739-40. In finding harmlessness, we also note that this prospective juror was ultimately excused by consent of both the State and defendant. In addition, it did not become necessary for any alternate juror to serve on defendant's jury. Because the alternate jurors did not participate in the jury deliberations, the excusal of the prospective juror with whom the judge had spoken in no way affected defendant. Under the circumstances, we find that the error was harmless beyond a reasonable doubt.

[4] Defendant next contends that the trial court erred in excusing a prospective alternate juror upon its own motion and in refusing to allow defendant to rehabilitate the prospective juror. The transcript shows that the trial court excused prospective juror Mr. P. for cause after Mr. P. stated in response to the State's voir dire questioning that he would find it hard to believe the testimony of witnesses who were presently prisoners. Defendant did not object to the trial court's excusal for cause of the prospective juror, therefore, defendant failed to preserve this issue for appellate review. N.C. R. App. P. 10(b)(1). Similarly, defendant did not make a request to rehabilitate the prospective juror. Thus, his contention that the trial court erred in not allowing him to

do so is similarly waived. *Id.* As observed earlier, it did not become necessary for any alternate juror to serve on defendant's jury. Thus, any possible error in excusing the prospective alternate juror could not have been harmful to defendant.

[5] In his next assignment of error, defendant argues that his federal and state constitutional rights were violated by the State's peremptory challenges to four black jurors solely on account of their race. Such discrimination is prohibited under the Fourteenth Amendment to the United States Constitution and under Article I, Section 26 of the Constitution of North Carolina. *See Batson v. Kentucky*, 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83 (1986); *State v. Crandell*, 322 N.C. 487, 501, 369 S.E.2d 579, 587 (1988).

In a challenge under *Batson*, a defendant must first establish a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87-88. Once the defendant makes his *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for having peremptorily challenged those jurors. *Id.* at 97, 90 L. Ed. 2d at 88. This Court has applied these principles and has permitted a third step in the analysis, specifically, that of allowing a defendant to introduce evidence that the State's explanations are merely a pretext. *State v. Robinson*, 330 N.C. 1, 16, 409 S.E.2d 288, 296 (1991).

In this case, the State voluntarily proffered explanations for the exercise of each peremptory challenge which resulted in the excusal of a black prospective juror. When the State voluntarily proffers explanations for its challenges, we proceed as if a *prima facie* case of purposeful discrimination has been established. *Id.* at 17, 409 S.E.2d at 297. The standard which the State must meet in rebuttal has recently been discussed and will not be repeated here. *See id.* Rather we turn directly to the reasons offered by the State for peremptorily challenging each of the four black jurors.

M.D. was the first black prospective juror peremptorily challenged by the State. The State explained that M.D. was excused because she expressed some ambivalence about her ability to recommend imposition of the death penalty upon a finding of guilty. In support of this explanation, the record reveals the following exchange:

> Q. [The assistant district attorney]: Do you feel after everything in this case and at the very end of the case, if in fact Mr.

> Wiggins has been found guilty of first degree murder, and then after you have gone in the back room again in the second phase; do you feel as if you could sign your name to a verdict sheet imposing the death penalty if you feel as though it should be applied in this case?
>
> A. [Prospective Juror M.D.]: No.
>
> Q. You don't feel like you could do that?
>
> A. Huh-Uh.

The exchange reveals that the juror at least possessed uncertainty about her willingness to impose the death penalty. This constitutes a valid non-racial reason for the State to excuse her peremptorily. *See State v. Smith*, 328 N.C. 99, 125, 400 S.E.2d 712, 727 (1991). Thus, the State has met its burden of showing that this peremptory challenge was not exercised for a racial purpose.

A second black prospective juror who was peremptorily challenged was H.D. On voir dire, H.D. stated that he knew William D. Spence, one of the defense attorneys, and that he had retained Mr. Spence to represent him in a legal matter. The prosecutor explained that he was excusing H.D. on the basis that H.D. may retain some bias in favor of his former attorney and thus in favor of defendant. The prosecutor excused a third black prospective juror, J.P., because she knew both the defendant and the victim and had engaged in social activities with the defendant. The fourth prospective black juror who was excused, M.G., stated on voir dire that she knew the victim, the victim's stepbrother and the victim's sister. She also stated that she had seen the victim's stepbrother and the victim's sister in the previous weeks but she did not know anything about the case, although she "may have . . . probably" discussed the case with the victim's sister. The explanations offered by the State in regard to these three prospective jurors, if not offered as a pretext, constitute valid non-racial reasons for the exercise of peremptory challenges. *Id.* at 124, 400 S.E.2d at 726.

We next address defendant's argument that each explanation offered by the State was merely a pretext. *See State v. Porter*, 326 N.C. 489, 498-99, 391 S.E.2d 144, 150-51 (1990) (for identification of factors to which a judge should refer in determining whether explanation is legitimate or a pretext). The record in this case permits a conclusion that the prosecutor was "primarily concerned

with removing jurors who might not be able to give defendant and the State a fair trial." *Smith*, 328 N.C. at 126-27, 400 S.E.2d at 727. The prosecutor's concerns about the four prospective jurors who were challenged arose in response to the jurors' uncertainties about the death penalty, or their potential bias resulting from prior contact with defense counsel, the defendant or the victim and his family members. We observe, in addition, that defense counsel proffered no evidence to show that any reason offered by the State was a pretext. *See Porter*, 326 N.C. at 501, 391 S.E.2d at 152 (defense counsel was apparently satisfied by the explanations offered by the State because no effort was made by the defense to demonstrate that the explanations were pretext). We hold that the record supports the trial court's conclusion that the State's explanations were legitimate and not a pretext. Defendant's *Batson* challenge was properly denied by the trial court.

[6] Defendant next complains that the trial court erred in admitting into evidence a letter purportedly written by defendant. The handwritten letter, allegedly written by defendant and received by Jeffrey Moore while Moore was in jail in Craven County, was written in printed rather than cursive lettering. Defendant contends that it is impossible to reliably identify one's "printing," thus the letter was not properly authenticated, making it error to admit the letter into evidence. We disagree.

Defendant objected prior to the State's introduction of the letter into evidence on the ground that the State could not properly authenticate the letter. The trial court held a voir dire hearing on this issue. Moore testified on voir dire and again before the jury that he knew the letter was from defendant because he recognized defendant's handwriting. He explained that he had received another letter from defendant while he was in jail and that he had also seen some songs which defendant had written. Moore testified that the other letter and the songs were also printed. After determining that there was sufficient evidence of authenticity to admit the letter into evidence, the trial court overruled defendant's objection.

At common law, a witness was permitted to give his opinion on the authenticity of a contested writing "based on previous sufficient observation." *State v. LeDuc*, 306 N.C. 62, 68, 291 S.E.2d 607, 611 (1982), *overruled in part by State v. Childress*, 321 N.C. 226, 362 S.E.2d 263 (1987). Today, under N.C.G.S. § 8C-1, Rule

901(a), "[t]he requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." By way of illustration, the rule specifically recognizes that a non-expert may offer an opinion as to the genuineness of handwriting if that witness has acquired familiarity with the handwriting at issue prior to the court action. N.C.G.S. § 8C-1, Rule 901(b)(2). *See also* 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 197 (3d ed. 1988) (quoting *Nicholson v. Lumber Co.*, 156 N.C. 48, 72 S.E.2d 86 (1911)). This Court has held that "[t]he competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for the jury." *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940). *See also* N.C.G.S. § 8C-1, Rule 104.

It was not error for the trial court to admit the letter if it could reasonably determine that there was sufficient evidence to support a finding that "the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901. Defendant then, of course, would have been free to introduce any competent evidence relevant to the weight or credibility of Moore's testimony. *See* N.C.G.S. § 8C-1, Rule 104(e). After reviewing Moore's testimony concerning his familiarity with defendant's handwriting, we conclude that there was sufficient evidence to support the trial court's admission of the letter into evidence. Thus, we find no merit in defendant's sixth assignment of error.

III.

In his seventh and eighth assignments of error, defendant contends that the trial court erred in denying defendant's motions to dismiss the charges of robbery with a dangerous weapon, first-degree murder based on the felony murder rule and first-degree murder based on premeditation and deliberation for insufficiency of the evidence. Since the jury found defendant not guilty of first-degree murder under the felony murder rule, we find it unnecessary to address whether the trial court erred in denying his motion to dismiss that charge.

In support of his contention that there was insufficient evidence to convict him of the remaining charges, defendant relies almost exclusively on this Court's holding in *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987). In that case, the defendant was charged with the premeditated and deliberate first-degree murder of a con-

venience store manager, who was murdered in a store which the defendant and Harmon, a co-conspirator, planned to rob. Their plan was for Harmon to enter the store first in order to subdue the victim and then for the defendant to enter and take the money. When the defendant entered, he was "horror-stricken" to find the victim on the floor bleeding. There was no direct evidence of the defendant's participation in the stabbing; nor was there any evidence placing the defendant in the store at the time of the stabbing. *Id.* at 139-40, 353 S.E.2d at 368. This Court held that there was insufficient evidence to convict the defendant of first-degree murder based on premeditation and deliberation since there was no direct evidence that the defendant "himself inflicted the deadly blows *or* that he was ready and willing to help Harmon stab [the victim] to death [.]" *Id.* (Emphasis added.)

The State contends that, unlike *Reese*, the evidence in this case was sufficient to show that defendant committed both the robbery with a dangerous weapon and the murder of the victim, either individually, or under a theory of aiding and abetting or acting in concert, and that the evidence was ample to show premeditation and deliberation by defendant. We agree.

[7] In regard to the charge of robbery with a dangerous weapon the State had to prove the following elements: 1) the unlawful taking or attempt to take personal property from the person or in the presence of another; 2) by use or threatened use of a firearm or other dangerous weapon; 3) whereby the life of a person is endangered or threatened. N.C.G.S. § 14-87 (1986).

There was evidence that defendant was in possession of money apparently belonging to the victim at the time Moore and Mewborn entered the victim's home on 10 April 1990. When Mewborn inquired as to where the money was, defendant responded that he "already had it." While Mewborn was attempting to get the money from defendant, the victim appealed to his attackers to take the money and the beer and leave. There was also evidence that defendant was in possession of a gun at that time. From this evidence the jury could infer that the life of the victim was threatened by the events taking place. *See State v. Harris*, 281 N.C. 542, 189 S.E.2d 249 (1972). Thus, there was sufficient evidence to support defendant's conviction for robbery with a dangerous weapon.

[8] In regard to the charge of first-degree murder based on premeditation and deliberation, the State had to prove that defend-

ant himself either inflicted a fatal wound upon the victim or that he aided and abetted Mewborn in doing so, and that in so doing, defendant possessed the requisite *mens rea* (willfulness, premeditation and deliberation). *State v. Reese*, 319 N.C. at 142, 353 S.E.2d at 370 (citing *State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979)). An unlawful killing is deliberate and premeditated if done as part of a fixed design to kill. *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 338 (1986).

The State met its burden of proof by offering evidence that defendant was present at the time Mewborn first shot the victim; that after Mewborn shot the victim with his single shot rifle, defendant said "Man, you got to kill him . . ."; that defendant complied with Mewborn's demand for more bullets by obtaining bullets from Moore after threatening him by pointing a gun in his face; that as Moore was running away from the scene he heard two more shots "a couple of seconds apart". Evidence that the defendant advocated killing the victim and then aided Mewborn in that task is sufficient for a finding that there was a "fixed design to kill" and thus that the murder was committed with premeditation and deliberation. *Id.*

This case is readily distinguishable from *Reese* because there was direct evidence in this case that defendant was present at the scene at the time of the initial assault, he advocated the killing[1], and he stood ready to support Mewborn in completing the homicide. In addition, there was circumstantial evidence to suggest that two guns were fired, thus permitting an inference that defendant himself fired one of the fatal shots at the victim. Only one cartridge case was found in the area where the victim was shot. In order for a single shot rifle to fire a subsequent bullet, the prior cartridge would have to be ejected from the gun. The victim was shot three times. In order for the three shots to come from one gun, two cartridges would have to have been ejected. Since only one ejected cartridge was found, the jury could have concluded that defendant shot one of the last two shots. From the direct and circumstantial evidence the jury could infer that de-

1. Testimony at trial by inmate Jerry Lynn High that defendant told him he was "surprised" when Mewborn first shot Sutton does not negate the relevance of the evidence of defendant's subsequent actions in obtaining ammunition to finish the killing nor the evidence tending to show that he fired a fatal shot or aided and abetted Mewborn in so doing.

fendant participated either directly or indirectly in the killing. Thus, the trial court did not err in denying defendant's motion to dismiss the charges.

[9] On his direct appeal, defendant finally assigns error to the trial court's refusal to charge the jury on voluntary and involuntary manslaughter. The trial court charged the jury on second-degree murder at defendant's request, but it was unnecessary for the jury to reach this issue since it found defendant guilty of murder in the first-degree.

Where the evidence tends to show that the defendant committed the crime charged, and there is no evidence of a lesser-included offense, the trial court is correct in not charging on the lesser-included offense. *State v. Brown*, 300 N.C. 731, 736, 268 S.E.2d 201, 204 (1980). In the present case, all of the State's evidence, if believed, tended to establish first-degree murder and not manslaughter. The defendant's evidence tended to show that he was not present at the scene of the crime, rather, that he was at Marshburn's home asleep. There was no evidence of self-defense, either perfect or imperfect. Defendant's evidence did not tend to negate any element established by the State's evidence by suggesting that defendant killed the victim but lacked malice, premeditation or deliberation. If defendant's evidence was believed, it would show that he was not guilty of any crime. Thus, we hold that it was not error for the trial court to refuse to instruct the jury on voluntary and involuntary manslaughter because there was no evidence to support these lesser-included offenses.

We further note that although the jury was instructed on the charge of second-degree murder it found defendant guilty of first-degree murder based on premeditation and deliberation. Thus, if the trial court did err by failing to instruct the jury on voluntary and involuntary manslaughter, the error was rendered harmless by the jury's verdict finding defendant guilty of premeditated and deliberate first-degree murder. *See State v. Young*, 324 N.C. 489, 492, 380 S.E.2d 94, 96 (1989); *State v. Tidwell*, 323 N.C. 668, 675, 374 S.E.2d 577, 581 (1989).

[10] Lastly, we turn to the issue of whether the trial court erred in denying defendant's motion for appropriate relief. Through the motion, defendant requested a new trial pursuant to N.C.G.S. § 15A-1415(b)(6) (1988), claiming that newly discovered evidence had been made available after his trial which had a direct and

material bearing on his innocence. The evidence was in the form of a letter, written by Mewborn and mailed to defendant's attorneys following defendant's trial, in which Mewborn stated that defendant was not present at Sutton's house when Mewborn and Jeffrey Moore killed Sutton. After holding an evidentiary hearing as ordered on remand by this Court, the trial court denied defendant's motion for a new trial.

The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion. *State v. Gappins*, 320 N.C. 64, 75, 357 S.E.2d 654, 661 (1987). Findings of fact made by the trial court are binding on appeal if they are supported by the evidence. *State v. Coker*, 325 N.C. 686, 692, 386 S.E.2d 196, 199 (1989); *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982). We conclude that the trial court's findings of fact are supported by sufficient evidence and that defendant has failed to show any abuse of discretion by the trial court.

The trial court found as facts, *inter alia*, that defendant and Mewborn were both housed in the Common Jail of Lenoir County awaiting trial for Sutton's murder. Defendant informed Mewborn that he did not want him to testify in his case since Mewborn could then face the death penalty. During the trial, defendant informed Mewborn that he in fact was being "railroaded." Defendant's attorneys interviewed Mewborn during the trial to see if he had any information which would assist defendant. Mewborn responded in the negative, although he later testified at the hearing that he knew at the time that defendant was not involved in the killing.

Pursuant to N.C.G.S. § 15A-1415(b)(6), newly discovered evidence must be "unknown or unavailable to the defendant at the time of trial" in order to justify relief. In this case, the trial court concluded that the information possessed by Mewborn "was known to the defendant, Phillip Novell Wiggins, and available to the defendant, Phillip Novell Wiggins, at the time of trial," and therefore denied defendant's motion for appropriate relief. We have reviewed the transcript of the hearing and conclude that the trial court's findings of fact are supported by the evidence. Defendant has shown no abuse of discretion by the trial court in denying defendant's

motion. We therefore find no error in the trial court's denial of defendant's motion for appropriate relief.

For all the reasons previously discussed, we conclude that defendant received a fair trial, free from prejudicial error, and that there was no error in the denial of defendant's motion for appropriate relief.

NO ERROR.

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

STATE OF NORTH CAROLINA v. DONALD REX BROGDEN

No. 46A92

(Filed 2 July 1993)

Jury § 226 (NCI4th)— capital punishment views—challenge for cause—refusal to permit rehabilitation of any juror—misapprehension of law—excusal of likely qualified juror—new sentencing hearing

The trial court erred during jury selection in a capital sentencing proceeding by refusing to permit defendant to question any prospective juror whom the prosecutor challenged for cause on the basis of his or her views about capital punishment where the refusal resulted from a misapprehension of law that the N.C. Supreme Court has held that rehabilitation of jurors is always a waste of valuable court time. A defendant sentenced to death is entitled to a new capital sentencing hearing where the court's ruling effected the excusal for cause of a prospective juror who would likely have answered the dispositive questions differently if the court had permitted defendant to attempt to rehabilitate him and who was thus likely qualified under the *Witherspoon-Witt* standard to be seated as a juror.

Am Jur 2d, Jury § 290.

Justice FRYE concurring.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a death sentence entered by Stevens, J., at the 6 January 1992 Criminal Session of Superior Court, Duplin County. Heard in the Supreme Court 11 May 1993.

Michael F. Easley, Attorney General, by Steven F. Bryant, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WHICHARD, Justice.

Defendant was first tried capitally at the 8 August 1988 Criminal Session of Superior Court, Duplin County. The jury found defendant guilty of first-degree murder, based on both premeditation and deliberation and felony murder, and of robbery with a dangerous weapon. Following a capital sentencing proceeding pursuant to N.C.G.S. § 15A-2000 (1988), the jury recommended the death sentence. On appeal, this Court found no error in the guilt phase of the trial but vacated the death sentence and remanded for a new capital sentencing proceeding. *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991). Following a second sentencing proceeding, the jury again recommended the death sentence.

Defendant contends, and we agree, that the trial court erred during jury selection by refusing to permit defendant to question any prospective juror whom the prosecutor challenged for cause on the basis of his or her views about capital punishment. The refusal apparently resulted from a misapprehension of the law and effected the excusal for cause of a prospective juror likely qualified to be seated as a juror. We thus hold that defendant is entitled to a new capital sentencing proceeding.

After the prosecutor challenged for cause, based on the venireperson's response to death qualification questions, the first venireperson examined in individual voir dire, defense counsel asked to examine the juror. The court responded:

> All right, the Court is going to rule . . . at the outset that it will not allow rehabilitation of a juror as it is, as the Supreme Court of North Carolina stated that such is a waste of valuable time if allowed by the Court. Objection is overruled. Exception.

The court elicited the statement that the venireperson would always vote for life no matter what the evidence, and then excused him for cause. Defense counsel asked that the court note a continuing request to examine the juror; in response, the court granted a continuing objection as to each venireperson excused for cause:

> MR. HALL: Your Honor, would you note our continuing request to examine him?
>
> THE COURT: Yes, I will. You will be given a continuing objection in each of these jurors because this is a ruling that the Court has made in accordance with it's [sic] understanding of the Supreme Court [of] North Carolina that it would accomplish nothing since there is [sic] no jurors in here that rehabilitation, you will just ask him well, can't you follow the judge's instruction and then after and say well, I guess I could. Well, then the district attorney would say then can't you do it and it would be back and forth and you would have the poor people so confused and you wouldn't know whether they were coming or going and out of human kindness and desire to move along and do the thing like it ought to be, I'm going to follow the Supreme Court as I understand it's [sic] rule, but you will get a continuing objection to each one of those cases where that comes up.

The court allowed sixteen challenges for cause on the grounds of the prospective jurors' responses to the death qualification questions posed by the prosecutor and the court. The court twice reiterated its ruling prohibiting *any* defense questioning following the prosecutor's death qualification "for cause" challenges, and ten times merely stated "exception to the defendant," acknowledging the vitality of defendant's continuing objection to the ruling as to each prospective juror excused for such cause. The court made an exception to its initial ruling that there would be no rehabilitation and allowed defendant to question one prospective juror challenged for cause by the State. It stated: "All right, I'm going to make an exception in this case. I'm going to let you examine him on this particular thing. Let's see, I want to get the other view. I want to be absolutely fair with this thing." The trial court subsequently denied that challenge for cause, and the State exercised a peremptory challenge.

The standard for determining whether a prospective juror may be excused for cause was announced in *Witherspoon v. Illinois*,

in which the United States Supreme Court held that prospective jurors could not be excused for cause simply because they voiced general objections to capital punishment; however, they could be excused for cause if they expressed an unmistakable commitment to automatically vote against the death penalty, regardless of the facts and circumstances which might be presented. *Witherspoon*, 391 U.S. 510, 20 L. Ed. 2d 776, *reh'g denied*, 393 U.S. 898, 21 L. Ed. 2d 186 (1968). "A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519, 20 L. Ed. 2d at 783. In *Wainwright v. Witt*, the Supreme Court clarified *Witherspoon* and held that a juror cannot properly be excused for his views on capital punishment unless those views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The Court acknowledged that

> [t]he state of this case law leaves trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially *and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial.*
>
> . . . .
>
> . . . [W]hether or not a venireman might vote for death under certain personal standards, the State still may properly challenge that venireman *if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge.*

Id. at 421-22, 83 L. Ed. 2d at 850 (emphasis added; emphasis in original omitted). "[T]he quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of. . . ." *Id.* at 423, 83 L. Ed. 2d at 851. In *Adams v. Texas*, the Court stated:

> [T]he Constitution [does not] permit the exclusion of jurors from the penalty phase of a . . . murder trial if . . . they aver that they will honestly find the facts and answer the [capital sentencing] questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, *yet*

> *who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt.*

448 U.S. at 50, 65 L. Ed. 2d at 593 (emphasis added). In *Lockhart v. McCree*, the Court said:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases *so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.*

476 U.S. 162, 176, 90 L. Ed. 2d 137, 149 (1986) (emphasis added).

We have 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." *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990).

> [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 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.

Witt, 469 U.S. at 424-26, 83 L. Ed. 2d at 852.

Both the defendant and the State have the right to question prospective jurors about their views on capital punishment. *E.g.*, *State v. Wilson*, 313 N.C. 516, 526, 330 S.E.2d 450, 458 (1985). The extent and manner of such an inquiry by counsel at voir dire, however, lies within the trial court's discretion. *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992). The ruling of the trial court will not be disturbed absent abuse of discretion. *Wilson*, 313 N.C. at 526, 330 S.E.2d at 458.

We have held that:

> "When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter]."

State v. Hill, 331 N.C. 387, 403, 417 S.E.2d 765, 772 (1992) (quoting *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990)) (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1981)), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 684, *reh'g denied*, --- U.S. ---, 123 L. Ed. 2d 503 (1993).

> The defendant is not allowed to rehabilitate a juror *who has expressed unequivocal opposition to the death penalty in response to questions propounded by the prosecutor and the trial court.* The reasoning behind this rule is clear. It prevents harassment of the prospective jurors based on their personal views toward the death penalty.

Cummings, 326 N.C. at 307, 389 S.E.2d at 71 (emphasis added). *See also State v. Johnson*, 317 N.C. 343, 376, 346 S.E.2d 596, 614 (1986) ("when a potential juror has expressed a clear and unequivocal refusal to impose the death penalty under all the circumstances, any additional cross-examination by defense counsel 'would thwart the protective purposes of N.C.G.S. 9-21(b) [and] would be a purposeless waste of valuable court time' ") (quoting *State v. Bock*, 288 N.C. 145, 156, 217 S.E.2d 513, 520 (1975), *judgment vacated in part*, 428 U.S. 903, 49 L. Ed. 2d 1209 (1976)). *Cf. State v. Zuniga*, 320 N.C. 233, 250, 357 S.E.2d 898, 909-10 (1987) ("[W]e have already decided that defendants are not entitled to engage in attempts to rehabilitate, . . . [and] find nothing in [a recent United States Supreme Court decision] to suggest that defendant has a right to inquire into the precise nature of a potential juror's views on the death penalty.") (citations omitted), *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987).

Accordingly, this Court has found no error when the trial court, in the exercise of its sound discretion, has refused a defendant's request to attempt to rehabilitate certain jurors challenged for cause by the State. *See, e.g., Taylor*, 332 N.C. at 391, 420

S.E.2d at 425 ("defendant made no showing that additional questioning would have resulted in different answers, and, thus, . . . failed to show an abuse of discretion by the trial court"); *Hill*, 331 N.C. at 403, 417 S.E.2d at 771-72 (juror unequivocally stated she would not be able to follow the law; no abuse of discretion, defendant did not show that further questioning by defendant would likely have produced different answers); *State v. Smith*, 328 N.C. 99, 132, 400 S.E.2d 712, 731 (1991) (juror's answers constituted grounds for challenge for cause; her initial response that, in some cases, the death penalty would be an appropriate punishment, and that she did not have any personal or religious feelings against the death penalty, did not clearly indicate that she would have changed her position in response to questioning by defendant, in light of her more definite, specific and adamant responses which formed the basis for her excusal for cause; therefore, trial court did not abuse its discretion in denying defendant's request to rehabilitate her); *State v. Reese*, 319 N.C. 110, 121, 353 S.E.2d 352, 358 (1987) (while "several jurors apparently changed their minds when the district attorney's questions became more specific," record provided no general reason to believe these jurors would have subsequently given defendant different answers; therefore, no abuse of discretion); *Johnson*, 317 N.C. at 376-77, 346 S.E.2d at 614-15 (although juror initially stated that her views on capital punishment would not affect her ability to reach a decision at the guilt phase, she then said she would not, under any circumstances, later vote to impose the death penalty at the sentencing phase; held, the trial court properly allowed the challenge for cause, and properly denied defendant's request to rehabilitate her because she expressed a clear refusal to invoke the death penalty). As noted above, we have indeed said:

> To allow defense counsel to cross-examine *a juror who has informed the court and counsel that he is irrevocably committed to vote against any verdict which would result in a death sentence* would thwart the protective purposes of G.S. 9-21(b). Further it would be a purposeless waste of valuable court time— . . . .

Bock, 288 N.C. at 156, 217 S.E.2d at 520 (emphasis added).

Here, however, the trial court did not refuse defendant's request to attempt to rehabilitate the jurors challenged for cause by the State in the exercise of its discretion, but did so under

the apparent misapprehension of law that this Court has held that rehabilitation of jurors is *always* a waste of valuable court time. "When the exercise of a discretionary power of the court is refused on the ground that the matter is not one in which the court is permitted to act, the ruling of the court is reviewable." *State v. Ford*, 297 N.C. 28, 30-31, 252 S.E.2d 717, 718 (1979).

Defendant contends that prospective juror Hall was improperly challenged for cause, or in the alternative, that his positions were ambiguous and unclear, and that additional questioning by defendant would have clarified these positions and shown that Hall was qualified to sit as a juror under the *Witherspoon-Witt* standard. Considering Hall's entire voir dire examination, we conclude that, although his responses up to that point supported the State's initial challenge for cause, they were by no means unequivocal and clear, and further questioning by defendant would likely have produced different answers.

Hall was a textile worker who had been employed at the same plant for thirteen years. In response to the trial court's preliminary questioning, he stated that he understood that the proceeding concerned the capital sentencing decision, that he must not have any preconceived notion as to what the sentence should be, and that his job if selected to sit would be to listen to the evidence and the court's instructions with an open mind. In response to the prosecutor's initial questions, Hall stated that he did not know either the defendant, named members of his family, or defense counsel, that he had not known the deceased, and that he had heard or read something about the case but he could not recall either the details of what he had read or when he had read them.

The prosecutor then briefly described the procedure followed in a capital sentencing proceeding. He noted that the State and defendant could introduce evidence in aggravation and mitigation, respectively, that aggravating evidence made death more deserving and that mitigating evidence made life more deserving, and that the jury's job was to weigh the evidence and arrive at a proper verdict. He then asked Hall to "tell me in your own words how you feel about the death penalty?" The following exchange ensued:

> JUROR HALL: Well, I don't necessarily believe totally against the death penalty. In other words, I believe a man should be punished for what he does . . . .
>
> . . . .

[PROSECUTOR]: . . . Do you think that there are some cases that are bad enough that the death penalty ought to be imposed?

JUROR HALL: I think there could be some cases that maybe could be.

[PROSECUTOR]: . . . Do you think that you would be able to sit on a jury and in a proper case, do you think that you yourself would be able to vote for a death penalty verdict? . . .

JUROR HALL: Well, after hearing the evidence I think I could. . . . I mean I don't believe that a man should, you know, take another man's life, but if he does, it's a real serious thing. It would have to be the last thing that you could do. There is nothing else that you could do.

. . . .

[PROSECUTOR]: Okay, Mr. Hall, are you, do you have any feelings that makes [sic] you think you're maybe predisposed to vote one way or the other whether it would be toward death or toward life?

JUROR HALL: *No.* (Emphasis added.)

. . . .

[PROSECUTOR]: . . . Do you think, sir, that your feelings about the death penalty would prevent or substantially impair the performance of your duty as a juror in this case in accordance with the evidence?

. . . .

JUROR HALL: I think maybe partially, you know, maybe just partially it would have. . . .

[PROSECUTOR]: So you think then that your feelings about the death penalty would to some extent prevent or substantially impair the performance of your duty as a juror in accordance with the evidence and the law, is that correct, sir?

JUROR HALL: I guess you could put it like that. I think that would almost fit.

. . . .

[PROSECUTOR]: Okay, do you think, Mr. Hall, then that you would be inclined to vote in favor of life imprisonment and

against the death penalty regardless of what the evidence might be in the case . . . ?

JUROR HALL: Let me see now. Well, *depending on the evidence, I think that would totally determine the way I would vote.* (Emphasis added.)

The prosecutor then described the sentencing issues, noted that it would be Hall's "sworn duty" to vote for life if the State's proof failed, and asked if Hall would be able to vote for death if the State met its burden of proof. Hall responded that he would vote for the death penalty as a duty. The prosecutor further questioned Hall:

[PROSECUTOR]: . . . [D]o you think that your feelings about the death penalty then would prevent or substantially impair the performance of your duty as a juror in accordance with the evidence and the law? . . .

JUROR HALL: Well, after hearing the evidence, I think would, you know, would come more clearer to me.

THE COURT: . . . I am just talking about a general proposition, just a general question, do you feel that some murders are so bad, so vial [sic], so mean, so inhuman that the death penalty would be an appropriate . . . recommendation or do you think that regardless of how vial [sic] or how mean or how inhuman they might have been that you would regardless of that, . . . whatever the circumstances were, that you would vote . . . automatically for a life sentence or would you consider both sides or do you understand what I'm saying?

JUROR HALL: I understand, Your Honor. I would, *the evidence would*, you know, *enable me to*, you know, *decide*. (Emphasis added.)

THE COURT: . . . [If] you felt like that about a case, not about the one, but about any case, could you under those circumstances vote for the death penalty if it was that bad in your mind?

JUROR HALL: If it was that bad in my mind.

THE COURT: Or would you automatically vote for life imprisonment regardless of what the evidence were [sic]?

JUROR HALL: *Not regardless* . . . . (Emphasis added.)

. . . .

THE COURT: Well, now, sir, you know, if you were selected as a juror in this case it would be your duty as a juror to follow the law in this case and respond to it as the Court instructed you as to the law depending upon the facts, as you found the facts to be in this case and that those instructions of this Court would necessarily in this sentencing hearing contain an alternative. That is life and death. That is what this Court would instruct the jury on. The alternatives and this means that a juror would have to consider the state's case and consider the defendant's case and weigh them according to what the instructions of the Court were and how they found it. Now if you couldn't do that, . . . then a juror in such a situation like that, his views on capital punishment would prevent or substantially impair his performing his sworn duties as a juror in accordance with his oath and instructions of the Court simply because, sir, he couldn't consider both sides and do what you thought was appropriate having heard the case. . . .

All right, then, if you could do that and consider both sides and in the appropriate case recommend death and in a case that wasn't appropriate recommend life upon the hearing of all the evidence and the charge of the Court, if you could do this, then you're a . . . qualified juror. . . . [I]f you can't do that, then you're not a qualified juror. . . .

Now which one are you? . . .

JUROR HALL: By law I don't know if I'm exactly qualified by law, I mean, the oath that, I don't know exactly that I'm qualified completely by law. My opinion of my personal judgments or whatever, it may not be exactly, totally, you know.

. . . .

[PROSECUTOR]: Mr. Hall, let me just ask you one more time, sir. Do you think that your feelings about the death penalty, your feelings against the death penalty or your feelings about the death penalty would prevent or substantially impair the performance of your duty as a juror in accordance with the evidence and the law, sir? . . .

JUROR HALL: Maybe partially I think.

[PROSECUTOR]: You think it would partially would and as the judge indicated to you it would, a juror is qualified to sit if they are willing to consider both possible punishments and consider both voting for the death penalty if we meet the requirements of the law and not if we don't. And if you don't think that you could do that, then you would not be qualified to sit as a juror. . . . [S]ir, do you think that you're qualified to sit or do you think that you're not qualified to sit in this case?

JUROR HALL: . . . I think, I mean I would like to do my duty as a fellow citizen, I mean and if I was chosen as a juror, I think I, you know—

[PROSECUTOR]: Yes, sir. But the question is if you're, if you're qualified to sit, if you think that if you could vote for the death penalty if the state were to prove those things that are required by law and that would vote for life imprisonment if the state did not prove those things that are requirements, then as I said if you could do that, then you would be a qualified juror. If you could not do that, sir, then you would not be a qualified juror. I know you're saying that you will try your best to do your duty and I certainly understand and appreciate that, but the question is under those what I have indicated to you what the judge has indicated to you, sir, would you say that in this case you are a qualified juror or are you not a qualified juror?

JUROR HALL: To some extent I think I probably won't be.

The trial court then allowed the State's earlier challenge for cause. We note that, to this point, Hall had consistently responded, in over twenty-one pages of voir dire transcript, when asked what he would do, that he would listen to the evidence and make his decision based on it, not on some predisposition to vote one way or the other. He would, he said, vote for death if the State proved its case to him. He was not "totally" either for or against the death penalty; he thought it was appropriate in the worst cases. Further, he thought he could vote for the death penalty in an appropriate case.

However, when asked by the prosecutor whether "[his] feelings about the death penalty would prevent or substantially impair the performance of [his] duty as a juror," Hall hesitated, and responded that his feelings and beliefs would "partially" and, when prompted

by the prosecutor, "to some extent prevent or substantially impair" the performance of his duty as a juror. Further, when the sentencing procedure was again explained at length, and his duties as a juror were described, he expressed uncertainty about whether he could be qualified under the law. He said: "To some extent I think I probably won't be [qualified]." Hall's responses to this point supported the State's challenge for cause. *See, e.g., State v. Syriani*, 333 N.C. 350, 370-71, 428 S.E.2d 118, 128-29 (1993) (prospective juror stated that he did not think he could sentence defendant to be executed, that he did not believe in the death penalty, and that he could possibly say that his views would prevent or substantially impair the performance of his duties in accordance with the court's instruction and his oath; held, trial court did not err in excusing him for cause); *State v. Bearthes*, 329 N.C. 149, 158-59, 405 S.E.2d 170, 175 (1991) (prospective juror stated that he did not believe in the death penalty, that he thought it would be impossible for him to recommend death, that he could not consider returning a verdict knowing that, pursuant to that verdict, the defendant would be sentenced to death, that he doubted he could do it under any circumstances, that he thought he would automatically vote against the death penalty based on his feelings and beliefs, etc.; held, trial court properly excused the juror for cause because his equivocal responses nonetheless revealed that his views would prevent or substantially impair the performance of his duties as a juror); *Davis*, 325 N.C. at 623-24, 386 S.E.2d at 426 (prospective juror stated at various times that he did not believe in the death penalty, could not vote to impose it, and could not act as an impartial juror in the guilt phase, but at other times agreed that he did not have a problem with following instructions and could consider all aggravating and mitigating factors presented; another's answers revealed that he wanted to follow the law, but thought his views on capital punishment would interfere with the performance of his duties as a juror; held, trial court did not err in excusing either juror for cause because they could not affirmatively agree to follow the law in carrying out their duties as jurors); *State v. Avery*, 299 N.C. 126, 135-37, 261 S.E.2d 803, 809 (1980) (two prospective jurors answered "I don't believe I would" and "I don't think so" when asked whether they could comply with the court's instructions and impose the death penalty if the evidence so required; held, trial court did not err in allowing State's challenge for cause because phrasing of jurors' negative responses did "not equivocate their refusal to follow the law as given by

the [court] to such an extent as to make their challenge for cause improper").

Defendant contends, however, and we agree, that Hall would likely have answered the dispositive questions differently if the court had acceded to defendant's request to attempt to rehabilitate him. Defendant contends, and we agree, that Hall was very likely confused about the meaning of the phrase, "prevent or substantially impair." When asked by the prosecutor whether "[his] feelings about the death penalty would prevent or substantially impair the performance of [his] duty as a juror," Hall responded that his feelings and beliefs would "partially" and, when prompted by the prosecutor, "*to some extent* prevent or substantially impair" the performance of his duty as a juror. Considering his entire voir dire, we agree with defendant that Hall could have meant only "that the potentially lethal consequences of [his] decision would invest [his] deliberations with greater seriousness and gravity or would involve [him] emotionally." *Adams*, 448 U.S. at 49, 65 L. Ed. 2d at 592.

> Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

Id. at 50, 65 L. Ed. 2d at 593. As Hall said at one point during his voir dire examination, "I don't believe that a man should . . . take another man's life, but if he does, it's a real serious thing. It would have to be the last thing that you could do." Hall's subsequent answers substantiate this viewpoint. When asked whether he would be inclined to vote in favor of life imprisonment regardless of the evidence, he answered that the evidence would "totally determine the way [he] would vote." He would do his duty, he said, if the State met its burden of proof.

Absent Hall's final statements, his earlier statements indicate, defendant contends, that he was a qualified juror. The State relies on Hall's final response, just before the prosecutor challenged him for cause. At the end of his extensive voir dire, Hall was asked repeatedly by the court and the prosecutor whether he was a "qualified juror." He thereupon expressed uncertainty about whether he could be qualified under the law and his oath. We agree with defendant that, had the trial court not mistakenly thought we have

prohibited rehabilitation as altogether a waste of valuable time, defendant might have added his unique perspective and insight to the questioning and elicited a different response from Hall. Considering Hall's entire voir dire, and especially his earlier inability to confirm or deny any effect whatsoever of his views upon his prospective performance as a juror, we agree with defendant that Hall's final statement that he was not sure he was qualified under the law may well have reflected only his uncertainty about whether the fact that his beliefs would affect his performance as a juror rendered him, "under the law," unqualified to sit.

Because the trial court refused, in blanket manner, defendant's request to attempt to rehabilitate jurors challenged for cause, which refusal apparently resulted from a misapprehension of the law, it erroneously excused a prospective juror who would likely have been qualified to be seated under the *Witherspoon-Witt* standard. Pursuant to *Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987), we hold that defendant is therefore entitled to a new capital sentencing proceeding.

In view of this disposition and of the improbability that the numerous other errors assigned will recur at the new capital sentencing proceeding, we find it unnecessary to address defendant's remaining arguments.

NEW CAPITAL SENTENCING PROCEEDING.

Justice FRYE concurring.

I concur fully in the Court's opinion. I write only to add that I am somewhat disturbed by a tendency in this case to ask the potential juror to determine whether he is a qualified juror to serve in a death case. While the potential juror should be asked questions regarding his ability to recommend a sentence of death or life, whether he is or is not a qualified juror is a question of law to be decided by the court.

STATE OF NORTH CAROLINA v. JEHUE COLLINS, JR.

No. 366A92

(Filed 2 July 1993)

1. **Criminal Law § 803 (NCI4th)— non-capital first degree murder—instruction on lesser-included offenses**

It was not necessary to decide whether in non-capital cases the Due Process Clause requires instructions on lesser-included offenses supported by evidence before the trial court; if the evidence before the court in the defendant's non-capital trial tended to show that defendant might be guilty of lesser-included offenses, the trial court was required under N.C.G.S. §§ 15-169 and 15-170 to instruct the jury as to those lesser included crimes.

Am Jur 2d, Trial §§ 876 et seq.

2. **Homicide § 21 (NCI4th)— attempted murder—lesser-included offense of murder**

Attempted murder exists as a part of the criminal law of North Carolina and is a lesser offense included within the greater crime of murder. It has been the law of North Carolina at least since 1891 that the prisoner may be convicted of the crime charged in the indictment or of an attempt to commit the crime so charged and, absent statutory provisions to the contrary, an attempt to commit a felony is a misdemeanor. However, N.C.G.S. § 14-3(b) provides that if a misdemeanor for which no specific punishment is provided is infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall be guilty of a Class H felony except when the offense is a conspiracy to commit a misdemeanor. Under North Carolina law, an attempt to commit murder is an infamous misdemeanor specifically elevated to the status of a Class H felony. N.C.G.S. § 15-170.

Am Jur 2d, Homicide §§ 45 et seq.

3. **Homicide § 21 (NCI4th)— attempted murder as lesser-included offense—failure to instruct—plain error**

There was plain error in a non-capital first degree murder prosecution where the trial court did not instruct the jury on the lesser-included offense of attempted murder. It is clear

that the evidence would have supported a reasonable finding that the defendant intended to commit murder and that he did the overt act of shooting the victim in the chest for that purpose. There was also evidence from an expert in forensic pathology that the victim died of complications from a gallbladder disease entirely unrelated to the gunshot wound and that the gunshot wound was not a cause of death.

Am Jur 2d, Homicide §§ 45 et seq.

4. **Appeal and Error § 157 (NCI4th)— no objection to instructions—no request for instructions on lesser offenses—appeal barred**

A murder defendant was barred from assigning as error the trial court's failure to instruct the jury on lesser-included offenses supported by evidence at trial where defendant did not object to the instructions given by the trial court and did not request instructions on lesser offenses. To the extent that earlier cases imply that a defendant is entitled to assign error to the trial court's failure to give instructions on lesser-included offenses when there was no specific prayer for such instructions or objection to the instructions given, those cases are disapproved and are no longer authoritative. Rule of Appellate Procedure 10(b)(2).

Am Jur 2d, Appeal and Error §§ 545 et seq.

5. **Appeal and Error § 158 (NCI4th)— murder—failure to instruct on attempted murder—plain error**

The trial court's error in failing to permit the jury to consider convicting the defendant of the lesser-included offense of attempted murder amounted to "plain error" so fundamental that it deprived the defendant of a fair trial where numerous eyewitnesses testified unequivocally that defendant pointed his rifle at the victim and intentionally shot the victim in the chest, but the testimony of a forensic pathologist with impeccable credentials clearly and unequivocally tended to show that the defendant's action in shooting the victim had nothing to do with the victim's death. "Plain error" does not mean obvious or apparent error; this is one of those rare cases in which the trial court's error in failing to instruct on the lesser-included offense was error so fundamental that it denied

the defendant a fair trial and quite probably tilted the scales against him.

Am Jur 2d, Appeal and Error §§ 545 et seq.

6. Homicide § 136 (NCI4th)— first-degree murder—short form indictment—failure to instruct on felonious assault—no plain error

There was no plain error in a murder prosecution in the failure to instruct on the lesser-included offense of felonious assault where there was evidence that defendant had shot the victim but not caused his death but defendant had been charged by a short-form indictment. It has been held that such an indictment does not specify a murder accomplished by assault and is insufficient to support a verdict of guilty of assault, assault inflicting serious injury, or assault with intent to kill.

Am Jur 2d, Homicide § 216.

Justice MEYER concurring in part and dissenting in part.

Appeal of right, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing a sentence of imprisonment for life entered by John, J., on 9 June 1992, in the Superior Court, Forsyth County. Heard in the Supreme Court on 10 May 1993.

Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Jehue Collins, Jr., was tried non-capitally upon a proper bill of indictment charging him with the murder of David Monte Brown. The jury found the defendant guilty of first-degree murder, and the trial court entered judgment sentencing him to imprisonment for life. The defendant appealed to this Court as a matter of right.

A complete review of the evidence introduced at trial is unnecessary in resolving the issue which we find dispositive of this

case on appeal. The State's evidence tended to show, *inter alia*, that several people saw the defendant with a rifle in his hands approach the victim at a party. Several people told the defendant to "stop," and Kenneth Woodruff told the defendant "not to do it" and put his hand on the defendant's chest. The defendant raised the rifle over Woodruff's shoulder and shot the victim, David Monte Brown, in the chest. Woodruff testified that a short time later at a gas station nearby, he heard the defendant say that the shooting had to be done. The State offered unequivocal testimony of numerous eyewitnesses to the effect that the defendant was the man who had shot the victim in the chest in their presence.

The defendant testified that he was present when the victim was shot, but that someone else shot him. Other evidence introduced by the defendant is discussed at later points in this opinion where pertinent to our resolution of the case.

[1] By an assignment of error, the defendant contends that the trial court erred in instructing the jury only on possible verdicts finding him guilty of first-degree murder or not guilty. Specifically, the defendant argues that the trial court erred when it failed to instruct the jury to consider possible verdicts of guilty of attempted murder and felonious assault, which the defendant says were lesser-included offenses supported by the evidence in the present case. Evidence at trial tended to show that the gunshot wound inflicted upon the victim did not in any way contribute to his death. The defendant argues that such evidence tended to negate the element of causation which must be established in order to sustain a conviction for any form of homicide, either murder or manslaughter, and that, therefore, on the evidence before it, the trial court erred by failing to instruct the jury on the lesser-included offenses of attempted murder and felonious assault—offenses for which it need not be shown that the defendant's actions were a cause of the victim's death.

The defendant contends that the trial court's error in failing to instruct the jury to consider possible verdicts finding him guilty of the lesser-included offenses of attempted murder and felonious assault deprived him of a panoply of state and federal constitutional rights, including the right to due process guaranteed by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Due process requires that a jury in a capital case be given instructions on lesser-included, non-capital offenses

when the evidence warrants such instructions. *Beck v. Alabama*, 447 U.S. 625, 635-38, 65 L. Ed. 2d 392, 401-403 (1980); *State v. Strickland*, 307 N.C. 274, 286, 298 S.E.2d 645, 654 (1983), *overruled on other grounds, State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). We need not and do not decide here whether in non-capital cases the Due Process Clause requires instructions on lesser-included offenses supported by evidence before the trial court. *See generally Beck*, 447 U.S. at 638 n. 14, 65 L. Ed. 2d at 403 n. 14 (expressly declining to address or decide this point); *Tata v. Carver*, 917 F.2d 670 (1st Cir. 1990) (review of federal cases addressing this issue). If the evidence before the trial court in the defendant's non-capital trial in the present case tended to show that the defendant might be guilty of lesser-included offenses, the trial court was required under N.C.G.S. §§ 15-169 and -170 to instruct the jury as to those lesser-included crimes. It is well established that:

> G.S. § 15-169 and G.S. § 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *State v. Jones*, 249 N.C. 134, 139, 105 S.E.2d 513, 516, and cases cited. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E.2d 545, 547.

State v. Williams, 275 N.C. 77, 88, 165 S.E.2d 481, 488 (1969). *Cf. State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986) (non-capital case). Therefore, we turn next to consider whether the evidence before the trial court was substantial evidence from which a jury reasonably could find that the defendant had committed a crime of lesser degree, which was an offense included within the crime of first-degree murder for which he stood charged.

[2] The defendant contends that the evidence before the trial court would have supported a finding that he committed the crime of attempted murder and that the crime of attempted murder is a crime of lesser degree included within the crime of first-degree murder. Our research has revealed one case in which this Court clearly has been required to review the validity of a conviction of a defendant for attempted murder. *State v. Gilley*, 306 N.C. 125, 291 S.E.2d 645 (1982), *overruled on other grounds, State v.*

Barnes, 324 N.C. 539, 380 S.E.2d 118 (1989). *Cf. State v. Alderman*, 182 N.C. 917, 110 S.E. 59 (1921) (The defendants were indicted for counts of (1) "attempt to kill" by administering poison, (2) secret assault with intent to kill by administering poison, (3) assault with intent to kill by administering poison, and (4) assault with a deadly weapon inflicting serious injury by administering poison. This Court merely stated that the "[d]efendants were convicted" without specifying whether the defendants were convicted of all of the counts or only certain ones of them.). In *Gilley*, the defendant did not contend that the law of North Carolina does not recognize the crime of attempted murder. Instead, he contended that there was insufficient evidence presented at trial to permit the trial court to submit the charge of attempted murder to the jury for its consideration. *Gilley*, 306 N.C. at 130, 291 S.E.2d at 648. We concluded that any error involved in the defendant's conviction and sentence for attempted murder in *Gilley* was harmless for reasons which are of no consequence here and have since been rejected. In doing so, however, we did state that the evidence before the trial court in *Gilley* "was sufficient to raise a reasonable inference as to each element of the offense of attempted murder." *Id.* The clear implication of our language, although perhaps it was *dicta*, was that an offense of attempted murder exists as a part of the criminal law of North Carolina; we now so hold in this case in which we are faced directly with that issue. Further, attempted murder is a lesser offense included within the greater crime of murder.

At least since 1891, it has been the law of this jurisdiction that "[u]pon the trial of any indictment the prisoner may be convicted of the crime charged therein . . . or of an attempt to commit the crime so charged. . . ." N.C.G.S. § 15-170 (1983). Further, it has long been established that, absent statutory provisions to the contrary, an attempt to commit a felony is a misdemeanor. *State v. Hageman*, 307 N.C. 1, 8, 296 S.E.2d 433, 438 (1982). Murder is a felony. N.C.G.S. § 14-17 (1986). Therefore, nothing else appearing, attempted murder would be only a misdemeanor. However, N.C.G.S. § 14-3(b) provides: "If a misdemeanor offense as to which no specific punishment is prescribed be infamous, done in secrecy and malice, or with deceit and intent to defraud, the offender shall, except when the offense is a conspiracy to commit a misdemeanor, be guilty of a Class H felony." N.C.G.S. § 14-3(b) (1992 Cum. Supp.). This Court has held that an attempted burglary was "infamous" and, for that reason, was elevated to the status of a felony by

N.C.G.S. § 14-3(b). *State v. Surles*, 230 N.C. 272, 52 S.E.2d 880 (1949). We said that this was so because burglary was an act of depravity, involving moral turpitude, revealing a heart devoid of social duties and a mind fatally bent on mischief. *Id.* For similar reasons, we have concluded that attempted common law robbery, attempted armed robbery and attempted crime against nature are misdemeanors which are elevated to the status of felonies by N.C.G.S. § 14-3(b). *Hageman*, 307 N.C. at 8, 296 S.E.2d at 438. Likewise, we now conclude that under North Carolina law an attempt to commit murder is an infamous misdemeanor specifically elevated by N.C.G.S. § 14-3(b) to the status of a Class H felony.

[3] We must next consider whether the evidence before the trial court would permit a rational jury finding that the defendant was guilty of the lesser-included offense of attempted murder, rather than the greater offense of murder. If so, the trial court erred in failing to instruct the jury on the lesser offense and in failing to submit a possible verdict finding the defendant guilty of the lesser offense for the jury's consideration.

The elements of an attempt to commit a crime are (1) an intent to commit the crime, (2) an overt act done for that purpose, going beyond mere preparation, (3) but falling short of the completed offense. *State v. Powell*, 277 N.C. 672, 178 S.E.2d 417 (1971); *State v. McNeely*, 244 N.C. 737, 94 S.E.2d 583 (1956); *Surles*, 230 N.C. 272, 52 S.E.2d 880. Here, beyond any serious contention to the contrary, it is clear that the evidence before the trial court would have supported a reasonable finding that the defendant intended to commit murder and that he did the overt act of shooting the victim in the chest for that purpose. The defendant contends that there was also substantial evidence tending to show that his actions fell short of the completed offense of murder. Therefore, he contends that there was substantial evidence in the present case which would have supported a reasonable finding that he committed the lesser-included offense of attempted murder. For this reason, he says that the trial court erred in failing to instruct the jury on the lesser-included offense of attempted murder. We agree.

A person may not be convicted of murder or any other homicide offense unless his actions cause or directly contribute to the death of the victim. *State v. Brock*, 305 N.C. 532, 290 S.E.2d 566 (1982). In other words, the defendant's actions must have been a proximate

cause of the victim's death in order for the defendant to be guilty of murder or any other form of homicide. *Id.*; *State v. Minton*, 234 N.C. 716, 68 S.E.2d 844 (1952).

In the present case, Dr. Page Hudson, former Chief Medical Examiner for the State of North Carolina, was accepted by the trial court as an expert in forensic pathology. Dr. Hudson testified at length and gave his unequivocal opinion as an expert that the gunshot wound, which had been inflicted to the victim's chest more than a month before the victim died, was not a cause of his death. Dr. Hudson testified unequivocally that the victim had died of complications from a gallbladder disease, entirely unrelated to the gunshot wound which evidence indicated the defendant had inflicted. Dr. Hudson also gave his unequivocal expert opinion that the gunshot wound did nothing to cause or aggravate the defendant's gallbladder disease. The testimony of Dr. Hudson was substantial evidence tending to show that no action by the defendant either caused or directly contributed to the death of the victim. This was substantial evidence, therefore, that the actions of this defendant fell short of the completed offense of murder. Dr. Hudson's testimony and the State's evidence tending to show that the defendant intended to kill the victim and shot him in the chest for that purpose, taken together, provided substantial evidence of all of the elements of attempted murder and required that the trial court submit a possible verdict finding the defendant guilty of that lesser offense to the jury for its consideration. *See Powell*, 277 N.C. at 678, 178 S.E.2d at 420. Therefore, the trial court erred in failing to take such action.

[4] In the present case, however, the defendant did not object to the instructions given by the trial court and did not request instructions on lesser offenses. Therefore, he is barred by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure from assigning as error the trial court's failure to instruct the jury on lesser-included offenses supported by evidence at trial. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). To the extent that earlier cases imply that a defendant is entitled to assign error to the trial court's failure to give instructions on lesser-included offenses when there was no specific prayer for such instructions or objection to the instructions given, those cases are disapproved and are no longer authoritative. *E.g.*, *State v. Weaver*, 306 N.C. 629, 295 S.E.2d 375 (1982); *State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980); *State v. Ferrell*, 300 N.C. 157, 265 S.E.2d 210 (1980);

State v. Banks, 295 N.C. 399, 245 S.E.2d 743 (1978); *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976); *State v. Bell*, 284 N.C. 416, 200 S.E.2d 601 (1973).

[5] In *Odom*, this Court adopted the "plain error" rule "to allow for review of some assignments of error normally barred by waiver rules such as Rule 10(b)(2)." 307 N.C. at 659, 300 S.E.2d at 378. But we emphasized in *Odom* that the term "plain error" does not simply mean obvious or apparent error. *Id.* at 660, 300 S.E.2d at 378. Since then, we have indicated that to reach the level of "plain error" contemplated in *Odom*, the error in the trial court's jury instructions must be "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988) (citing *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983)).

As the defendant did not object to the trial court's instructions or request an instruction on lesser-included offenses, we must review this assignment under the "plain error" standard of *Odom*. Having done so, we conclude that this is one of those rare cases in which the trial court's error in failing to instruct on the lesser-included offense was, on the evidence presented, error so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him.

Although the defendant testified to the contrary, numerous eyewitnesses testified unequivocally that, after being asked not to do so, the defendant pointed his rifle at the victim and intentionally shot the victim in the chest. However, the testimony of Dr. Page Hudson, a forensic pathologist of impeccable medical credentials who had performed approximately 5,000 autopsies and who had taught forensic pathology at several nationally recognized medical colleges, clearly and unequivocally tended to show that the defendant's action in shooting the victim had nothing to do with the victim's death. Dr. Hudson's testimony was that the victim would have died of a gallbladder infection at the same time he actually died, even if he had not been shot by the defendant; the shooting did nothing to hasten or cause the victim's death. Based on all the evidence at trial, it is fair to say that one of the elements (causation) of the offense of murder charged in the indictment re-

mained in substantial doubt; however, as the defendant plainly was guilty of some offense, the jury was likely to resolve its doubts in favor of conviction. *See Beck v. Alabama*, 447 U.S. 625, 65 L. Ed. 2d 392 (1980); *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986). Given this state of affairs, we can only conclude that the trial court's error in failing to permit the jury to consider convicting the defendant of the lesser-included offense of attempted murder amounted to "plain error" so fundamental that it deprived the defendant of a fair trial. Accordingly, we conclude that the defendant must receive a new trial.

[6] The defendant also contends under this assignment of error that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of felonious assault. Since this issue is likely to arise again at a new trial of the defendant, we address it here in the interest of judicial economy.

The defendant was charged in this case by a "short-form" murder indictment, which alleged that he "unlawfully, willfully and feloniously and of malice aforethought did kill and murder David Monte Brown." 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. In *State v. Gibson*, 333 N.C. 29, 424 S.E.2d 95 (1992), we reaffirmed our holding in *Whiteside* after careful and detailed analysis. Nevertheless, the defendant asks us to again reconsider the question and overrule *Whiteside*. A proper regard for the doctrine of *stare decisis* requires that we reject the defendant's request and reaffirm our holdings on this issue in *Whiteside* and *Gibson*. Therefore, we reject this argument by the defendant.

The defendant has presented several other assignments of error. We do not address them in this opinion, however, as they are unlikely to recur in any new trial of the defendant on this charge of murder.

For the foregoing reasons, we hold that the defendant must receive a new trial.

New trial.

Justice MEYER concurring in part and dissenting in part.

I concur in the majority's holding that attempted murder is a lesser included offense of the crime of first-degree murder and is punishable as a felony. I dissent from the majority's holding that under a plain error analysis, defendant is entitled to a new trial for the trial court's failure to charge the jury on attempted murder.

On the face of the transcript of this case, it is as plain as plain can be that this defendant did not want the trial judge to submit any lesser included offense and that this was calculated trial strategy. Defendant's defense was simply and solely that he was not guilty of first-degree murder. His trial strategy was two-pronged. First, defendant believed that the State could not prove to the satisfaction of the jury beyond a reasonable doubt that he was the person who shot the victim. Defendant took the stand and testified categorically that although he was at the Wessex party with his friends, he did *not* fire the gun and did not see who fired it because the shot came from behind him. Second, defendant believed that even if the jury was convinced that he fired the shot, the State could not satisfy the jury beyond a reasonable doubt that the gunshot wound in any way caused or contributed to the victim's death. Defendant mounted an attack on the element of the "killing" of another human being, through the testimony of his pathology expert, who, contrary to the State's expert witness, gave his expert opinion that the victim would have died on 25 January 1992 of gallbladder disease and ensuing complications even had he not been shot.

At the charge conference, the trial court announced that it would submit first-degree murder and not guilty as possible verdicts and specifically inquired of defense counsel whether he had any request for special instructions or *any recommended alternative verdicts* to be submitted to the jury. When this inquiry was made, defense counsel asked for confirmation that the trial court would give a charge on the definition of "reasonable doubt," and when he received an affirmative answer, he stated that he had no objections or additions.

The transcript demonstrates to me that defendant in no way wished to have the jury consider whether he was guilty of some lesser included offense. Defendant wanted the jury to consider only two possible verdicts: guilty of first-degree murder or not

guilty. Defendant obviously felt that the jury would not convict him of first-degree murder and that he would walk away a free man. He relied solely on the State's inability to prove first-degree murder. Though defendant's trial strategy failed him, he knowingly chose to rely upon introducing reasonable doubt as to whether he, in fact, shot the victim and whether the shot, in fact, killed the victim.

It is familiar learning that trial counsel should be given wide latitude in matters of strategy. Although a defendant may always show not only his innocence under the theory of prosecution chosen by the State, but also his possible guilt of some lesser offense, there is no law forcing him to do so, and it is obvious that this defendant deliberately chose not to do so.

It is true that this Court has held that where there is evidence of a defendant's guilt of a lesser included offense of the crime set forth in the bill of indictment, the defendant is entitled to have the question submitted to the jury even in the absence of a specific request for the instruction. It is clear from the text of the opinions in those cases, however, that the defendants did, in fact, request instructions on lesser included offenses, or made motions for dismissal, as part of their trial strategy. This Court, therefore, determined in each case whether the trial court had erred in *refusing* to give the requested instructions to the jury. *See, e.g., State v. Moore*, 300 N.C. 694, 268 S.E.2d 196 (1980) (and cases cited therein); *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970) (and cases cited therein). In short, in those cases, the Court was *not* ascertaining whether *plain error* was present. Thus, in that regard, this case is distinguishable.

Defendant clearly waived his right to assign error to the omission from the charge. Rule 10(b)(2) of our Rules of Appellate Procedure provides as follows:

> (2) *Jury Instructions; Findings and Conclusions of Judge.* A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

In *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), we said:

> The adoption of the "plain error" rule does not mean that every failure to give a proper instruction mandates reversal regardless of the defendant's failure to object at trial. To hold so would negate Rule 10(b)(2) which is not the intent or purpose of the "plain error" rule. *See United States v. Ostendorff*, 371 F.2d 729 (4th Cir.), *cert. denied*, 386 U.S. 982, 18 L. Ed. 2d 229, 87 S. Ct. 1286 (1967). The purpose of Rule 10(b)(2) is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212, 97 S. Ct. 1730, 1736 (1977).

Odom, 307 N.C. at 660-61, 300 S.E.2d at 378.

Because this issue is considered by this Court under the plain error rule, the defendant should not be entitled to relief by reason of his deliberately chosen strategy at trial of withholding from the jury's consideration any lesser included offense. *See State v. Liner*, 98 N.C. App. 600, 391 S.E.2d 820 (defendant who knowingly, intelligently, and voluntarily waives right to have trial court submit possible verdicts of lesser included offense may not thereafter assign as error on appeal trial court's failure to do so, even though evidence would support same), *disc. rev. denied*, 327 N.C. 435, 395 S.E.2d 693 (1990).

N.C.G.S. § 15A-1443, "Existence and showing of prejudice," specifically provides: "A defendant is not prejudiced . . . by error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (1988). I find no plain error in this case.

The majority's holding in this case will many times prove detrimental to criminal defendants, as they will be deprived of the trial strategy relied upon by the defendant here, and it is no secret that this strategy oftentimes proves successful. Because our trial judges are forced to charge on all lesser included offenses supported by the evidence and, under the majority's holding, defendants may not waive submission of such charges, defendants

are deprived of the strategy employed in this case. While it is true, as the majority observes, that juries often convict because of their reluctance to allow a defendant to go free when they strongly "suspect" he is guilty, juries also tend to convict a defendant of a lesser included offense rather than find him not guilty of the crime charged in the indictment when they are not convinced beyond a reasonable doubt of his guilt of the greater offense.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS BARNES

No. 287A92

(Filed 2 July 1993)

1. **Homicide § 250 (NCI4th) — first-degree murder — premeditation and deliberation — defendant as perpetrator — sufficiency of evidence**

The State presented sufficient evidence that defendant was the perpetrator of a homicide and that he acted with premeditation and deliberation to support his conviction of first-degree murder where the State's evidence tended to show that the victim was shot at night at his body shop and three .22 caliber long rifle bullets were recovered from the victim's body and clothing; defendant and the victim had previously experienced ill will resulting from an ongoing love triangle involving them and a female; defendant had repeatedly threatened the victim's life; a week before the murder defendant demanded that the female meet him at a location down the street from the victim's body shop or he would go to the body shop and kill the victim; when the female arrived to meet defendant, he told her to take him to the shop because he wanted to "kill that old son-of-a-bitch"; defendant told the female more than once that she would be "going to a funeral"; defendant was opposed to an abortion obtained by the female and told her that the victim "would have the blood of his [defendant's] child on his hands"; the victim's dying words to the female were "[t]hat son-of-a-bitch shot me"; the motive for the killing was not robbery as the victim had over $1,300 in cash in his wallet; defendant had previously purchased a Browning .22 caliber rifle which would break down into two

separate pieces, thereby making it concealable in a small backpack; the rifle's box was found in defendant's home, but the rifle was absent from defendant's home following the shooting; the bullets found in defendant's body and clothing could have been fired from the Browning rifle purchased by defendant; defendant was identified as being in the vicinity of the victim's body shop in Eden, at a place "you rarely see anyone walking," the day before the shooting; the day after the shooting, defendant was seen by hunters on wooded farm land behind the body shop, dressed in the same clothes that he had been seen wearing the day prior to the shooting; defendant lived in Greensboro, not Eden; a blue backpack identified as belonging to defendant was seen in the woods behind the body shop by the same hunters who had seen defendant; following the shooting, defendant drove to Virginia and then to South Carolina, leaving his blue backpack in a room used for storage in a cabin in Virginia; while incarcerated, defendant wrote a letter to his sister in which he self-servingly stated that he did not commit the crime but also stated that he "planned everything" so that she would be in the least possible danger; and defendant also told his sister in the letter that, if he was convicted, she was to gun down the drivers of the transport van as he was being moved to Central Prison so that he could escape. The State was not bound by defendant's exculpatory statement in the letter to his sister because this statement was contradicted and shown to be false by the other facts and circumstances in evidence.

Am Jur 2d, Homicide §§ 437 et seq.

2. Evidence and Witnesses § 1070 (NCI4th)— instruction on flight—out-of-state visits—escape plan

The trial court's instruction on flight was supported by evidence that, on the day following a homicide, defendant was seen by hunters in some woods behind the body shop where the homicide occurred; the next day defendant arrived at a friend's cabin in Virginia, where he stayed for two days; then he visited a friend in South Carolina for an additional two days; and both out-of-state visitations were unexpected by defendant's friends. The instruction on flight was likewise supported by evidence that, while awaiting trial, defendant wrote a letter to his sister planning his escape if convicted.

Am Jur 2d, Evidence §§ 633 et seq.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by Morgan, J., at the 10 February 1992 Criminal Session of Superior Court, Rockingham County. Heard in the Supreme Court 13 April 1993.

Michael F. Easley, Attorney General, by David F. Hoke, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

MEYER, Justice.

On 13 November 1990, defendant, William Thomas Barnes, was indicted for the first-degree murder of Jessie William Lemons. Defendant was tried noncapitally in the Superior Court, Rockingham County, in February 1992 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 night of 31 October 1990 at 9:08 p.m., Lieutenant Jerry Pulliam of the Eden Police Department received a call to go to the Central Body Shop on Stadium Drive in Eden, North Carolina. When he arrived at 9:12 p.m., he observed off-duty Officer Ronald Brown kneeling on the ground beside the victim, Jessie William Lemons, who had been shot. Lieutenant Pulliam then saw Ms. Marla Rodgers,[1] who had placed the call for help, standing in front of the doorway of the body shop, screaming and yelling hysterically.

When Lieutenant Pulliam arrived, the victim could not speak. There was blood on his clothing, and Lieutenant Pulliam concluded from his examination that the victim had multiple gunshot wounds that appeared to have been made by a small-caliber weapon. In the victim's pants pocket, Lieutenant Pulliam found a wallet containing $1,325.59. Lieutenant Pulliam opined that the victim was no longer alive at the time the ambulance arrived.

Ms. Marla Rodgers knew the victim, with whom she had had an ongoing relationship for over ten years. Ms. Rodgers also knew defendant, William Thomas Barnes. She had a relationship with him beginning in the spring of 1990, and she cohabited with him

1. At the time of trial, Ms. Rodgers was referred to by her married name, Ms. Marla Rodgers Roof.

for a short period of time later that summer when she and the victim "had some problems." During the time that Ms. Rodgers was living with defendant in early August of 1990, the victim came to visit her at defendant's mother's convenience store, where she and defendant were working. The victim asked Ms. Rodgers if she would come outside and talk to him, and she did so. While the two of them were outside talking, defendant came outside and asked Ms. Rodgers if everything was okay, and she told him everything was fine.

A few days later, Ms. Rodgers stopped living with defendant in Greensboro and moved back in with the victim in Eden. Ms. Rodgers stayed in Eden with the victim only about a week because defendant began calling and arguing with the victim. There were many calls and arguments between defendant and the victim. After defendant would call and argue with the victim, the victim would argue with Ms. Rodgers. Ms. Rodgers then left the victim and moved back in with defendant in Greensboro.

Around 1 September 1990, Ms. Rodgers took a trip to Florida with the victim. She had learned that she was pregnant with his child, and they took the trip to "sort things out." When they returned from Florida, Ms. Rodgers stayed with the victim at his home in Eden. However, they had an argument about her pregnancy the day after they got back, so Ms. Rodgers left the victim's house again and moved back to Greensboro to stay with defendant.

Ms. Rodgers told defendant that she had decided to abort her pregnancy. Defendant was "very much against" the abortion, believing the child to be his own. Defendant told Ms. Rodgers that if she had the abortion, "[the victim] would have the blood of his [defendant's] child on his hands." In mid-September, Ms. Rodgers aborted the pregnancy at a clinic in Greensboro. She stayed with the victim at his home in Eden after the abortion. After four or five days, Ms. Rodgers went back to defendant's home in Greensboro and stayed there for about a week. Defendant became angry whenever the victim's name was mentioned and said that when the victim had come to the store on that prior occasion, "he should have went ahead and shot him then." Ms. Rodgers then returned to the victim's house.

On 22 October 1990, while Ms. Rodgers was staying at the victim's house, defendant called her several times. Defendant told Ms. Rodgers that he was at the Draper Club Market and that

if she would not meet him, he was going to the shop to kill the victim. Ms. Rodgers met defendant at a shopping center. Defendant got in Ms. Rodgers' car with a "pistol-type gun" "wrapped in a cloth with his bag." Defendant said, "Take me to the damn shop. . . . I want to kill that old son-of-a-bitch." Defendant told her that he knew where the victim lived and that he knew which bedroom the victim and Ms. Rodgers slept in. Ms. Rodgers convinced defendant to drive around and talk for awhile, and then they drove to defendant's home in Greensboro. Ms. Rodgers stayed there with defendant for about a week.

Ms. Rodgers decided to leave defendant on 29 October 1990. When she told him she was leaving, he hit her and choked her in an attempt to prevent her from going. Defendant told Ms. Rodgers that he was going to kill the victim, and he said more than once that she would be "going to a funeral." Defendant jerked some wires out of Ms. Rodgers' car to prevent her from leaving, so Ms. Rodgers ran to a service station and called the victim, who came and picked her up.

On the evening of 31 October 1990, Ms. Rodgers and the victim went to K-Mart to buy some candy and other items for his son's birthday. They left the K-Mart as it was closing at 9:00 p.m. and went to the Central Body Shop, which was owned by the victim. When they were ready to leave, the victim went outside to start the car. Ms. Rodgers remained inside the shop. She heard three "popping sounds" from outside, ran out, and saw the victim lying on the ground on his back. The victim said, "That son-of-a-bitch shot me." Ms. Rodgers called 911 and the victim's daughter.

Ms. Rodgers knew that defendant kept guns in his house. She testified that "he had a small gun that he carried in his pouch, and there were some guns upstairs, like shotgun, rifle-type guns, and then there were other guns, like paint guns." Defendant used the paint guns to play a game called "paintball," about which he had authored a book. The paintball game involves players divided into two teams, each with a base and a flag; the object of the game is to capture the other team's flag and to eliminate opposing players by shooting them with paintballs. Ms. Rodgers once played this game with defendant in some woods in Mebane, North Carolina.

William F. Nicely testified that he worked at Ed's Gun Shop in Southern Pines, North Carolina. Mr. Nicely identified a federal form used when buying a weapon. The form reflected the sale

of a Browning .22-caliber semiautomatic rifle, serial number 01244PN146, by Ed's Gun Shop to a Charles Howard Lockmuller Jr. on 19 February 1989. Charles Howard Lockmuller testified that he purchased the rifle from Mr. Nicely and that he sold the rifle to defendant in July or August of 1990. The serial number of the rifle, which was listed on the federal form, matched the serial number on a Browning rifle box found in defendant's home.

Dr. Anthony Macri, pathologist at Morehead Hospital in Eden, testified as an expert in forensic pathology. He performed an autopsy on the victim on 1 November 1990. The victim was sixty-five years of age. There were three gunshot wounds. Two bullets had passed through the body. A third bullet had entered and was still lodged in the body. The cause of death was a gunshot wound to the chest and massive injury to the heart. Dr. Macri recovered a bullet lodged in the wall of the abdomen, and another bullet was recovered from the victim's clothing by a nurse in the emergency room. A detective with the Eden Police Department recovered the third bullet when it fell out of the coat worn by the victim on the night of the shooting.

Thomas Trochum, Special Agent with the State Bureau of Investigation and forensic firearms examiner, identified the gold-coated Remington brand, .22-caliber, long rifle-fired bullets that had been retrieved from the victim and submitted to the laboratory on 2 November 1990. In his examination of the bullets, Agent Trochum found that "all were of six lands and grooves; their twist was to the right." Agent Trochum testified that he measured the bullets and that they were all consistent. The land impression was approximately forty thousandths of an inch wide; the groove impression was approximately seventy thousandths of an inch wide. "What that meant is that they could have all been fired from the same firearm." Agent Trochum opined that the bullets could have been fired from the Browning rifle purchased by defendant from Mr. Lockmuller.

A witness testified that on the morning of 30 October 1990, as she was driving down Stadium Drive in Eden below the Central Body Shop, she saw a person walking at a place "you rarely see anyone walking." The individual was wearing blue jeans and a plaid "outdoor-type" shirt. Later, when the witness saw a picture of defendant in the *Eden Daily News*, she recognized the picture "immediately as the man [she] had seen."

Two witnesses, Timmy Sanders and Billy Richardson, testified that on the afternoon of 1 November 1990, they were hunting on Fieldcrest Farm, which is located behind the Central Body Shop. Mr. Sanders found a blue backpack about ten yards from his deer stand. Mr. Sanders thought that the backpack belonged to another hunter and did not open it. Mr. Sanders testified that the blue backpack identified in court by Ms. Rodgers as belonging to defendant looked like the one he had seen in the woods. Mr. Richardson testified that he saw a man coming through the woods wearing "blue jeans and a checked shirt, or either a flannel jacket." The man had a knife on his side, a water bottle, and a black hat on his head. Upon seeing Mr. Richardson, the man jumped behind a tree, and then, after about five minutes, the man walked away. Mr. Richardson saw the photograph of defendant in the *Eden Daily News* and thought the photograph "kind of resembled" the person in the woods. Mr. Sanders also showed Mr. Richardson the blue backpack, and Mr. Richardson told Mr. Sanders to leave the pack where they had found it.

Michael Cullifer testified that on 2 November 1990, when he arrived home at his cabin in Craig County, Virginia, after work, he found defendant asleep on the couch. Defendant was dressed in jeans and a shirt and had a blanket as a cover. Mr. Cullifer asked defendant who he was, and defendant said that he was a friend of Mr. Cullifer's cousin. When Mr. Cullifer's cousin, Michael Woods, came to the cabin, he and defendant left together. Mr. Woods testified that on 2 November, defendant was dressed in blue jeans and a flannel shirt, and his belongings consisted of "a backpack and a blanket and pillow." Mr. Woods allowed defendant to shower and shave at his house. Defendant stayed with Mr. Woods for two days. When defendant was leaving, Mr. Woods noticed defendant was driving a blue rental car. After defendant had left, Mr. Woods discovered that defendant had left his backpack in a bedroom used for storage. Mr. Woods identified the same blue backpack previously identified by others as defendant's. Mr. Woods subsequently gave the backpack to police officers.

Thomas Johnson Byars, a friend of defendant, saw defendant at his (Mr. Byars') house in South Carolina on Sunday, 4 November 1990. Defendant left on the following Tuesday, telling Mr. Byars that the rental car was due back and that he had to get back in order to vote.

A search of defendant's apartment revealed an array of weapons, a rifle, gun boxes, and ammunition.

While defendant was in prison awaiting trial, he wrote the following letter to his sister:

> Shara, look, I planned everything so that you would be in the least danger possible. If you had only simply followed instructions then I wouldn't be in this mess. You were my only lifeline to safety and you failed me. It would have been much safer for both of us if you had only stuck to the plan. You do a person unimaginably more harm by telling them that you're going to do something—that they can count on you—than if you'd simply told them right from the start that you did and didn't have guts enough to do. If you'd only told me in advance. Well, a hell of a lot of good it does now, I guess.
>
> Look, I don't want to go "behind the wall" at Central Prison in Raleigh for a crime I didn't commit. I hate to have to ask you to risk your life like this but, remember, if you'd only done what the hell you agreed to do I wouldn't have to. If I get convicted . . . I want you to get yourself an accomplice, I'll try to get Tony from California, two bulletproof vests, and two of those Ruger 10/22 "assault pistols" like your friend made. Then you can park along Highway #65 somewhere East of here in a discrete [sic] location every day from the time of my conviction. I'll have no way of knowing exactly when they'll be transporting me. Follow the transport van (it doesn't make any stops) and then, at a preselected spot stop in front of it at a natural stop and then both you get out and waste the bastards. I think you know everything I would need, both of us would need at this point to "get the hell out of Dodge and never look back." I hate having to ask something of you like this but, if I don't get bond and all other options fail, I would rather die than go behind the wall for 20 years on account of some bastard I didn't kill. I love you, Shara, but remember I wouldn't have to be asking this of you if you only hadn't chickened out back when it would have been so laughably easy. Please do it, Shara, if it—God forbid—comes to it. I'm not in the least surprised at Marla betraying me, she had a track record of it, after all, but I never dreamed that you would. If I could have even remotely

dreamed it I never would have put my life in your hands the way I did. Love, Bill.

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

[1] Defendant first argues that the trial court erred in denying defendant's motion to dismiss at the close of the State's evidence. Defendant contends that the State's evidence was insufficient as a matter of law to support his conviction of first-degree murder. We disagree.

The law regarding denials of motions to dismiss in criminal trials is well settled. This Court reviewed the law in *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980):

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted). In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. *Id.* The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then " 'it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy [it] beyond a reasonable doubt that the

defendant is actually guilty.' " *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (alteration in original) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)).

Defendant was convicted of first-degree murder. First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Judge*, 308 N.C. 658, 303 S.E.2d 817 (1983). The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. *Id.* Premeditation may be established by proving that the killing was thought out beforehand for some length of time, however short. *State v. Stone*, 323 N.C. at 451, 373 S.E.2d at 433. Deliberation may be established by proving that 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 passion suddenly aroused by lawful or just cause or legal provocation. *State v. Williamson*, 333 N.C. 128, 133-34, 423 S.E.2d 766, 769 (1992); *State v. Small*, 328 N.C. 175, 181, 400 S.E.2d 413, 416 (1991).

"Premeditation and deliberation may be and is most often proved by circumstantial evidence." *State v. Pridgen*, 313 N.C. 80, 93, 326 S.E.2d 618, 627 (1985). 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.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

In applying the foregoing principles of law to the facts of this case, we find no error in the trial court's refusal to dismiss the case at the close of the State's evidence. A review of the evidence in this case supports a reasonable conclusion that the homicide was committed with malice, premeditation, and deliberation and that defendant was the perpetrator of the crime.

Defendant and the victim had previously experienced ill will resulting from the ongoing love triangle involving them and Ms. Rodgers. Defendant had repeatedly threatened the victim's life. A little more than a week before the murder, defendant demanded that Ms. Rodgers meet him at a location down the street from the body shop or he would go to the body shop and kill the victim. When Ms. Rodgers arrived to meet defendant, he said, "Take me to the damn shop. . . . I want to kill that old son-of-a-bitch." Defendant told Ms. Rodgers more than once that she would be "going to a funeral." Defendant was opposed to Ms. Rodgers' abortion, and he told her that the victim "would have the blood of his [defendant's] child on his hands." The victim's dying words to Ms. Rodgers were "[t]hat son-of-a-bitch shot me." The evidence shows that the motive for the killing was not robbery, as the victim had over $1,300 in cash in his wallet.

Defendant's house in Greensboro was a virtual storehouse of weapons and ammunition. In August of 1990, defendant purchased a Browning .22-caliber rifle, which, by pressing a button and turning the barrel counterclockwise, would break down into two separate pieces, thereby making it concealable in a small backpack. The rifle used .22-caliber long-rifle bullets. The rifle's box was found in defendant's house, but the rifle itself was conspicuously absent from defendant's home following the shooting. The victim customarily checked his body shop at night to protect his business interest. The victim was shot on the night of 31 October 1990, and three .22-caliber long-rifle bullets were recovered from the victim's body and clothing. The SBI forensic firearms examiner testified that these bullets could have been fired from the Browning rifle purchased by defendant. Defendant was identified as being in the vicinity of the body shop in Eden, at a place "you rarely see anyone walking," the day before the shooting. The day after the shooting, defendant was seen on wooded farm land behind the body shop, dressed in the same clothes that he had been seen wearing the day prior to the shooting. Defendant lived in Greensboro, not Eden. A blue backpack identified as belonging to defendant was seen in the woods behind the body shop by the same hunters who had seen defendant.

Following the shooting, defendant drove to Virginia and then to South Carolina, leaving his blue backpack in a room used for storage in a cabin in Virginia. While incarcerated, defendant wrote a letter to his sister concerning the crime. He self-servingly says

in the letter that he did not commit the crime. However, in the letter, defendant tells his sister, Shara, that he "planned everything" so that she would be in the least danger possible. He then exhorts her for not following the plan and blames her for the "mess" he is in, telling her that she was his "lifeline" had she only "stuck to the plan." Defendant instructed Shara that if he was convicted, she was to gun down the drivers of the transport van as he was being moved to Central Prison, effectuating his escape.

With regard to the exculpatory statements made by defendant in his escape plan, defendant contends that the State is bound by these exculpatory statements of defendant, because the State has not sufficiently contradicted or rebutted the statements. We disagree.

> "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." *State v. Carter*, 254 N.C. 475, 479, 119 S.E.2d 461, 464 (1961). The introduction in evidence by the State of a statement made by defendant which may tend to exculpate him[ ] does not prevent the State from showing that the facts concerning the homicide were different from what the defendant said about them.

State v. Bolin, 281 N.C. 415, 424-25, 189 S.E.2d 235, 241-42 (1972) (citations omitted). Here, the exculpatory statement of defendant made in the context of his plan to commit murder to effectuate his escape was contradicted and shown to be false by the other facts and circumstances in evidence.

As our recitation of the evidence discloses, we find substantial evidence that defendant was the perpetrator of the crime and that the murder of Jessie Lemons was premeditated. Defendant had both motive and opportunity. The circumstances of this case are more than sufficient to remove this case from the realm of mere suspicion and conjecture. This assignment of error is overruled.

[2] In his remaining assignment of error, defendant contends that the trial court erred by instructing the jury on flight. Defendant argues that the evidence was insufficient to support such an instruction. We disagree.

The trial court, in instructing the jury on flight, outlined the differing contentions:

> The state contends that the defendant fled the Eden area on November 1, 1990. The defendant denies this. He contends that he was not in the Eden area on October 31, 1990, or on November 1, 1990. Further, the state contends that the defendant planned to flee law enforcement custody after any conviction. On [the] other . . . hand, the defendant contends any idea of fleeing custody was only a conditional plan by a desperate person who was wrongfully charged and wrongfully incarcerated.

The court then instructed the jury on flight substantially as provided in N.C.P.I.—Crim. 104.36, "Flight—First Degree Murder Cases," as follows:

> Evidence of flight or evidence of a plan to escape 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, such circumstance of flight or plan to escape has no bearing on the question of whether the defendant acted with premeditation and deliberation. Therefore, such evidence must not be considered by you as evidence of premeditation or deliberation.

We find that the evidence in the case *sub judice* clearly supports this instruction. On the day following the shooting, defendant was spotted by hunters in some woods behind the body shop. The next day, defendant arrived at a friend's cabin in Virginia, where he stayed for two days. Then he visited a friend in South Carolina, where he stayed an additional two days. Both out-of-state visitations were unexpected by defendant's friends. After his arrest and while awaiting trial, defendant wrote a letter to his sister planning his escape if convicted. "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E.2d 833, 842 (1977). The State's evidence shows that following the shooting, defendant roamed the woods, then stayed in Virginia for two days, and then stayed in South Carolina for another two days. In addition to this evidence, defendant wrote a note to his sister outlining an escape plan. "It

is well settled in this state that an escape from custody constitutes evidence of flight. Evidence of defendant's attempt to escape provides additional support for the trial court's instruction on flight." *State v. Levan*, 326 N.C. 155, 165, 388 S.E.2d 429, 436 (1990) (citations omitted). Here, evidence of defendant's plan to escape likewise supports the trial judge's instruction on flight.

This case is distinguishable from *State v. Lee*, 287 N.C. 536, 215 S.E.2d 146 (1975), relied on by defendant. In *Lee*, an arrest warrant was issued for defendant for robbery, and the sheriff " 'attempted to locate the [d]efendant for the purpose of serving the warrant on him by riding—just by riding and looking for him, didn't ask any questions if anybody had seen him, or anything.' " *Id.* at 538, 215 S.E.2d at 147. The sheriff looked for defendant in this manner for six days, acknowledging that defendant sometimes divided his time between several cities. This Court concluded that the evidence was insufficient in *Lee* to support a flight instruction, reasoning that the sheriff "merely looked for defendant while riding around on the street where defendant lived. He never went to defendant's residence, nor . . . did he make any inquiry as to defendant's whereabouts. This, together with the sheriff's own testimony that defendant customarily frequented other cities, leaves the question of whether defendant did indeed flee or otherwise try to avoid apprehension to utter conjecture, speculation and surmise." *Id.* at 539-40, 215 S.E.2d at 149. In *Lee*, there was simply no evidence that defendant went anywhere after the robbery.

In the case at bar, the evidence placed defendant in a wooded area, then in a cabin in Virginia, and then at a friend's house in South Carolina, for a period of six days after the shooting. Furthermore, defendant devised a plan to escape while in custody, which, like the actual attempt in *Levan*, further supports the flight instruction. Finally, the wording of the instruction itself reveals that defendant has suffered no prejudice. The trial judge carefully worded his flight instruction to the jury so that defendant's contentions were also set out for the jury. Because we find the evidence sufficient to support the instruction on flight, this assignment of error is overruled.

Based upon the foregoing, we conclude that defendant received a fair trial, free of prejudicial error.

NO ERROR.

GATSY N. SMITH v. DURWOOD EUGENE SMITH AND WIFE, MRS. DURWOOD EUGENE SMITH, AND MICHAEL A. ELLIS, ADMINISTRATOR OF THE ESTATE OF WAYNE SMITH, DECEASED, JOHN E. DUKE, GUARDIAN AD LITEM FOR CORNELIUS WAYNE SMITH, AND KEVIN F. MACQUEEN, GUARDIAN AD LITEM FOR LITTLE RED SMITH (NOW CHADWICK BRIAN SMITH)

No. 372PA92

(Filed 2 July 1993)

1. **Judgments § 243 (NCI4th)— res judicata—persons in privity with parties**

The married defendants are in privity with a party to a prior action where, pursuant to a consent judgment in the prior action and an ensuing deed, they obtained title to the subject property from plaintiff subsequent to the prior action. The minor defendant is in privity because he is an heir of a party to the original action.

Am Jur 2d, Judgments §§ 567 et seq.

2. **Judgments § 303 (NCI4th)— res judicata—property disposed of by court order—trust or equitable lien prohibited**

Under *res judicata*, no trust or equitable lien can be impressed upon property disposed of by an order of the court. Before any kind of trust or equitable lien could be impressed upon property conveyed pursuant to a consent judgment, the consent judgment would have to be directly attacked by a motion in the cause.

Am Jur 2d, Judgments § 428.

3. **Judgments § 363 (NCI4th)— equitable distribution consent judgment—conveyance of property—claims for trust and equitable lien—improper collateral attack**

Plaintiff could not collaterally attack an existing equitable distribution consent judgment in a former action by seeking to engraft a constructive trust or an equitable lien on property conveyed to defendant husband's brother pursuant to the judgment on the ground of intrinsic fraud by defendant husband in failing to abide by the judgment. Nor could the minor defendant collaterally attack the consent judgment by seeking to engraft an express trust on such property. The sole remedy for plaintiff and the minor defendant was to modify or set

aside the consent judgment through a Rule 60 motion in the cause.

Am Jur 2d, Judgments §§ 630 et seq.

Chief Justice EXUM dissenting.

Justices FRYE and PARKER join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, which affirmed in part and vacated and remanded in part the judgment entered for defendants by Jones (Arnold O.), J., at the 4 March 1991 Civil Session of District Court, Wayne County. Heard in the Supreme Court 15 March 1993.

Law Offices of Roland C. Braswell, by Roland C. Braswell, for plaintiff-appellee.

Paul B. Edmundson, Jr.; and Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendant-appellants Mr. and Mrs. Durwood Smith.

Bruce and Bryant, P.A., by R. Michael Bruce, for defendant-appellee John E. Duke, Guardian ad Litem for Cornelius Wayne Smith.

MEYER, Justice.

The issue that we must resolve in this case is whether an existing equitable distribution judgment in a former action may be collaterally attacked. We conclude that the Court of Appeals erred in allowing a collateral attack upon a judgment in a prior action, which ordered an equitable distribution, and hold that the judgment must be directly attacked by a motion in the prior case to modify or set aside the judgment.

An examination of the pleadings and affidavits filed in support of the motion for summary judgment reveals the following: On 18 February 1983, Wayne Smith brought an action for absolute divorce in District Court, Wayne County, against Gatsy N. Smith. Gatsy Smith answered and counterclaimed for alimony and equitable distribution of property. On 4 May 1984, the court granted Wayne Smith an absolute divorce. On that same day and in that same action, a consent judgment was entered. The consent judgment required, *inter alia*, that simultaneously with the execution of the

judgment, plaintiff and defendant both were to pay 50% of the federal and state taxes totalling in excess of $12,000, and that Wayne Smith was to pay Gatsy Smith $500.00 to cover 50% of the payment that she had made to a surveyor, Bobby Rex Kornegay, to keep a judgment from being entered against them. The consent judgment further provided:

> That the parties own 37.7/16 [sic] acres of land and it is agreed that the plaintiff and defendant will deed to Durwood Eugene Smith [the brother of Wayne Smith] a 7/12 interest and to the defendant a 5/12 interest in said land.

Furthermore, the consent judgment provided that each of the parties was declared to be the owner of the property allotted to him or her, "free and clear of any claim from the other party." The consent judgment concluded "[t]hat this property settlement is in full and complete settlement of any and all rights that the parties might have arising out of the marriage between them or the equitable distribution laws of this State or otherwise." The judgment was consented to by all of the parties and signed by the trial judge.

Pursuant to the consent judgment, Gatsy Smith conveyed a 7/12 undivided interest in the property to Durwood E. Smith by deed dated 7 May 1984 and executed and recorded on 8 May 1984. Because the plaintiff in that action, Wayne Smith, had previously deeded his interest in the above property to Gatsy Smith on 5 June 1974, he did not sign the deed with Gatsy Smith to Durwood E. Smith.

In March 1985, almost a year after the consent judgment was entered in the prior divorce action, Gatsy Smith filed this action against Wayne Smith and Mr. and Mrs. Durwood Smith. Gatsy Smith claimed that Wayne Smith had never paid his part of the taxes or reimbursed her for the survey expense and had not intended to do so when the consent judgment was entered into. She further contended that Wayne Smith committed a fraud on the court in that Durwood Smith was never intended to be the beneficial owner of the 7/12 interest in the property and that Durwood Smith was holding the 7/12 interest in the property in trust for Wayne Smith. Gatsy Smith claimed that she had been defrauded by Wayne Smith and that he had never intended to carry through with anything he had agreed to in the consent judgment. Gatsy Smith prayed that Durwood Smith and his wife be declared to hold title to the subject property in trust for the use and benefit of Wayne Smith and, further, that an equitable lien be declared against the subject

property in the amount of $13,805.96. In the interim, Wayne Smith died and Michael A. Ellis was appointed the administrator of his estate.

In 1989, the trial court allowed Gatsy Smith's motion to add Wayne Smith's two legitimated minor children, Cornelius Smith and Chadwick Brian Smith, as defendants. The children, each represented by a guardian ad litem, filed crossclaims contending that the property in question was owned by Durwood Smith but was subject to an express trust in favor of Cornelius Wayne Smith. Mr. and Mrs. Durwood Smith answered the complaint and crossclaims by denying the minor children's claims and asserting that Durwood Smith was the owner of the property free and clear of any express trust or equitable lien.

Mr. and Mrs. Durwood Smith subsequently filed a motion for summary judgment. At the hearing, Mr. and Mrs. Durwood Smith contended that all of the parties in this action were the same parties or were in privity with the parties in the prior action. Thus, defendants argued, all the parties were bound by the prior action and could not collaterally attack the equitable distribution judgment. After a hearing on the motion, the trial court allowed Mr. and Mrs. Durwood Smith's motion for summary judgment and dismissed the complaint and both crossclaims.

Gatsy Smith and the two minor children appealed to the Court of Appeals, which, in an unpublished opinion pursuant to Rule 30(e), upheld the dismissal of the claim of Chadwick Brian Smith, but vacated and remanded the action to the trial court as to defendant Cornelius Smith and plaintiff Gatsy Smith. This Court granted Mr. and Mrs. Durwood Smith's petition for discretionary review on 17 December 1992. We find no error by the trial court and thus reverse the Court of Appeals' holding in regard to defendant Cornelius Wayne Smith and plaintiff Gatsy Smith.

Defendants Mr. and Mrs. Durwood Smith contend that Gatsy Smith and Cornelius Smith are barred by the doctrine of *res judicata* from bringing an action collaterally attacking the equitable distribution judgment. We agree.

North Carolina follows the general rule " 'that a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies, in all other actions involving the same matter.' " *Masters*

v. Dunstan, 256 N.C. 520, 523, 124 S.E.2d 574, 576 (1962) (quoting *Bryant v. Shields*, 220 N.C. 628, 634, 18 S.E.2d 157, 161 (1942)). In order for a person to be privy to an action, he must have acquired an interest in the subject matter of the action either by succession, inheritance, or purchase from a party subsequent to the action. *Id.* at 525, 124 S.E.2d at 577-78.

[1] In the case *sub judice*, defendants Mr. and Mrs. Durwood Smith are in privity because, pursuant to the consent judgment of 4 May 1984 and the ensuing deed, they obtained title to the subject property from plaintiff Gatsy Smith subsequent to the earlier action. In addition, defendant Cornelius Smith is in privity because he is an heir of Wayne Smith, a party to the original action.

[2] Under *res judicata*, no trust or equitable lien can be impressed upon property disposed of by an order of the court. In *Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983), this Court established the rule that:

> whenever the parties bring their separation agreements before the court for the court's approval, it will no longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated similarly, to-wit, as court ordered judgments. These court ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case.

Id. at 386, 298 S.E.2d at 342. Before any kind of trust or equitable lien could be impressed upon the property in question, the consent judgment would have to be directly attacked by a motion in the cause. This Court has stated the law as follows:

> A judgment regular upon the face of the record, though irregular in fact, requires evidence *aliunde* for impeachment. Such a judgment is voidable and not void, and may be opened or vacated after the end of the term only by due proceedings instituted by a proper person. The procedural remedy is by motion or petition in the cause and not by independent action. Ordinarily, the persons entitled to have an irregular voidable judgment opened or vacated are the parties thereto or persons in privity with them. In *Card v. Finch, supra* (142 N.C. 140) at p. 148, it is said: "Persons who are not parties or privies

> and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment. They have no status in Court. No wrong has been done them *by the Court.*"

Shaver v. Shaver, 248 N.C. 113, 119, 102 S.E.2d 791, 795-96 (1958) (citations omitted). A collateral attack may not be made upon a judgment rendered by a court of competent jurisdiction. *Masters v. Dunstan*, 256 N.C. at 524, 124 S.E.2d at 576. This rule is applicable to attacks by parties to the action in which the judgment is rendered and by persons in privity with them. *Id.*

[3] In the case at bar, defendant Cornelius Smith asks for relief from the consent judgment in the prior divorce action by seeking to engraft an express trust on the judgment and the subsequent deed. We find that this constitutes a collateral attack, as Cornelius Smith is trying to change the disposition of the property from that specified in the consent judgment entered in the prior action.

In the instant case, plaintiff Gatsy Smith is collaterally attacking the consent judgment in the previous case for alleged intrinsic fraud. Plaintiff contends that she is entitled to a constructive trust or equitable lien on the property in question based on the fact that defendant Wayne Smith failed to abide by the equitable distribution consent judgment in the original action.

It is clear that in North Carolina an attack upon an order of the court for intrinsic fraud must be brought by motion in the cause. *Stokely v. Stokely*, 30 N.C. App. 351, 354-55, 227 S.E.2d 131, 134 (1976). However, judgments may be collaterally attacked if the fraud is extrinsic. *Id.* Our courts have held:

> Fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court. If an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time. A party who has been given proper notice of an action, however, and who has not been prevented from full participation, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court.

Id.; *see also Florida National Bank v. Satterfield*, 90 N.C. App. 105, 367 S.E.2d 358 (1988). Here, Gatsy Smith fully participated in the original action. Her allegations against Mr. and Mrs. Durwood Smith and Wayne Smith are of intrinsic fraud.

The sole remedy for plaintiff Gatsy Smith and defendant Cornelius Smith was to modify or set aside the consent judgment in the prior case through a motion in the cause pursuant to Rule 60 of the North Carolina Rules of Civil Procedure. Unless and until this is done, it is *res judicata* to the parties' claims for relief in this action. We therefore reverse the opinion of the Court of Appeals as to plaintiff Gatsy Smith and defendant Cornelius Smith.

REVERSED.

Chief Justice EXUM dissenting.

The majority views this case as an attack on the consent judgment settling the marital claims between plaintiff and her former husband, Wayne Smith. Concluding that this judgment may not be collaterally attacked and can be set aside, if at all, only by a Rule 60 motion in the cause, it holds the trial court properly allowed defendants Durwood Smith and wife's motion for summary judgment and reverses the Court of Appeals' contrary decision.

I view this action not as an attack upon the consent judgment but as an action which, in effect, seeks to require the estate of Wayne Smith to comply with the terms of that judgment. The action seeks, first, to impress the property conveyed pursuant to the judgment by the plaintiff to Durwood Smith with a constructive trust in favor of Wayne Smith's estate and, second, to impress the estate's beneficial interest with an equitable lien to secure her former husband's, and now his estate's, obligations under the judgment. Plaintiff does not seek to set aside or alter the essential terms of the judgment. She is satisfied with the judgment. She is simply trying to enforce it according to its terms.

The case, therefore, should not be analyzed in terms of whether plaintiff can attack the judgment in a collateral action. It should be analyzed in terms of whether, under plaintiff's allegations and the evidentiary showing made at the summary judgment hearing, she may be able to establish at trial her entitlement to the equitable lien. Whether she will ultimately be so entitled depends upon what her evidence shows at trial. I think the allegations of her complaint

and the evidentiary showing are sufficient to enable plaintiff to survive defendants Smiths' motion for summary judgment. I vote, therefore, to affirm the decision of the Court of Appeals.

The complaint, to which a copy of the consent judgment is attached, alleges that Wayne Smith refused to make the payment to plaintiff required by the judgment despite numerous demands upon him and that the amount due plaintiff under the terms of the judgment is $13,805.96. While there is no such language in the judgment itself or in the deed from plaintiff to Durwood Smith, plaintiff alleges that she conveyed the property in question to Durwood Smith "in trust for the use and benefit of Wayne Smith." She alleges that Wayne Smith never intended to pay the plaintiff according to judgment "knowing that with [the property] being put in his brother's name . . . he [Wayne Smith] had no other real property and no personal property against which execution could be levied to collect this money." The complaint prays the court for an order restraining Durwood Smith from alienating or encumbering the property, declaring that Durwood Smith holds the property in trust for Wayne Smith and declaring the $13,805.96 owed plaintiff under the judgment to be an "specific lien against" Wayne Smith's beneficial interest in the property.

This Court has described a constructive trust as follows:

> A constructive trust is a duty, or relationship, imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or an interest in, property which such holder acquired through fraud, breach of duty, or some other circumstance making it inequitable for him to retain it *against the claim of the beneficiary of the constructive trust.* Unlike the true assignment for benefit of creditors, which is an express trust, intended as such by the creator thereof, a constructive trust is a fiction of equity, brought into operation to prevent unjust enrichment through the breach of some duty or other wrongdoing. It is an obligation or relationship imposed irrespective of the intent with which such party acquired the property, and in a well-nigh unlimited variety of situations. Nevertheless, there is a common, indispensable element in the many types of situations out of which a constructive trust is deemed to arise. This common element is some fraud, breach of duty or other wrongdoing *by the holder of the property,*

> *or by one under whom he claims*, the holder, himself, not being a bona fide purchaser for value.

Wilson v. Development Co., 276 N.C. 198, 211-12, 171 S.E.2d 873, 882 (1969) (citations omitted) (emphasis added).

Plaintiff does not seek title to the property in question. She seeks only to charge Wayne Smith's estate's beneficial interest in the property with an equitable lien to the extent of the money due her under the terms of the judgment.

> An equitable lien, or encumbrance, is not an estate in land, nor is it a right which, in itself, may be the basis of a possessory action. It is simply a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists. "It is the very essence of this conception, that while the lien continues, the possession of the thing remains with the debtor or person who holds the proprietary interest subject to the encumbrance." 1 Pomeroy's Equity Jurisprudence § 165 (5th Ed., 1941). "[T]he doctrine of 'equitable liens' was introduced for the sole purpose of furnishing a ground for the specific remedies which equity confers, operating upon particular identified property, instead of the general pecuniary recoveries granted by courts of law." *Id.* § 166. In other words, an equitable lien, by charging specific property, provides an enforcement of the obligation more effective than that provided for the enforcement of the ordinary money judgment.
>
> > 'An equitable lien arises either from a written contract which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity out of the general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealings.' *Garrison v. Vermont Mills*, 154 N.C. 1, 6, 69 S.E. 743, 744, 31 L.R.A. (N.S.) 450, 453, *modifying on rehearing*, 152 N.C. 643, 68 S.E. 142; *accord, Burrowes v. Nimocks*, 35 F.2d 152 (4th Cir.); *Jones v. Carpenter*, 90 Fla. 407, 106 So. 127, 43 A.L.R. 1409. *See Stanley v. Cox*, 253 N.C. 620, 630-631, 117 S.E.2d 826, 833-834.

Fulp v. Fulp, 264 N.C. 20, 24, 140 S.E.2d 708, 712 (1965). "An equitable lien on real property is an equitable encumbrance [citation

omitted] which may arise either out of contractual obligations, or whenever the court declares it necessary under the circumstances of the case from considerations of justice." *Brinkley v. Day*, 88 N.C. App. 101, 105, 362 S.E.2d 587, 590 (1987) (Property devised in fee may be impressed with equitable lien to pay certain maintenance and other expenses which testator directed be paid out of rental income during occupancy of life tenant.).

At the summary judgment hearing the forecast of evidence tended to show that while plaintiff and Wayne Smith were married, the Internal Revenue Service filed tax liens against Wayne Smith. Wayne Smith conveyed property which he owned to others to be held in trust by them for the benefit of Wayne Smith. One of these tracts included the property conveyed by plaintiff to Durwood Smith pursuant to the judgment. Wayne Smith conveyed this property to plaintiff by deed dated 5 June 1974. After Wayne Smith filed for divorce against plaintiff in February 1983 he had several discussions with his brother, Durwood Smith, regarding the disposition of his marital interest in this property. He asked Durwood Smith on several occasions if he would take title to the property in trust for Wayne Smith. "Durwood Eugene Smith agreed to do so and to do with the land whatever Wayne Red Smith directed." Wayne Smith "speculated on numerous occasions that he would have trouble getting Gatsy Newsome Smith to convey the marital interest of Wayne Red Smith to any third party." Wayne and Durwood Smith continued to discuss their intentions that plaintiff "convey the marital interest of Wayne Red Smith to Durwood Eugene Smith for the use and benefit of Wayne Red Smith to avoid a tax lien attaching to the said land." At the time of the divorce plaintiff agreed to convey the interest of Wayne Smith to Durwood Smith.

While plaintiff's claims might have been more artfully alleged and the forecast of evidence somewhat more precise, her allegations and the evidentiary showing at the hearing on summary judgment boil down to this: Her former husband, Wayne Smith, agreed to pay and now owes her $13,805.96 pursuant to the terms of the consent judgment. In consideration for Wayne Smith's agreement to pay this sum she conveyed property which she owned and in which Wayne Smith held a marital interest to Wayne Smith's brother, Durwood Smith, for the benefit of Wayne Smith. Wayne Smith never intended to pay her pursuant to the judgment and persuaded her to convey the property to his brother rather than to him to

shield him not only from his other creditors but also from plaintiff, who became his creditor under the terms of the consent judgment.

This showing, as the Court of Appeals concluded, is enough to demonstrate that plaintiff may be able to establish at trial that Durwood Smith holds the property in trust for the estate of Wayne Smith. She may then be able to charge the estate's beneficial interest in the property with an equitable lien to the extent of $13,805.96, the amount the estate owes her under the judgment. The evidentiary showing coupled with the allegations in the complaint are, therefore, enough to permit plaintiff to survive defendants Smiths' motion for summary judgment.

Another theory upon which plaintiff might be able to establish an equitable lien in her favor rests on her being a judgment creditor of Wayne Smith's estate. She contends there is no property in the estate from which she can be paid because Wayne Smith fraudulently induced her to transfer property in which he had a marital interest, and which ordinarily would have been transferred to him, to his brother so as to shield Wayne Smith from his creditors, including plaintiff. Plaintiff's claim is thus analogous to that of a judgment creditor who seeks to impress an equitable lien on property transferred in defraud of creditors by a judgment debtor to third parties.

In *Michael v. Moore*, 157 N.C. 462, 73 S.E. 104 (1911), plaintiff obtained a judgment against Moore for $300 in Catawba County. Moore appealed. Before time for perfecting appeal expired and before plaintiff caused the judgment to be docketed in Alexander County where Moore owned real property, Moore mortgaged the Alexander County property to secure the payment of $2,000 which he borrowed from the mortgagee. With this $2,000 Moore erected a house on a lot owned by his wife in Catawba County. At the time of these transactions Moore was insolvent. After plaintiff had exhausted his legal remedies to enforce the judgment against Moore, he filed an action for equitable relief against Moore and his wife. This Court concluded on these facts that plaintiff was entitled in equity to "follow the fund invested by his debtor in improvements upon his wife's land." *Id.* at 465, 73 S.E. at 105. The Court said, further,

> No principle is better settled by our decisions than the one that an insolvent debtor cannot withdraw money from his own estate and give it to another to be invested by him in the

purchase or improvement of his property, and when it is done, creditors may subject the property so purchased or improved to the payment of their claims.

Id.

Had plaintiff conveyed the property to Wayne Smith and if the property was in the same county in which the consent judgment was entered, the amount owed by Wayne Smith to plaintiff under the judgment would have, upon the judgment's being docketed, become a lien against the property. If Wayne Smith, being insolvent, had conveyed the property to his brother, Durwood Smith, before the judgment could have been docketed in the county where the land lay, then, under the doctrine expressed in *Michael v. Moore*, plaintiff could have obtained an equitable lien against the property in the hands of Durwood Smith to the extent of her claim against Wayne Smith. That Wayne Smith may have accomplished the same result, as plaintiff alleges and which the evidentiary forecast indicates she may be able to prove, by fraudulently inducing plaintiff to convey the property directly to Durwood Smith would seem to entitle plaintiff to an equitable lien under the *Michael v. Moore* doctrine. "The lien assures the claimant that the asset will be devoted to satisfying" her claim. Restatement (Second) of Restitution § 30, cmt a. (Tent. Draft #2, 1984).

Justices Frye and Parker join in this dissenting opinion.

STATE OF NORTH CAROLINA v. THOMAS FRANCIS QUARG

No. 164PA92

(Filed 2 July 1993)

1. **Evidence and Witnesses § 2185 (NCI4th) — indecent liberties — opinion testimony not properly disclosed on discovery — door not opened on cross-examination — admission not prejudicial**

There was no prejudicial error in an indecent liberties prosecution where defendant requested that the State voluntarily produce copies of all results or reports of physical or mental examinations, tests, measurements or experiments; the State provided defendant with a copy of the initial report

of Braun, the clinical social worker who was the unit director of the mental health center and who prepared a screening/admission assessment; the State called Braun to the stand during trial and implicitly qualified him as an expert in child sexual abuse; Braun testified from memory regarding his initial screening and the admission assessment; defendant objected to a question concerning whether Braun had diagnosed the victim as suffering from any type of trauma; the trial court ruled his testimony inadmissible on the grounds that the State failed to provide defendant with a final report or any progress notes of subsequent interviews; defendant cross-examined Braun concerning a specific statement by the victim to Braun; and the State was allowed on redirect examination to question Braun extensively concerning statements made to him by the victim's mother and to elicit his opinion as to whether the victim suffered from post-traumatic stress disorder. Defendant's limited cross-examination did not open the door for Braun's opinion testimony concerning PTSD and, assuming that the basis for the ruling was that defendant opened the door, the admission of the evidence was error. However, in light of the substantive and corroborative testimony from other witnesses, defendant has not demonstrated a reasonable possibility that a different result would have been reached absent the disputed portion of Braun's testimony.

Am Jur 2d, Expert and Opinion Evidence § 97.

2. Evidence and Witnesses § 2342 (NCI4th) — indecent liberties — opinion testimony — limiting instruction

There was no error in an indecent liberties prosecution where the court admitted testimony that the victim was suffering from post-traumatic stress disorder and instructed the jury that the testimony was admitted to show the basis for the treatment which the witness administered to his patient and not to prove the truth of the matters stated. The instruction was not error in context because the witness had seen the victim five times and had prescribed treatment goals for her. Although it was held after this trial that expert opinion testimony concerning PTSD could be admitted for purposes of corroboration, the rule has long been that an instruction limiting admissibility to corroboration is not required unless counsel specifically requests such instruction. The limiting instruction given was favorable to defendant and, since the record

is silent as to a request for a limiting instruction on corroboration, the failure to give such an instruction was not error.

Am Jur 2d, Expert and Opinion Evidence § 244.

3. **Evidence and Witnesses § 3171 (NCI4th) — indecent liberties — statements of victim — admitted for corroboration — minor discrepancies — no error**

There was no error in an indecent liberties prosecution in the admission of hearsay testimony concerning the victim's statements to her mother and a deputy sheriff for corroborative purposes where discrepancies were minor and insignificant and the court repeatedly instructed the jury that the testimony was being offered for purposes of corroborating the victim's earlier testimony and that they were to consider only so much of it as did in fact corroborate earlier testimony.

Am Jur 2d, Witnesses §§ 641 et seq.

4. **Criminal Law § 113 (NCI4th) — indecent liberties — discovery — statement by defendant not furnished — trial recessed and witnesses interviewed — no abuse of discretion**

There was no abuse of discretion in an indecent liberties prosecution from the failure of the State to furnish to defendant, upon proper request, a statement of defendant where the trial judge recessed the trial for the length of time the attorneys stated they needed and required the State's attorney to interview the State's witnesses to ascertain and furnish to defendant any additional statements that defendant allegedly made and also permitted defense counsel to interview State's witnesses. The sanctions, if any, to impose for the State's failure to comply with discovery is in the discretion of the court.

Am Jur 2d, Depositions and Discovery §§ 426, 427.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 106 N.C. App. 106, 415 S.E.2d 578 (1992), setting aside judgments entered upon defendant's conviction of five counts of indecent liberties by Small, J., at the 8 January 1991 Criminal Session of Superior Court, Dare County and awarding defendant a new trial. Heard in the Supreme Court 14 January 1993.

Michael F. Easley, Attorney General, by Angelina M. Maletto, Assistant Attorney General, for the State-appellant.

W. Mark Spence for defendant-appellee.

PARKER, Justice.

Defendant, upon a proper bill of indictment, was convicted of five counts of committing indecent liberties upon a minor in violation of N.C.G.S. § 14-202.1. The trial judge consolidated two counts for judgment and sentenced defendant to six years' imprisonment in that judgment; for the remaining three counts, also consolidated for judgment, defendant received an eight-year sentence. On defendant's appeal the Court of Appeals found reversible error. This Court having allowed the Attorney General's petition for discretionary review, the issue now before the Court for review is whether the admission of expert opinion testimony that the prosecuting witness suffered from post-traumatic stress disorder was error. We hold that admission of the evidence was not prejudicial error and reverse the Court of Appeals' decision granting defendant a new trial.

The record reflects that the female victim (herein "S.W.") was seven years old and that the incidents for which defendant was charged occurred on five different occasions between 18 December 1989 and 6 January 1990. In August of 1990, S.W.'s mother took her to the Albemarle Mental Health Center in Edenton, North Carolina because S.W. "wouldn't sleep in her room anymore all by herself. She was afraid to go outside and play. . . . She just seemed afraid." Following an initial screening on 6 August 1990 and an admission assessment on 13 August 1990, Steven N. Braun, a clinical social worker who was also the unit director, prepared a screening/admission assessment report, dated 13 August 1990, which (i) indicated a provisional diagnosis of post-traumatic stress disorder (primary) and adjustment disorder (principal and primary) and (ii) proposed an estimated six months for treatment. This report also outlined the victim's social, family and medical history and her history with respect to the incidents with which defendant was charged. Braun treated S.W. on three more occasions following the preparation of this initial report but prepared no further reports or summaries.

During discovery, defendant requested the State voluntarily to produce copies of "[a]ll results or reports of physical or mental

examinations, tests, measurements or experiments made in connection with this case which are known to the State or which may become known to the State, as provided by N.C. Gen. Stat. 15A-903(e)." In response, the State provided defendant with a copy of Braun's initial 13 August 1990 report.

At trial, the State called Braun to the stand and implicitly qualified him as an expert witness in child sexual abuse. He testified from memory regarding his initial screening of the victim and the admission assessment. Defendant objected to a question posed to Braun as to whether he had diagnosed the victim as suffering from any type of trauma. Following *voir dire*, the trial court ruled Braun's testimony inadmissible on the grounds that the State failed to provide defendant with a final report or any progress notes of Braun's subsequent interviews with the child and these materials could not be provided in a timely manner at trial.

Thereafter, on cross-examination, defendant questioned Braun concerning a specific statement S.W. made to Braun which he had noted in the 13 August 1990 report. The State, on redirect examination, was allowed, over objection, to question Braun extensively concerning statements made to him by the victim's mother and to elicit his opinion as to whether the victim suffered from post-traumatic stress disorder (herein "PTSD").

[1] On appeal, defendant maintains the trial court erred in admitting the opinion testimony which was not properly disclosed in response to his discovery requests. The State contends defendant opened the door to this line of inquiry with his questions on cross-examination. The Court of Appeals ruled that it was error for the trial court to have allowed Braun's testimony since it related to a final diagnosis derived from interviews subsequent to those in the report and since the limited questions posed by defendant were insufficient to open the door for this testimony. "This questioning did not cover new matter so as to allow the State on redirect to question Braun about his diagnosis of PTSD. The admission of Braun's opinion testimony regarding his final diagnosis, after having been held inadmissible for failure to comply with discovery, was error." *State v. Quarg*, 106 N.C. App. 106, 110, 415 S.E.2d 578, 581 (1992).

Before this Court, the State, emphasizing that the questions asked on redirect examination of Braun related solely to the 13 August 1990 screening/admission assessment report, argues that

defendant opened the door to this examination by cross-examining Braun about statements in the report. We note initially that the record is silent as to the trial judge's reasoning for his ruling allowing Braun's testimony, over objection, on redirect examination after his initial ruling that Braun's testimony was inadmissible for the State's failure to comply with discovery. We can only speculate whether the trial judge reconsidered his initial ruling or determined that the defendant had opened the door.

Assuming arguendo, as the State asserts, that the basis of the ruling was that defendant opened the door, we agree with the Court of Appeals that admission of the evidence was error. The questions defendant asked on cross-examination after establishing Braun prepared the screening/admission assessment report were as follows:

Q August 13. And you stated in that report that [S.W.] was able to talk about the incident and anxious to talk about the incident; is that right?

A She had anxiety. That's for sure.

Q And you reported in there in quotation marks that [S.W.] said, "I think this is what my mother wants me to talk to you about. And she said it would help me."

A I think the purpose of her statement there was—

Q Did she say that, say what you put in your report?

A Yes, she did.

[Colloquy between court and witness and question read back]

A I think that [S.W.] in saying that, what had preceeded [sic]—[S.W.'s] comments preceeding [sic] that were that she was frightened to confront the alleged perpetrator in court. And she thought this would help her reduce her fear.

Q [By defense counsel] Okay. It says the child had some insight into the nature of her difficulties, and although anxious, she was able to talk about the incident and her feelings concerning it. She does admit that she was worried about seeing this man and about facing him in court. About this she said, "I think, this is what my mother wants me to talk to you about. And she said, it would help me"; is that what her report said?

> A Yes, sir. And that was the reason for referral. That was the reason she was here.

On direct examination before *voir dire*, Braun had testified that S.W. had "arrived with her family for treatment on a referral from Shirley Harrell [the victim and witness assistant]," and in response to a question whether he knew why S.W. was there, Braun had stated: "I had a pretty good idea, but they explained the reason they were there. The mother and the daughter both explained that she was having a great deal of emotional distress dealing with being sexually abused." Confronted with this testimony, defendant was entitled to attempt to soften its impact by questioning Braun about the inconsistent statement in his report that was more limited in scope than his testimony at trial. In our view, defendant's limited cross-examination did not open the door for Braun's opinion testimony concerning PTSD. The State has cited no authority to support its position that defendant opened the door; and this case is distinguishable from *State v. Bright*, 320 N.C. 491, 358 S.E.2d 498 (1987), where the prosecutor asked the witness to explain on redirect examination the same question defendant had asked the expert witness on cross-examination. Furthermore, the State's assertion that the questions on redirect examination were limited to the initial assessment interview with the victim is not supported by the record. Certain of the assistant district attorney's questions were limited to that particular interview, but the critical question relative to Braun's opinion on PTSD contained no time limitation. The question asked was:

> Again, I ask you, based on what you observed about [S.W.] and the things that she told you, did you diagnosis her as suffering from any type of trauma?

Over objection, the witness answered affirmatively and then stated that he "gave her a diagnosis of post-traumatic stress disorder and adjustment disorder." The 13 August 1990 screening/admission assessment report contained only a "provisional diagnosis." On *voir dire* Braun explained that a provisional diagnosis is required for an admission assessment preliminary to establishing treatment goals. Braun had also testified on *voir dire* that he had reviewed his file including his progress notes before coming to court, but had not brought them with him. The import of this testimony that the victim suffered from PTSD was that this determination was a final diagnosis based on his entire series of consultations with

the victim. For these reasons we agree with the Court of Appeals' analysis that defendant did not open the door to the expert testimony, and admission of Braun's opinion concerning PTSD was error.

We do not agree, however, with the Court of Appeals' determination that the error entitled defendant to a new trial. "The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial," *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983), and the burden of showing prejudice is on the defendant. *Id.* The statutory test for errors not relating to a right under the Constitution of the United States is that "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C.G.S. § 15A-1443(a) (1988). Defendant has not carried his burden of showing that he was prejudiced by admission of the expert's opinion testimony.

The victim testified at length as to the specifics of each occasion of abuse including defendant's statements threatening both her and her father's safety if she related the events to anyone and his question to her if she knew about sex. She further testified to the best of her ability as to the date of each offense and she identified the defendant in open court. The victim's mother and grandmother, the deputy sheriff, and the emergency room nurse also offered substantive and corroborative testimony which supported elements of the victim's allegations.

The mother testified that, during the afternoon of 6 January 1990, she heard defendant call her daughter into the garage; she saw defendant close and lock the garage door with her daughter inside; a few moments later, the door opened and she saw defendant's hands on her daughter's back; and she sensed something was wrong from her daughter's behavior when S.W. came out of the garage. The child was hanging her head and wringing her hands. The mother reiterated what the child told her at that time and later that evening about the instances of abuse including the sex question and the threats. The mother further testified that, later that same night, she overheard defendant offer her husband $1,200 and state: " 'Jerry, let this make things right. Let us be friends again. . . . This is $1,200. Please just let this make things right.' " The victim's grandmother testified that her granddaughter suffered severe crying spells following the incidents and became hysterical when she told her about the instances of abuse. Deputy

Sheriff James Suggs testified that the victim on two occasions weeks apart consistently related to him the details of defendant's abuse. Nurse Susan Pearson, who treated S.W. at Albemarle Hospital in Elizabeth City, North Carolina, on 7 January 1990, testified that S.W. told her "[h]e [defendant] put his hands up my skirt and put his hand down my panties" on several occasions and that "[h]e said he would shoot daddy and hurt me if I told my parents." Finally, Jason Evans, a tenant of the victim's parents, testified he was also present on the night defendant offered the victim's father a sum of money and stated "[l]et's make it right and be friends again."

In order to convict under N.C.G.S. § 14-202.1, the State must prove:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104, 361 S.E.2d 578, 580 (1987) (quoting *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986)). "The fifth element, that the action was for the purpose of arousing or gratifying sexual desire, may be inferred from the evidence of the defendant's actions." *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580. In the instant case, the evidence is sufficient to warrant the inference that defendant, a thirty-six year old male, wilfully took indecent liberties with a seven year old female child for the purpose of arousing or gratifying sexual desire. The uncorroborated testimony of the victim is sufficient to convict under N.C.G.S. § 14-202.1 if the testimony establishes all of the elements of the offense. *State v. Vehaun*, 34 N.C. App. 700, 705, 239 S.E.2d 705, 709 (1977), *cert. denied*, 294 N.C. 445, 241 S.E.2d 846 (1978).

In light of the substantive and corroborative testimony from other witnesses, defendant has not demonstrated a reasonable possibility that a different result would have been reached absent the admission of the disputed portion of Braun's testimony. The error is, therefore, harmless.

[2] We next address the appropriateness of the trial court's limiting instruction as to Braun's opinion testimony in order to clarify the

Court of Appeals' opinion. At trial the trial court gave the following instruction:

> Members of the jury, the testimony that is being elicited from this witness at this time about the symptoms that the witness, [S.W.], gave to him and that she was experiencing and was the purpose of the treatment is offered not to prove the truth of the matters stated in those symptoms, but to show the basis of the treatment that the witness administered to his patient.

In context, this instruction was not error. At the time this instruction was given the assistant district attorney was examining Braun on redirect examination and inquiring about what the victim had told him in his interview with her. This Court has held that statements made for purposes of obtaining treatment to physicians, psychologists, and social workers, if qualified as experts, are admissible as substantive evidence pursuant to N.C.G.S. § 8C-1, Rule 803(4). *See State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). While the victim was referred to Braun by the district attorney's victim and witness assistant, the evidence showed that Braun had seen S.W. five times and had prescribed treatment goals for the victim. Hence, the limiting instruction was, in fact, favorable to defendant at the point in the trial where it was given. The record is somewhat confusing because in response to the question "What else did she tell you about during that time, if you recall?" Braun answered, "She had a typical syndrome or pattern of feeling very guilty about—." Thereafter, the State asked the question calling for an opinion as to whether the victim suffered from PTSD. The record does not reflect whether defendant requested a further limiting instruction as the bench conference was not recorded.

Subsequent to the trial of this action, this Court decided *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), in which the Court held that expert opinion testimony concerning PTSD could, under certain circumstances, be admitted for the purposes of corroboration, but "[i]n no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Id.* at 822, 412 S.E.2d at 891. The rule, however, in this State has long been that an instruction limiting admissibility of testimony to corroboration is not required unless counsel specifically requests such instruction. *Smith*, 315 N.C. at 82, 337 S.E.2d at 838. We hold, therefore, that the limiting instruction given was

favorable to defendant, and that since the record is silent as to a request for a limiting instruction on corroboration respecting the opinion testimony, the failure to give such an instruction was not error.

Finally, defendant brought forward three additional assignments of error on which the Court of Appeals did not rule. In our discretion, we have elected to consider these assignments prior to determination by the Court of Appeals and, having reviewed them, find these assignments to be without merit.

[3] In the first of these assignments of error, defendant contends that the trial court erred in admitting hearsay testimony for corroborative purposes which contradicted rather than corroborated the victim's testimony. We have carefully reviewed the alleged errors, and find that although inconsistencies exist between S.W.'s testimony and that of her mother and the deputy sheriff, the discrepancies are minor and not so significant as to render the testimony reversible error. *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985). Moreover, the trial court repeatedly instructed the jury, even without a request from defendant, that the testimony was being offered for purposes of corroborating the victim's earlier testimony and that they were to consider only so much of it as did in fact corroborate earlier testimony. The victim's testimony and that of the corroborating witnesses were consistent in all material respects. All the testimony was that five incidents of abuse occurred, some shortly before Christmas and some after Christmas, that on each occasion defendant had placed the victim on a counter in the garage and had run his hands up her dress and under her underpants, and that defendant made threats against the victim's father and the victim if S.W. told anyone what had occurred.

[4] The other assignments of error on which the Court of Appeals did not rule were that (i) the trial court erred in allowing into evidence statements allegedly made by defendant that had not been furnished to defendant upon proper request in discovery prior to trial, and (ii) the trial court erred in denying defendant's motion to dismiss, for mistrial or for a continuance for failure of the State to provide discovery pursuant to N.C.G.S. § 15A-903. Our review of the transcript and record discloses that the only statement not furnished in substance to defendant prior to trial related to a confrontation on 7 January 1990, early in the morning after the last incident occurred, in which, according to the mother's

testimony, defendant yelled at the victim, accusing her of lying; and the victim stood up to him by saying, " 'I am not lying, Tom, and you know I am not.' " When this allegation came out at trial, the trial judge recessed the trial for the length of time the attorneys stated they needed and required the State's attorney to interview the State's witnesses to ascertain and furnish to defendant any additional statements that defendant allegedly made and also permitted defense counsel to interview State's witnesses. What sanctions, if any, to impose for the State's failure to comply with discovery is in the discretion of the trial court. This Court has previously stated:

> [T]he State's failure to comply with a discovery order pursuant to N.C.G.S. § 15A-903 will not automatically require the exclusion of the undisclosed evidence. *State v. Misenheimer*, 304 N.C. 108, 282 S.E. 2d 791 (1981); *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). A variety of sanctions is authorized under N.C.G.S. § 15A-910 for failure to comply with a discovery order. The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. King*, 311 N.C. 603, 320 S.E. 2d 1 (1984); *State v. Alston*, 307 N.C. 321, 298 S.E. 2d 631 (1983); *State v. Stevens*, 295 N.C. 21, 243 S.E. 2d 771 (1978). 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. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985).

State v. Gladden, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986). In the present case, we find no abuse of discretion.

For the foregoing reasons, defendant received a fair trial, free from prejudicial error.

REVERSED.

STATE OF NORTH CAROLINA v. FRANKIE DWAYNE PALMER

No. 340A91

(Filed 2 July 1993)

1. **Evidence and Witnesses § 653 (NCI4th)— motion to suppress in-custody statements—oral pretrial ruling—written order after notice of appeal**

The trial court's order denying defendant's motion to suppress his statements to a police officer was not improperly entered out of session and when the court was *functus officio* where the court held a hearing on the motion prior to trial; at the conclusion of the hearing, the judge in open court stated that the motion to suppress was denied and directed the prosecutor to draw an order and make the appropriate findings of fact; and an order signed by the judge was filed fifty-seven days after defendant gave notice of appeal of his conviction. The order was simply a revised written version of the verbal order entered in open court.

Am Jur 2d, Motions, Rules, and Orders §§ 26, 29 et seq.

2. **Evidence and Witnesses § 1249 (NCI4th)— right to counsel—waiver of Sixth Amendment and N.C. Constitution rights—knowledge of source not required**

Defendant waived his right to counsel under the Sixth Amendment to the U.S. Constitution and Art. I, § 23 of the N.C. Constitution when he signed a written waiver of his rights after being given the *Miranda* warnings even though he was not informed that he was entitled to counsel under the Sixth Amendment and Art. I, § 23 rather than under the Fifth Amendment since adversary judicial proceedings had been commenced against him. If a defendant is informed that he has a right to counsel, he does not have to know the precise source of the right before waiving it.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

Necessity that Miranda warnings include express reference to right to have attorney present during interrogation. 77 ALR Fed 123.

3. Evidence and Witnesses § 2510 (NCI4th)— opinion or inference—personal knowledge or perception of witness

A detective was properly permitted to testify that there was no forced entry into a murder victim's apartment where the detective testified concerning his inspection of the apartment which formed the basis for this conclusion. N.C.G.S. § 8C-1, Rules 602, 701.

Am Jur 2d, Witnesses §§ 75, 76.

4. Evidence and Witnesses § 876 (NCI4th)— hearsay statement by victim—state of mind exception

A hearsay statement by decedent, defendant's mother, that she would not give defendant money to bail him out of an embezzlement charge was admissible under the state of mind exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(3) and was relevant to show a motive by defendant to kill his mother.

Am Jur 2d, Evidence §§ 497 et seq.

5. Evidence and Witnesses § 110 (NCI4th)— keeping money on person—admissible evidence of habit

Testimony by decedent's sister that decedent always kept from twenty to forty dollars on her person was evidence of habit admissible under N.C.G.S. § 8C-1, Rule 406.

Am Jur 2d, Evidence §§ 303, 316-319.

6. Homicide § 263 (NCI4th)— murder in perpetration of armed robbery—taking of property—continuous transaction—sufficiency of evidence

There was sufficient evidence that defendant took U.S. currency and a pistol from decedent to support his conviction of murder in the perpetration of armed robbery where the evidence tended to show (1) that defendant told an officer he shot decedent with her own pistol and then carried the pistol from her apartment, and (2) that decedent always had money on her person, decedent's purse had been emptied and there was no money in it, and a search of decedent's apartment revealed no money. Furthermore, whether the taking of the pistol was part of the same transaction as the killing was a question for the jury.

Am Jur 2d, Homicide § 442.

7. Robbery § 5.2 (NCI3d)— felony murder—armed robbery—instructions—taking of "property"—no plain error

The trial court in a prosecution for felony murder did not commit plain error by instructing that, in order to find defendant guilty of the underlying felony of armed robbery, the jury must find that defendant took "property" from the person or presence of the victim rather than charging that the jury must find that he took U.S. currency and a pistol as alleged in the indictment where the evidence showed that defendant took money and a pistol and knife wrapped in a towel; if the jury found that defendant took a knife and towel, it must have found that he also took the pistol as alleged, since all three were part of one bundle; and defendant was thus not convicted on a theory not supported by the evidence and not alleged in the indictment.

Am Jur 2d, Robbery § 15.

8. Homicide § 612 (NCI4th)— felony murder—instruction on self-defense not required

The trial court in a felony murder prosecution was not required to instruct on self-defense by evidence that defendant told an officer that the victim, his mother, advanced on him with a knife, he was able to take the knife from her, and he stabbed her in the back as she walked away from him, since the jury could not find that defendant reasonably believed at that time that it was necessary to stab his mother to protect himself from death or great bodily harm. Nor was an instruction on self-defense required by defendant's statement that, after he stabbed his mother and procured his mother's pistol from another room, she crawled toward him and threatened him and he shot her, since a jury could not find that defendant reasonably believed it necessary to shoot a woman who was on her hands and knees and suffering from multiple stab wounds in order to protect himself from death or great bodily harm.

Am Jur 2d, Homicide §§ 519 et seq.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Bowen (Wiley F.), J., at the 26 November 1990 Criminal Session of Superior Court, Lee County, upon a jury verdict finding the defendant guilty

of first degree murder. Heard in the Supreme Court 11 September 1992.

The defendant was tried for his life for the first degree murder and armed robbery of his mother, Ruby Chandler Palmer. The State's evidence showed that on 22 October 1989, the body of the defendant's mother was found in her apartment. There were multiple stab wounds in the body and numerous blunt force injuries to the head as well as a gunshot wound in the body.

Kevin Gray, a detective with the City of Sanford Police Department, testified that the defendant made a statement to him in which he said he was in his mother's apartment on 20 October 1989, at which time his mother advanced on him with a knife. He was able to get the knife away from her and she started walking away from him. At that time, he lunged at his mother and stabbed her repeatedly with the knife. Mr. Gray testified further that the defendant then told him he threw a table at her. The defendant then went to his mother's bedroom and got her gun. When he returned to the living room, his mother was on her hands and knees crawling out of the kitchen and saying, "I'm going to get you." The defendant then shot his mother. Mr. Gray testified further that the defendant told him he wrapped the knife and the pistol in a towel and left.

There was other evidence that the defendant needed money to help him avoid prison on an embezzlement charge and was angry with his mother for not helping him.

The jury found the defendant guilty of first degree murder based on the felony murder rule and guilty of armed robbery. The court arrested judgment on the armed robbery charge. A post conviction hearing was then conducted by the court without a jury at which it was concluded there were no aggravating circumstances pursuant to N.C.G.S. § 15A-2000(e).

The defendant was sentenced to life in prison. He appealed.

Lacy H. Thornburg, Attorney General, by Dennis P. Myers, Assistant Attorney General, for the State.

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

WEBB, Justice.

[1] In his first assignment of error, the defendant argues that it was error to admit into evidence testimony by Kevin Gray as to statements made by the defendant because the court did not properly rule on his motion to suppress the statements. The court held a hearing on the motion prior to the trial. At the conclusion of the hearing, the judge in open court stated that the motion to suppress was denied and directed the prosecutor to draw an order and make the appropriate findings of fact. The judgment and commitment were issued and notice of appeal was given on 30 November 1990. The record shows that an order was filed on 17 January 1991 signed by the judge. Findings of fact and conclusions of law were made in the order and the defendant's motion was denied.

The defendant argues first that the order is invalid because the superior court was *functus officio* and it could not enter an order fifty-seven days after notice of appeal was given. He also argues that "this mysterious Order suddenly appeared out of nowhere and was filed in the Clerk's office." He says the order is not authenticated and there is no accounting for this order in the trial record or in the case on appeal. The order is contained in the agreed record on appeal which counsel for the defendant and the State stipulated to be correct. It purports to be an order signed by the judge who ruled on the motion. The record certified to this Court imports verity and we are bound by it. N.C. R. App. P. 9(a). *State v. Hedrick*, 289 N.C. 232, 221 S.E.2d 350 (1976). We have to consider it an order signed by the judge who heard the motion.

The defendant, relying on *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984), says the order was signed out of the term and out of the district and is a nullity. This case is governed by *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987) and *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984), rather than *Boone*. In *Boone*, we held that an order purporting to allow the admission of evidence was a nullity because the judge did not make a ruling on the motion in court during the term, but signed the order after the term had expired. In *Smith* and *Horner*, rulings on the motions to suppress were made in open court during the terms at which the motions were heard. We held the rulings in open court during the term distinguished these cases from *Boone* and the fact that

the written orders were filed after the terms had concluded did not keep the orders from being valid. In *Smith*, the written order was entered six months after the trial. We said, "[t]he order, however, is simply a revised written version of the verbal order entered in open court which denied defendant's motion to suppress decedent's wife's identification testimony. It was inserted in the transcript in place of the verbal order rendered in open court." *State v. Smith*, 320 N.C. 404, 415, 358 S.E.2d 329, 335. We hold the order entered in this case is valid. This assignment of error is overruled.

[2] The defendant next assigns error to the admission of testimony by Mr. Gray as to the statement made by the defendant. The defendant was in the Lee County jail on 25 October 1989 when he requested to speak to Detective Gray. Mr. Gray went to the jail and carried the defendant to the police headquarters. The detective advised the defendant of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), including his right to counsel. The defendant signed a written waiver of his *Miranda* rights and made a statement to the detective.

The defendant contends it was error to let the detective testify as to the defendant's statement to him. He concedes that he waived his right to an attorney under the Fifth Amendment to the Constitution of the United States when he signed the written waiver after receiving the *Miranda* warnings. He argues, however, that adversary judicial proceedings having been commenced against him, he was entitled to have counsel under the Sixth Amendment to the United States Constitution and under Article I, Section 23 of the Constitution of North Carolina. This right to counsel could not be waived, says the defendant, by the giving of the *Miranda* warnings. The defendant says that because he was not informed that he had the right to counsel under the Sixth Amendment and Article I, Section 23 of our state Constitution, he could not voluntarily and understandingly waive this right.

We disagree with this contention by the defendant that in order to waive his right to counsel a defendant must have explained to him his right to counsel under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the Constitution of North Carolina. If a defendant is told he has a right to counsel, as the defendant was in this case, he does not have to

know the precise source of the right before waiving it. This assignment of error is overruled.

[3] The defendant next assigns error to the admission of testimony by Mr. Gray. While the detective was testifying on direct examination the following colloquy occurred:

> Q. Detective Gray, during your search of the apartment, did you discover any sign of forced entry into the apartment?
>
> (DEFENSE COUNSEL): Objection.
>
> COURT: Overruled.
>
> A. No, sir. There was no forced entry into the apartment.
>
> (DEFENSE COUNSEL): Objection. Move to strike.
>
> COURT: Overruled.
>
> A. I walked directly around the entire house. There was no forced entry into the house at all.
>
> (DEFENSE COUNSEL): Move to strike.
>
> COURT: Denied.
>
> Q. Now, what did you see that you base that on, Detective Gray? Tell me what it was you saw that you base that on.
>
> A. I checked all the doors—well, which was only one door actually going to the upstairs, which there was no pry marks at all. The door was not forced open.
>
> I checked all the windows on the first floor, which were all closed. This is a front door to the house, which does not go to that apartment, but that was also secure.

The defendant contends this testimony of the detective that there was no forced entry into the apartment was admitted in violation of N.C.G.S. § 8C-1, Rule 602 which provides in part, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." The defendant says the evidence shows the detective had no way of knowing whether there had been a forced entry. The defendant also argues that this testimony was inadmissible under N.C.G.S. § 8C-1, Rule 701, which provides: "[i]f 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." The defendant says that if the detective's statement that there was no forced entry into the apartment was an expression of an opinion, it was not helpful to a clear understanding of his testimony. He also argues this opinion was not rationally based on the detective's perceptions.

We hold there was no prejudicial error in allowing this testimony. The detective testified as to the inspection he made of the apartment upon which he made his conclusion that there had been no forced entry. The jury should have had no difficulty determining whether his conclusion was correct. This testimony did not unfairly prejudice the defendant. This assignment of error is overruled.

[4] The defendant next assigns error to the testimony of a witness. Annie McKiver testified for the State over the objection of the defendant that the deceased told her that "she wasn't going [to] bail [defendant] out of embezzling." "She said she wouldn't give [defendant] a penny out of neither one of [her] jobs." One theory of the State at the trial was that the defendant killed his mother because she would not give him money to help him stay out of prison on another charge. If she in fact refused to help the defendant in this way it would provide a motive for him to kill her.

This testimony as to what the deceased had said constituted a statement other than one made by the declarant while testifying at trial to prove the truth of the matter asserted. It was hearsay testimony. N.C.G.S. § 8C-1, Rule 801(c) (1992). N.C.G.S. § 8C-1, Rule 803 provides in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (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)[.]

This hearsay statement of the decedent that she would not give the defendant any more funds was admissible under this section as an exception to the hearsay rule. It was a statement of the declarant's intent and it was relevant to show a motive by the defendant to kill his mother. *State v. McElrath*, 322 N.C. 1, 366 S.E.2d 442 (1988); *Griffin v. Griffin*, 81 N.C. App. 665, 344 S.E.2d 828 (1986). This assignment of error is overruled.

[5] In his next assignment of error, the defendant contends it was error to allow the decedent's sister to testify that she was familiar with the decedent's habit of keeping money and she always kept on her person from twenty to forty dollars. The State offered this evidence pursuant to N.C.G.S. § 8C-1, Rule 406 which provides:

> Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

The defendant, relying on the definition of habit in the commentary which definition is "one's regular response to a repeated specific situation[,]" says that the deceased's conduct was not "any type of regular practice of meeting a particular kind of situation with a specific type of conduct." We believe the custom of always having money on her person constituted a habit. If the definition in the commentary is to be used, we believe keeping at all times a sum of money is a response to the situation of whether or not a person keeps money on his or her person at all times.

[6] The defendant next assigns error to the denial of his motion to dismiss the charge of felony murder. This motion was based on what the defendant contends is the lack of evidence to support the underlying felony of armed robbery. The indictment charged that the defendant took United States currency and a pistol from the deceased and the defendant says there is no evidence to support this feature of the case.

The defendant's statement to which Mr. Gray testified included a statement that after he had shot his mother, he carried the pistol from the apartment. This supports the jury's finding that he took the pistol during the course of the robbery. The deceased's purse had been emptied and there was no money in it. A search of the apartment revealed no money and there was evidence that

the deceased always had money. This would support a finding by the jury that there was money in the apartment which was taken at the time of the killing.

The defendant also says there is not sufficient evidence that the taking of the pistol was part of the same transaction as the killing, which is necessary to prove an armed robbery. *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985). It was a question for the jury in this case as to whether the taking of the pistol was a part of a continuous transaction. It does not matter if the intention to commit the theft is formed before or after the force was used if they are part of a continuous transaction. *State v. Green*, 321 N.C. 594, 365 S.E.2d 587 (1988). This assignment of error is overruled.

[7] In his next assignment of error, the defendant contends the court improperly charged when defining armed robbery as the underlying felony for first degree murder and when it charged on the offense of armed robbery. The court instructed the jury that in order to find the defendant guilty of armed robbery that it must find the defendant took and carried away property from the person or presence of the deceased.

The defendant says it was error for the court not to charge that the jury must find that the defendant took and carried away United States currency and a pistol, which is what the State charged in the indictment was the property taken. He says this instruction allowed the jury to convict him on theories of guilt that were not supported by the evidence and not alleged in the indictment. He argues that the question of what property was taken was a hotly contested issue in this case and by failing to instruct the jury that it must find the defendant took United States currency and a pistol, the jury was allowed to convict for the taking of something for which he was not charged.

The defendant did not object to these instructions at the trial and thus did not preserve this question for appellate review. N.C. R. App. P. 10(b). The defendant asks us to review this question under the plain error rule. "The test for plain error is whether absent the omission the jury probably would have returned a different verdict." *State v. Stevenson*, 327 N.C. 259, 265, 393 S.E.2d 527, 530 (1990).

We cannot say the court committed error in not charging that the jury must find the defendant took United States currency or a pistol rather than charge that the jury must find he took property. The evidence for the State was that he took money and the pistol and a knife wrapped in a towel. There was no evidence he took anything else. If the jury found he took a knife and a towel, it must have found he also took a pistol because the evidence was the knife, towel, and pistol were all part of one bundle. We do not believe the jury convicted the defendant on a theory not supported by the evidence or convicted him for something for which he was not charged.

We hold that this jury charge was not erroneous. If it was erroneous, we cannot hold the jury probably would have reached a different verdict if the jury had been charged as the defendant says it should have been. This assignment of error is overruled.

[8] In his last assignment of error, the defendant contends it was error not to charge on self defense. In order to be entitled to an instruction on self defense, there must be evidence among other things that it reasonably appeared necessary to the defendant to kill in order to protect himself from death or great bodily harm. *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979). In the light most favorable to the defendant, we cannot say the evidence meets this test.

In his statement to Mr. Gray, the defendant says his mother advanced on him with a knife. He was able to take the knife from her and he stabbed her in the back as she was walking away from him. The jury could not find that the defendant reasonably believed at that time that it was necessary to stab his mother to protect himself from death or great bodily harm. The evidence was that the defendant also told Mr. Gray that after he procured his mother's pistol, she crawled toward him and threatened him. At this time he shot her. A jury could not find that defendant reasonably believed that it was necessary to protect himself from death or great bodily harm to shoot a woman who was on her hands and knees, suffering from multiple stab wounds. This assignment of error is overruled.

NO ERROR.

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

MOLLIE JACKSON DUNN AND HUSBAND, CECIL DUNN; DAISY JACKSON TROGDON AND HUSBAND, JAMES H. TROGDON, JR.; PATRICIA JACKSON DAVIS AND HUSBAND, WILLIAM R. DAVIS; FAIRLYN JACKSON MONTELLA AND HUSBAND, MICHAEL MONTELLA v. WILLARD J. PATE; BOBBIE LOU JACKSON GRIMES; FAIRLEY JAMES GRIMES AND WIFE, JENNIFER B. GRIMES; DAVID E. GRIMES, JR.; ELIZABETH GRIMES FISHER AND HUSBAND, WILSON DAVID FISHER; LABON CHARLES GRIMES AND WIFE, LIBBY GRIMES

No. 170PA92

(Filed 2 July 1993)

1. **Constitutional Law § 50 (NCI4th)— private examination statutes—constitutionality—standing to challenge**

Defendants had standing to challenge the constitutionality of North Carolina's former private examination statutes where the operation of N.C.G.S. § 52-6 would invalidate a 1962 deed and directly deprive them of their bequests under a will. Although plaintiffs argue that defendants have no standing because they do not belong to the class prejudiced by the statute, the exception that allows an affected party to allege discrimination when no member of the class subject to the discrimination is in a position to do so applies here because both parties to the 1962 deed are now dead.

Am Jur 2d, Constitutional Law § 190.

2. **Deeds § 25 (NCI4th)-- 1962 deed—private examination statutes—constitutionality**

North Carolina's former private examination statutes, N.C.G.S. § 52-6 and N.C.G.S. § 47-39, are unconstitutional and noncompliance with those statutes will not serve as a basis to invalidate the 1962 deed in this case. The fact that the deed was executed prior to the express incorporation of the Equal Protection Clause into the State Constitution does not mandate a finding that such discrimination was constitutional at the time the deed was executed. Since the private examination statutes required unequal application of the law while serving no clearly discernible important governmental interest, they were unconstitutional at the time the deed was executed and will not presently be enforced.

Am Jur 2d, Deeds §§ 116-119.

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

On appeal and discretionary review of the decision of the Court of Appeals, 106 N.C. App. 56, 415 S.E.2d 102 (1992), reversing an order granting summary judgment in favor of defendants entered by Herring, J., in the Superior Court, Cumberland County, on 31 December 1990. Heard in the Supreme Court 15 January 1993.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Richard M. Wiggins, for plaintiff-appellees.

Garris Neil Yarborough for defendant-appellees.

FRYE, Justice.

This case presents the question of whether noncompliance with the private examination requirements set forth in N.C.G.S. § 52-12 (Supp. 1957) (superseded by N.C.G.S. § 52-6) (repealed 1977) and N.C.G.S. § 47-39 (Supp. 1957) (repealed 1977) in the execution of a deed in 1962 may be an effective basis for relief in an action to set aside that deed today. In light of the principle of equal protection under the law which makes gender-based discrimination presumptively unconstitutional, we hold that noncompliance with the statutes in question will not lead to the requested relief.

Plaintiffs instituted this action on 12 February 1989, seeking to have a 1962 deed to real property in Cumberland County set aside for failure to comply with the private examination requirements then in effect. The property in question was previously owned by Mary A. Jackson. On 22 October 1951, she conveyed title to the land to her son Fairley J. Jackson and his wife, Mary Elizabeth Jackson, as tenants by the entirety. In 1962 Fairley J. and Mary Elizabeth Jackson conveyed the property to Fairley J. Jackson individually. At that time the former N.C.G.S. § 52-12[1] [hereinafter referred to as N.C.G.S. § 52-6] and N.C.G.S. § 47-39[2] required that

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1. The former N.C.G.S. § 52-12 provided in relevant part:

> (a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife . . . unless such contract . . . is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.
>
> (b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife . . . .

2. N.C.G.S. § 47-39 outlined the form of the acknowledgement required by N.C.G.S. § 52-6 (the former N.C.G.S. § 52-12).

the deed contain a certification by the clerk of court that the conveyance was neither unreasonable nor injurious to the wife. The deed executed by the couple, otherwise regular in form, did not contain the required certification.

In 1976 Fairley J. Jackson died testate, devising the property in question to his wife (Mary Elizabeth) for life, with the remainder in equal shares to each of his living children and to his sister-in-law, Willard J. Pate. By codicil the share to his sister-in-law was devised to her for life, with the remainder in the children of Bobbie Lou Jackson Grimes (Fairley's grandchildren). Mary Elizabeth Jackson died intestate in 1980, leaving five living children from her marriage to Fairley J. Jackson as heirs. Four of Fairley and Mary Elizabeth's five children and their spouses are the plaintiffs in this action. Willard J. Pate, Bobbie Lou Jackson Grimes (Fairley and Mary Elizabeth's other child) and Bobbie Lou Jackson Grimes' children and spouses are the defendants in this action.

In the present action, plaintiffs challenge the 1962 deed as ineffective to convey the property to Fairley J. Jackson individually due to noncompliance with the private examination statutes and allege that title to the property continued in both Fairley J. and Mary Elizabeth Jackson as tenants by the entirety. They contend that upon Fairley's death the property passed to Mary Elizabeth Jackson individually by operation of law. In such case, the property descended upon Mary Elizabeth's death by virtue of her intestacy to the five children in five equal shares rather than passing in six shares as directed by Fairley's Will and Codicil. Defendants originally argued that failure to comply with the private examination statutes in effect in 1962 could not be a basis upon which the deed could be set aside since the legislature enacted curative statutes after the repeal of the examination statutes and since the examination statutes are unconstitutional. Both parties filed motions for summary judgment. The trial court granted defendants' motion. Plaintiffs appealed to the Court of Appeals which reversed on state substantive law grounds and remanded to the superior court. *Dunn v. Pate*, 98 N.C. App. 351, 390 S.E.2d 712 (1990).

On remand, defendants argued that the remaining issue for resolution was the constitutionality of N.C.G.S. § 52-6 and N.C.G.S. § 47-39 which had been raised and preserved throughout the litigation. Both parties again filed motions for summary judgment and again defendants' motion was granted. Plaintiffs appealed to the

Court of Appeals which reversed the trial court on the basis of *stare decisis*, noting that this Court held a former version of the statutes in question to be constitutional in *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915), and had not as yet indicated a change in position. *Dunn v. Pate*, 106 N.C. App. 56, 59, 415 S.E.2d 102, 104 (1992). Defendants filed notice of appeal and a petition for discretionary review of the constitutional issue. Appeal was retained and the petition for discretionary review was allowed by this Court on 9 July 1992.

We observe initially that the Court of Appeals correctly stated the law of *stare decisis* in its decision below. As the Court of Appeals noted, it has "no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions 'until otherwise ordered by the Supreme Court.' " *Dunn v. Pate*, 106 N.C. App. at 60, 415 S.E.2d at 104 (quoting *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985)). However, we conclude that *Butler*, 169 N.C. 584, 86 S.E. 507, the decision relied upon by the Court of Appeals, does not control the question in this case. *See Spencer v. Spencer*, 37 N.C. App. 481, 487-88, 246 S.E.2d 805, 809 (Chief Judge Morris observed that drastic changes have occurred in society since 1915 when a woman could not vote, was denied educational opportunities, was excluded from most legal and commercial matters and was generally occupied in the home), *disc. rev. denied*, 296 N.C. 106, 249 S.E.2d 804 (1978), *cert. denied*, 441 U.S. 958, 60 L. Ed. 2d 1062 (1979).

The statutes in question, N.C.G.S. § 52-6 and N.C.G.S. § 47-39, were both repealed in 1977. After their repeal N.C.G.S. § 52-8 was amended by the legislature to provide a cure for deeds failing to comply with the private examination requirements. On earlier appeal in this case, the Court of Appeals held, however, that the deed in question was not cured by N.C.G.S. § 52-8 since the plaintiffs' rights in the property vested in August of 1980 and the relevant amendment to N.C.G.S. § 52-8 was not effective until 1981. *Dunn v. Pate*, 98 N.C. App. at 355, 390 S.E.2d at 715 (citing *West v. Hays*, 82 N.C. App. 574, 346 S.E.2d 690 (1986)). Thus, the question before us is whether plaintiffs may assert noncompliance with the examination statutes as a basis for setting aside the 1962 deed. Finding the statutes unconstitutional, we hold that they may not.

[1] Before addressing the constitutionality of the statutes in question, we must address plaintiffs' argument that defendants have

not shown an injury in fact and therefore do not have standing to challenge the constitutionality of the private examination statutes. Plaintiffs rely on *Murphy v. Davis*, 61 N.C. App. 597, 599, 300 S.E.2d 871, 873, *cert. denied & appeal dismissed*, 309 N.C. 192, 305 S.E.2d 735 (1983), and *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), to support this contention. We are not persuaded by plaintiffs' argument.

A general rule of standing is that only persons "who have been injuriously affected . . . in their persons, property or constitutional rights" may challenge the validity of a statute. *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962); *see also Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663 (1962). Defendants in this case have alleged that they will be injured in fact by operation of N.C.G.S. § 52-6 if it is enforced because its effect will be to invalidate the 1962 deed and directly deprive them of their bequests under the Will and Codicil of Fairley J. Jackson. We believe that deprivation of property resulting from enforcement of the statute gives these defendants standing to challenge the constitutionality of the statute.

In *Murphy*, on facts very similar to the facts in the present case, the Court of Appeals held that the petitioner had no standing to challenge the constitutionality of the examination statutes. *Murphy*, 61 N.C. App. at 600, 300 S.E.2d at 873. The court correctly stated that the petitioner "must allege she has sustained an 'injury in fact' as a direct result of the statute to have standing." *Id.* However, the court concluded that the petitioner failed to do so because her injury resulted from "her father's failure to comply with the statute, not because the statute was discriminatory as to her." *Id.* To the extent that this conclusion implies that petitioner, the transferee of her father's interest, suffered no direct injury by operation of the statute, *Murphy* is hereby overruled.

However, the Court of Appeals may have reached the conclusion that petitioner in *Murphy* had no standing because one must "belong[ ] to the class which is prejudiced by the statute." *Martin*, 286 N.C. at 75, 209 S.E.2d at 773. Plaintiffs in this case argue that this rule also prevents defendants from challenging the constitutionality of the statute. However, we believe the recognized exception that "allows an affected party to allege discrimination when no member of a class subject to the alleged discrimination is in a position to raise the constitutional question," *id.*, applies

in this case. Both parties to the 1962 deed are now deceased. Defendants are challenging the statute on the basis that enforcement of the statute would work to deprive them of their interest in the property which they received after the 1962 conveyance to Fairley Jackson individually. There is no other party that could appropriately challenge the statute on these facts.

> The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968).

Stanley, Edwards, Henderson v. Dept. of Conservation & Development, 284 N.C. 15, 27, 199 S.E.2d 641, 650 (1973). We are quite satisfied that defendants in this case have a great enough "stake in the outcome of the controversy" to ensure "concrete adverseness." Thus, we hold that defendants have standing to challenge the statutes in question.

[2] In reviewing the constitutionality of the statutes at issue, plaintiffs urge the Court to limit its review to the law as it existed in 1962. Plaintiffs do not contend that the private examination statutes at issue would be constitutional if they were in force today. Rather, plaintiffs argue that the Court should continue to enforce the examination statutes as they relate to deeds executed during that period. We decline to do so.

In *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507, decided in 1915, this Court held that the private examination statute at issue was a "constitutional exercise of legislative power." *Butler*, 169 N.C. at 588, 86 S.E. at 509. The Court has not revisited the issue since that opinion was rendered. However, the North Carolina Constitution has been amended twice since *Butler* in order to provide greater equality under the law. *See* N.C. Const. art. I, § 19 (amended 1970) and art. X, § 4 (amended 1964). In addition, the Fourteenth Amendment to the United States Constitution has been interpreted since that time to provide greater protections against gender-based discrimination. *See, e.g., Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225 (1971). These changes undoubtedly affected the constitutionality of the statutes prior to their repeal in 1977. We must now decide

whether the private examination statutes were constitutional in 1962 when the deed was executed.

This Court has recognized that the concept of equal protection under the law was inherent in our State Constitution even before the Fourteenth Amendment was explicitly incorporated into it by amendment in 1970. *S.S. Kresge v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971) (citing *State v. Glidden Co.*, 228 N.C. 664, 46 S.E.2d 860 (1948); *State v. Fowler*, 193 N.C. 290, 136 S.E. 709 (1927)). The fact that the deed was executed prior to the express incorporation of the Equal Protection Clause into the State Constitution does not mandate a finding that such discrimination was constitutional at the time the deed was executed. Rather, our determination of the constitutionality of the statutes at issue should be resolved under our present understanding of the principle of equal protection. "When a court is required to decide issues of constitutionality, such issues are resolved under the governing law at that time, although operative facts may predate the recognition of the relied-upon constitutional principal [sic]." *Wessely Energy Corp. v. Jennings*, 736 S.W.2d 624 (Tex. 1987) (citing *Reed v. Campbell*, 476 U.S. 852, 856, 90 L. Ed. 2d 858, 863 (1986)).

In 1987 the Texas Supreme Court held that a repealed statute that required a husband to join his wife in a conveyance of her separate property and required acknowledgement by the wife "privily and apart from her husband" was unconstitutional under current constitutional standards. *Wessely Energy*, 736 S.W.2d at 626-27. Thus, a wife's failure to comply with the statute in 1954, prior to its repeal, did not invalidate the conveyance made at that time. *Id.* at 628. The Texas Supreme Court observed that the "Texas Equal Rights Amendment was not passed until 1972" and "the Equal Protection Clause of the Fourteenth Amendment was not extended to gender-based discrimination until 1971." *Id.* at 627. Nonetheless, the court stated that

> [a]lthough this equal protection analysis was not yet recognized in 1954, we think the wiser course mandates review under standards as we understand them today . . . . By limiting our review to current constitutional analysis, we can resolve constitutional issues without speculating as to the application of constitutional principles or basing a decision of grave importance on conjecture.

Id. We are persuaded that this is the best approach in the present case.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution has generally been interpreted to prohibit unequal application of the law between the sexes. *See, e.g., Caban v. Mohammed*, 441 U.S. 380, 60 L. Ed. 2d 297 (1979); *Orr v. Orr*, 440 U.S. 268, 59 L. Ed. 2d 306 (1979); *Stanton v. Stanton*, 421 U.S. 7, 43 L. Ed. 2d 688 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690 (1975); *Reed v. Reed*, 404 U.S. 71, 30 L. Ed. 2d 225 (1971). Gender-based distinctions in the law must "serve important governmental objectives and must be substantially related to achievement of those objectives" in order to satisfy the guarantees of the Equal Protection Clause of the Fourteenth Amendment. *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 407 (1976). Since 1970 the principle of equal protection of the law has been expressly incorporated in Article I, Section 19 of the North Carolina Constitution. *S.S. Kresge*, 277 N.C. at 660, 178 S.E.2d at 385.

The examination statutes in effect in 1962 required certification by the clerk of court that the conveyance was neither unreasonable nor injurious to the wife. Without the proper certification, the deed was unenforceable. When enacted, the private examination statutes conferred upon women the right to enter into separation agreements, a right which until that time they had been denied. *See Spencer v. Spencer*, 37 N.C. App. 481, 486, 246 S.E.2d 805, 809 (discussing the purpose and rationale of the examination requirements). The examination requirement allowed a wife to void a transaction into which she otherwise competently entered on the sole basis that the contract was not certified. The husband did not have this ability. While the examination statute conferred a new right upon the wife, it also restricted her exercise of that right. It did so for the purpose of protecting the wife from participating in conveyances which were not in her interest. While this may have been a worthy purpose at the time, it nonetheless had the effect of continuing the fiction that formed the basis for so many coverture laws—that a married woman lacked the ability to contract on her own. There was no requirement of certification that a conveyance was neither unreasonable nor injurious to the husband. Thus, the husband had no special protections or constraints under these laws as did the wife.

Plaintiffs have offered no argument as to what significant governmental interests, if any, were served by this gender-based distinction in 1962 and we will not speculate as to what those interests may have been. Since the private examination statutes at issue required unequal application of the law while serving no clearly discernable important governmental interest, they were unconstitutional at the time the deed was executed and will not presently be enforced by this Court.

Finally, plaintiffs argue that failure of this Court to enforce N.C.G.S. § 52-6 will only unsettle land titles, contrary to the doctrine of *stare decisis* which promotes stability in the law. Plaintiffs argue that continued enforcement of the statutes "enables people to predict with reasonabl[e] accuracy the consequences of their deeds and business transactions." Defendants, on the other hand, argue that the private examination statutes have "played havoc" with land titles for decades and that a holding of unconstitutionality will finally resolve this problem by allowing buyers, real estate attorneys and title insurers to rely in confidence on the validity of deeds which previously had to be evaluated on a case-by-case "substantial compliance" basis. *See Kanoy v. Kanoy*, 17 N.C. App. 344, 194 S.E.2d 201, *cert. denied*, 283 N.C. 257, 195 S.E.2d 689 (1973). We find it unnecessary to engage in speculation as to whether our decision will tend to settle or unsettle land titles. Such considerations cannot take precedence over our duty to interpret the Constitution, once a constitutional question is clearly presented and necessary to a determination of the case before us.

For the reasons stated above, we hold that the private examination statutes, N.C.G.S. § 52-6 and N.C.G.S. § 47-39, are unconstitutional. Thus, noncompliance with the private examination statutes will not serve as a basis to invalidate the 1962 deed in this case. Summary judgment in defendants' favor was therefore appropriate. The decision of the Court of Appeals is hereby reversed.

REVERSED.

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

DONNA McBRIDE v. TERRY McBRIDE

No. 419PA92

(Filed 2 July 1993)

1. **Indigent Persons § 14 (NCI4th)— failure to pay child support—civil contempt—incarceration—necessity for appointment of counsel**

Principles of due process embodied in the Fourteenth Amendment to the U.S. Constitution require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. To the extent that the decision in *Jolly v. Wright*, 300 N.C. 83 (1980), is inconsistent with this holding, that decision is overruled.

Am Jur 2d, Criminal Law §§ 735, 977.

2. **Indigent Persons § 14 (NCI4th)— nonsupport—civil contempt—necessity for appointment of counsel—duties of trial court**

At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the court should then inquire into defendant's desire to be represented by counsel and his ability to pay for legal representation, and the court must appoint counsel to represent the defendant if he wishes representation but is unable due to his indigence to pay for such representation.

Am Jur 2d, Criminal Law §§ 735, 977.

On appeal of right, pursuant to N.C.G.S. § 7A-30(1), and on discretionary review of a decision of the Court of Appeals, 108 N.C. App. 51, 422 S.E.2d 346 (1992), affirming an order entered by Fuller, J., in District Court, Davidson County, on 7 June 1991. Heard in the Supreme Court on 13 May 1993.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for the defendant-appellant.

No counsel contra.

MITCHELL, Justice.

On 12 January 1989, the defendant signed a Voluntary Support Agreement in which he agreed to pay $40 per week in child support. On the same day, that agreement was approved and signed by a District Court Judge and thereby became a court order. On 10 May 1991, after the defendant failed to appear in court to respond to a motion to show cause why he should not be held in contempt for failure to pay child support as required by the 12 January 1989 order, an order was entered for his arrest. On 7 June 1991, the defendant was brought before the District Court, Davidson County, for a contempt hearing. The defendant was not represented by counsel, and the issue of whether the defendant was entitled to appointed counsel because of indigence was not raised. The defendant represented himself. The trial court found the defendant in willful contempt of court and ordered that he be held in custody until he purged himself of contempt by paying $1,380.46, the full amount of child support arrearage which he owed. The trial court, however, made no determination as to whether the defendant was presently able to pay that amount.

The defendant remained in jail until 2 July 1991, when he gave notice of appeal and was released pending his appeal. He argued on appeal to the Court of Appeals that, because he was indigent at the time of the contempt hearing which resulted in his incarceration, the trial court had violated his constitutional right to due process by failing to appoint counsel to represent him at that hearing. The Court of Appeals, relying on this Court's holding in *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), rejected the defendant's due process arguments. 108 N.C. App. at 54, 422 S.E.2d at 347. The defendant filed a notice of appeal to this Court on 8 December 1992, as a matter of right under N.C.G.S. § 7A-30(1), involving a substantial question arising under the Constitution of the United States. Additionally, on 11 February 1993, we allowed the defendant's petition for discretionary review of the decision of the Court of Appeals.

In *Jolly*, this Court considered whether an indigent defendant facing incarceration in a civil contempt proceeding brought to enforce compliance with a child support order is constitutionally entitled to representation by appointed counsel. We distinguished the right to counsel in a civil contempt proceeding from the right to counsel in a criminal proceeding, stating that the source of any

right to counsel in a civil contempt action is the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, while the Sixth and Fourteenth Amendments are the source of a criminal defendant's right to counsel. 300 N.C. at 92, 265 S.E.2d at 142. In *Jolly*, we held that

> due process does not require that counsel be automatically appointed for indigents in such cases; rather, the minimum requirements of due process are satisfied by evaluating the necessity of counsel on a case-by-case basis. . . . [D]ue process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness.

Id. at 93, 265 S.E.2d at 143 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790, 36 L. Ed. 2d 656, 666 (1973)). Subsequent decisions by the Supreme Court of the United States and other courts pertaining to the issue of an indigent defendant's right to appointed counsel in a civil contempt proceeding, however, now compel us to re-examine the validity of our holding in *Jolly*.

After our decision in *Jolly*, the Supreme Court of the United States considered whether an indigent parent in a parental status termination proceeding is entitled to appointed counsel by virtue of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. *Lassiter v. Dept. of Social Servs. of Durham County*, 452 U.S. 18, 24, 68 L. Ed. 2d 640, 647 (1981). Although in *Lassiter* the Court concluded that there was no due process requirement of automatic appointment of counsel in a proceeding to terminate parental rights, the Court's analysis in that case is instructive with regard to the analysis which this Court must apply in addressing the issue which we face here.

The Court in *Lassiter* emphasized that, in determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of the indigent's personal liberty rather than on the "civil" or "criminal" label placed on the proceeding. Where due process is concerned, "it is the defendant's interest in personal freedom . . . which triggers the right to appointed counsel." *Lassiter*, 452 U.S. at 25, 68 L. Ed. 2d at 648. The Court noted that, irrespective of the "civil" or "criminal" label placed on a proceeding, "as a litigant's interest in personal liberty diminishes,

so does his right to appointed counsel." *Id.* at 26, 68 L. Ed. 2d at 649. Thus, a defendant in a "civil" juvenile delinquency proceeding is entitled to counsel if the proceeding "may result in commitment to an institution in which the juvenile's freedom is curtailed," *id.* at 25, 68 L. Ed. 2d at 648 (quoting *In re Gault*, 387 U.S. 1, 41, 18 L. Ed. 2d 527, 554 (1967)), while, even in criminal prosecutions, an indigent defendant is not entitled to appointed counsel if the prosecution does not result in actual imprisonment. *Id.* (citing *Scott v. Illinois*, 440 U.S. 367, 373, 59 L. Ed. 2d 383, 389 (1979)).

The Supreme Court concluded in *Lassiter* that "[t]he pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.* The Court further concluded that its precedents establish "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured." *Id.* at 26-27, 68 L. Ed. 2d at 649. The Supreme Court thus determined that a presumption against appointed counsel exists when there is "the absence of at least a potential deprivation of physical liberty" in a particular proceeding. *Id.* at 31, 68 L. Ed. 2d at 652.

Because there was no potential deprivation of physical liberty in the proceeding at issue in *Lassiter*—a proceeding to terminate parental rights—the Court considered the following three factors: (1) the private interests at stake in the proceeding; (2) the government's interest; and (3) the risk that the procedures being used will lead to erroneous decisions. *Lassiter*, 452 U.S. at 27, 68 L. Ed. 2d at 649 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976)). The Court then weighed these three factors against the presumption that a defendant is not entitled to appointed counsel in a proceeding in which his physical liberty is not at stake. Based on this analysis, the Court concluded that due process does not require the appointment of counsel in every parental termination proceeding and adopted the case-by-case standard set forth in *Gagnon v. Scarpelli*, 411 U.S. at 790, 36 L. Ed. 2d at 666, for determining whether appointed counsel is required in a proceeding to terminate parental rights.

In *Gagnon*, the Supreme Court held that an indigent, previously sentenced probationer has a due process right to appointed counsel in a probation revocation hearing only on a case-by-case basis—the state authority administering the probation and parole system has discretion to determine whether counsel is necessary in a particular case to preserve the fundamental fairness of the proceeding. *Id.* The Court reasoned that a probationer has a more limited right to due process than does a criminal defendant who has not yet been convicted of the criminal offense of which she is accused. 411 U.S. at 789, 36 L. Ed. 2d at 666. Because probationers and parolees already have been convicted of the crimes which resulted in their probation or parole, and restrictions have been placed on their continued physical freedom, they have only a conditional interest in physical liberty. *See Morrisey v. Brewer*, 408 U.S. 471, 481-82, 33 L. Ed. 2d 484, 494-95 (1972).

In *Jolly*, this Court relied upon *Gagnon* as the basis for our holding that, in nonsupport civil contempt cases, "the minimum requirements of due process are satisfied by evaluating the necessity of counsel on a case-by-case basis." 300 N.C. at 93, 265 S.E.2d at 143. We reasoned that the potential loss of liberty in parole or probation revocation proceedings "is much more serious and extensive than in nonsupport civil contempt cases," focusing on our assumption that "a person in civil contempt holds the key to his own jail by virtue of his ability to comply" and on our finding of a general lack of complexity involved in civil contempt proceedings for nonsupport. *Id.* Recent practical experience in the courts of North Carolina has diminished our faith in our assumption in *Jolly* that incarcerated civil contemnors hold the keys to their own jail by virtue of their ability to comply with the purge clauses contained in the orders of contempt resulting in their incarceration.

Furthermore, the federal circuit courts of appeal which have addressed the issue now before us appear to have unanimously concluded that due process requires that an indigent defendant in a civil contempt proceeding not be incarcerated absent the assistance of appointed counsel.[1] The majority of state courts

1. *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied*, 474 U.S. 1061, 88 L. Ed. 2d 781 (1986); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *U.S. v. Bobart Travel Agency, Inc.*, 699 F.2d 618 (2d Cir. 1983); *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983); *U.S. v. Anderson*, 553 F.2d 1154 (8th Cir. 1977) (per curiam); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973). *See also Leonard v. Hammond*, 804 F.2d 838 (4th Cir.

which have addressed this issue have reached the same conclusion.[2] In light of *Lassiter* and the numerous recent federal and state court decisions which have addressed the issue now before us, we conclude that our focus in *Jolly* was misplaced. Therefore, we now reconsider the issue of whether due process requires that an indigent defendant be provided appointed counsel at state expense before he may be incarcerated for civil contempt.

As we have pointed out, the Supreme Court of the United States expressly stated in *Lassiter*, albeit by *obiter dictum*, that its precedents compel "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." 452 U.S. at 26-27, 68 L. Ed. 2d at 649. We agree with the view expressed by courts such as the United States Court of Appeals for the Fourth Circuit that: "Although the Court applied a case-by-case approach to the *Lassiter* facts (parental termination proceedings), the Court recognized that a presumption that an indigent has a right to appointed counsel arises when, if he loses, he may be deprived of his physical liberty." *Leonard v. Hammond*, 804 F.2d 838, 841 (4th Cir. 1986). *See also Mead v. Batchlor*, 435 Mich. 480, 493, 460 N.W.2d 493, 499 (1990) (noting "the clear indication that if the indigent's liberty interest had been at stake in *Lassiter*, she would have been entitled to counsel."). *But cf. Walker v. McLain*, 768 F.2d 1181, 1183 n.1 (10th Cir. 1985), *cert. denied*, 474 U.S. 1061, 88 L. Ed. 2d 781 (1986)

1986) (expressing the view that, if faced with the issue, the Supreme Court of North Carolina would reconsider *Jolly* in light of *Lassiter*).

2. *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974); *Dube v. Lopes*, 40 Conn. Supp. 111, 481 A.2d 1293 (1984); *In re Marriage of Stariha*, 509 N.E.2d 1117 (Ind. Ct. App. 1987); *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982); *Rutherford v. Rutherford*, 296 Md. 347, 464 A.2d 228 (1983); *Mead v. Batchlor*, 435 Mich. 480, 460 N.W.2d 493 (1990); *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984); *Ex Parte Martinez*, 775 S.W.2d 455 (Tex. Ct. App. 1989), *overruled on other grounds by Ex Parte Linder*, 783 S.W.2d 754 (Tex. Ct. App. 1990); *Tetro v. Tetro*, 86 Wash. 2d 252, 544 P.2d 17 (1975); *Ferris v. State ex rel. Maass*, 75 Wis. 2d 542, 249 N.W.2d 789 (1977). *See also Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), *cert. denied*, 488 U.S. 1019, 102 L. Ed. 2d 807 (1989) (indigent putative father entitled to appointed counsel in a paternity proceeding; once paternity established, father is responsible for child support and may be incarcerated for failure to provide it).

Contra In re Marriage of Betts, 200 Ill. App. 3d 26, 558 N.E.2d 404 (1990), *appeal denied*, 136 Ill. 2d 541, 567 N.E.2d 328 (1991); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980); *Duval v. Duval*, 114 N.H. 422, 322 A.2d 1 (1974); *State ex rel. Dept. of Human Services v. Rael*, 97 N.M. 640, 642 P.2d 1099 (1982); *In re Calhoun*, 47 Ohio St. 2d 15, 350 N.E.2d 665 (1976).

(implying that *Lassiter* does not establish a presumption of a right to counsel where personal liberty is at stake, but merely "indicates that, where personal liberty is *not* at stake, the court must take a second step in the analysis and weigh the combination of the *Mathews* factors against a presumption *against* the right to counsel."). Accordingly, we conclude that principles of due process embodied in the Fourteenth Amendment required the trial court in the present case to apply the presumption in favor of this defendant's right to appointed counsel in the hearing which resulted in his incarceration.

The private interest at stake in the present case is, perhaps, the most fundamental interest protected by the Constitution of the United States—the interest in personal liberty. A defendant who is found in civil contempt and incarcerated for nonsupport does not "hold the keys to the jail" if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages. While it is true that a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is presently capable of complying, *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142, the facts of the present case illustrate that trial courts do not always make such a determination before ordering the incarceration of a civil contemnor. A trial court's failure to make this determination may result in the incarceration of an indigent defendant who is without the means to procure his release and who, absent those means, may be incarcerated for an indeterminate period of time.[3] Under such facts, one court has pointed out that it is "absurd to distinguish criminal and civil incarceration; from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used." *Walker v. McLain*, 768 F.2d at 1183 (citing *Ridgway v. Baker*, 720 F.2d 1409, 1413 (5th Cir. 1983)). When a truly indigent defendant is jailed

3. A person confined for civil contempt for failure to comply with a court order may be imprisoned as long as the purpose of the order may still be served by compliance and the person to whom the order is directed is able to comply. N.C.G.S. § 5A-21 (1986). In contrast, N.C.G.S. § 5A-12 provides that a defendant found in criminal contempt of court for failure to comply with a court order may be confined for a maximum of 30 days.

pursuant to a civil contempt order which calls upon him to do that which he cannot do—to pay child support arrearage which he is unable to pay—the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense.

Experience has now shown that absent appointed counsel for indigent defendants in civil contempt proceedings, the risk of an erroneous deprivation of personal liberty is high. Because, pursuant to N.C.G.S. § 5A-21, a trial court may not imprison a civil contemnor absent a finding of the contemnor's present ability to comply with the court order, indigent defendants faced with imprisonment in a civil contempt proceeding for nonpayment of child support could avoid imprisonment if they showed that they were unable to pay the amount of child support owed at the time of the hearing. However, as the present case illustrates, indigent defendants often are unaware of this fact. Further, many such defendants would not know how to prove their inability to pay. Despite the statutory requirements, experience subsequent to our decision in *Jolly* also has shown that trial courts do at times order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay the amount of child support owed.[4] An attorney would raise such issues on behalf of an indigent defendant, thereby preventing an unjustified deprivation of the defendant's physical liberty and increasing the accuracy of the proceeding.

[1] In light of the Supreme Court's opinion in *Lassiter*, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. To the extent that our decision in *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), is inconsistent with this holding, that decision is overruled.

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4. An examination of civil contempt cases which have been reviewed by this State's appellate courts indicates that the failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent. *See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988); *Lee v. Lee*, 78 N.C. App. 632, 337 S.E.2d 690 (1988); *McMiller v. McMiller*, 77 N.C. App. 808, 336 S.E.2d 134 (1985); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984); *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983); *Jones v. Jones*, 62 N.C. App. 748, 303 S.E.2d 582 (1983); *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E.2d 786 (1980); *Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971).

[2] At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him.

For the foregoing reasons, we conclude that the trial court erred by ordering that the defendant be incarcerated for civil contempt without the benefit of appointed counsel to represent him at the hearing resulting in his incarceration. Accordingly, the decision of the Court of Appeals affirming the order of the trial court is reversed.

Reversed.

CAPRICORN EQUITY CORPORATION, A NORTH CAROLINA CORPORATION v. THE TOWN OF CHAPEL HILL BOARD OF ADJUSTMENT

No. 187PA92

(Filed 2 July 1993)

Municipal Corporations § 30.8 (NCI3d)— duplexes—defined

A superior court determination that petitioner's proposed duplexes constituted duplexes rather than rooming houses under the Chapel Hill Development Ordinance was reinstated where petitioner applied for building permits to construct duplexes intended for occupancy by graduate students on Roberson Street in Chapel Hill; half of each duplex contained 6 bedrooms with 3 connecting bathrooms, a kitchen/dining area, and a great room; petitioner was notified that the structures appeared to be rooming houses in violation of the zoning ordinance; petitioner made changes in the leases to make all tenants jointly and severally liable for rent, reduced available parking places, and changed individually keyed locks on bedroom doors to privacy locks; certificates of occupancy were issued; petitioner applied for permits for three duplexes on Green Street

which would be substantially similar to those on Roberson Street; permits were denied based on a determination that these were rooming houses; the Board of Adjustment vote to reverse that decision did not reach the required four-fifths majority and the decision to deny the permits stood; the superior court concluded that the structures constituted duplexes and satisfied all applicable requirements and ordered that the respondent Board reverse the town manager's decision to deny the permits; and the Court of Appeals stated that the superior court had failed to set forth findings in support of its conclusion and remanded. The Court of Appeals erred because there were no factual disputes raised by the evidence presented at the hearing before the Board of Adjustment and the superior court, sitting as an appellate court, could freely substitute its judgment for that of respondent. Applying the rules of interpretation that words must be given their ordinary meaning and restrictions on usage construed in favor of the landowner, the Town's ordinance as a matter of law will not support the interpretation urged by the Board. No functional description is given in the ordinance of a "single housekeeping unit" other than the sharing of a single culinary facility; given that these duplexes include only one such facility, the proposed tenants were not excluded from "family" as defined in the ordinance and, although groups whose association is of an institutional nature are regulated by the ordinance, an association of graduate students is not on its face of such a nature.

Am Jur 2d, Buildings §§ 8-11.

On discretionary review of the decision of the Court of Appeals, 106 N.C. App. 134, 415 S.E.2d 752 (1992), reversing a judgment entered 20 February 1991 by Allsbrook, J., in the Superior Court, Orange County, which reversed respondent's decision affirming denial of building and zoning compliance permits to petitioner. Heard in the Supreme Court 15 February 1993.

Michael B. Brough & Associates, by Michael B. Brough, for petitioner-appellant.

Ralph D. Karpinos, Chapel Hill Town Attorney's Office, for respondent-appellee.

PARKER, Justice.

The issues before the Court for review are (i) whether the Court of Appeals erred in remanding the case to superior court to make findings of fact and (ii) whether the superior court erred in reversing the decision of respondent board to deny petitioner's application for building and zoning compliance permits. The factual background of this action is as follows. In October 1989 petitioner applied to the Town of Chapel Hill Inspections Department for building permits to construct duplexes intended for occupancy by graduate students on Roberson Street in Chapel Hill, North Carolina ("Town"). Half of each duplex comprised about 3100 square feet and contained 6 bedrooms with 3 connecting bathrooms, a kitchen/dining area, and a great room. Town's planning director notified petitioner that the structures appeared to be rooming houses in violation of Town's zoning ordinance and that certificates of occupancy would not be issued. Petitioner made changes in the proposed leases to make all tenants jointly and severally liable for rent, reduced available parking spaces, and changed individual keyed locks on the bedroom doors to privacy locks. With these modifications, on 27 July 1990 certificates of occupancy for the Roberson Street duplexes were issued.

On 14 September 1990 petitioner applied for building and zoning compliance permits for three duplexes on Green Street; these duplexes are the subject of the instant action. Each affected half-acre lot was in an R-4 zoning district, within which duplexes are a permitted use. Chapel Hill, N.C., Development Ordinance art. 12, § 12.3 (1990). Each half of a duplex had a proposed floor area of about 3000 square feet, 6 bedrooms with 3 connecting bathrooms, a kitchen/dining area, and a great room. Although the Green Street structures were substantially similar to those on Roberson Street, Town's planning director determined that the Green Street structures constituted rooming houses. Approval of the structures as rooming houses would require site plan approval by the Planning Board and compliance with additional provisions of the Development Ordinance. On 10 October 1990 the town manager officially denied the permit requests on this basis.

Petitioner appealed the town manager's decision to respondent board; respondent heard the appeal on 5 December 1990. Respondent voted six to four to reverse the decision to deny the permits.

Since a four-fifths majority vote was required to reverse, *see* N.C.G.S. § 160A-388(e) (Supp. 1992), the decision to deny the permits stood.

Thereafter, petitioner sought judicial review by petitioning for a writ of certiorari to the superior court. The superior court issued its writ on 31 December 1990. In its judgment, the superior court concluded that the Green Street structures constituted duplexes and satisfied all applicable requirements for issuance of building and zoning compliance permits under Town's ordinance. The court concluded further that respondent's "decision affirming the town manager's interpretation of the development ordinance was erroneous as a matter of law." Thus the court ordered that respondent reverse the town manager's decision to deny permits.

Respondent appealed to the Court of Appeals, contending that (i) respondent correctly denied the permits because the proposed structures were rooming houses and not duplexes and (ii) the superior court erred in reversing respondent's decision interpreting Town's ordinance. The Court of Appeals addressed only the latter contention and stated that the superior court reversed respondent's decision on grounds that its interpretation of the ordinance was erroneous as a matter of law but failed to set forth any findings of fact in support of this conclusion or tending to show respondent's "decision was arbitrary, oppressive, or an abuse of authority." *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjust.*, 106 N.C. App. 134, 138, 415 S.E.2d 752, 755, *review allowed*, 332 N.C. 482, 421 S.E.2d 350 (1992). The court remanded the case to the superior court with instructions to make adequate findings of fact establishing the erroneous nature of respondent's interpretation and decision and to "mold its findings to the language of the ordinance." *Id.* at 138-39, 415 S.E.2d at 755. This Court granted petitioner's petition for discretionary review on 10 October 1992.

Chapter 160A provides that every decision of a municipal board of adjustment "shall be subject to review by the superior court by proceedings in the nature of certiorari." N.C.G.S. § 160A-388(e) (Supp. 1992). In proceedings of this nature,

> the findings of fact made by the Board, if supported by evidence introduced at the hearing before the Board, are conclusive. *In re Application of Hasting*, 252 N.C. 327, 113 S.E.2d 433; *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E.2d 1. The matter is before the Court to determine whether an error of law has been committed and to give relief from an order

> of the Board which is found to be arbitrary, oppressive or attended with manifest abuse of authority. *Durham County v. Addison*, 262 N.C. 280, 136 S.E.2d 600; *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128. It is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the Board are supported by the evidence before the Board. It may vacate an order based upon a finding of fact not supported by evidence.

In re Campsites Unlimited, 287 N.C. 493, 498, 215 S.E.2d 73, 76 (1975); *see also Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 54-55, 344 S.E.2d 272, 274 (1986). The superior court is not the trier of fact but rather sits as an appellate court and may review both (i) sufficiency of the evidence presented to the municipal board and (ii) whether the record reveals error of law. *Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 626, 265 S.E.2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980); *see also Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662 ("The superior court judge may not make additional findings [of fact]. The test is whether the findings of fact are supported by competent evidence in the record; if so, they are conclusive upon review.") (citation omitted), *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990). *Contra CG&T Corp. v. Bd. of Adjustment of Wilmington*, 105 N.C. App. 32, 40, 411 S.E.2d 655, 660 (1992) (adopting whole record test). In light of these principles of review applicable to the superior court when hearing a case based solely on the record certified from an administrative board, the Court of Appeals erred in remanding this case to the superior court for findings of fact.

The superior court's judgment states that the court "reviewed the undisputed facts set forth in the record stipulated by counsel for petitioner and respondent as the official record of the board of adjustment's decision." Respondent did not assign error to this portion of the judgment and argued in the Court of Appeals and before this Court that written findings of fact were not required. Before this Court petitioner argues, and we agree, that there were no factual disputes raised by the evidence presented at the hearing before respondent. The questions respondent was called upon to decide were (i) how to interpret "duplex" as used in Town's ordinance and (ii) whether on the undisputed facts petitioner's plan came within the purview of that definition. *See Concrete Co. v.*

Board of Commissioners, 299 N.C. at 629, 265 S.E.2d at 384 (stating issue was whether commissioners made an error of law in interpreting exemption section of county's ordinance).

The only question for the Court of Appeals, then, was whether in reversing respondent's decision, the superior court committed error of law in interpreting and applying the municipal ordinance. In determining whether error of law existed, the superior court, sitting as an appellate court, could freely substitute its judgment for that of respondent and apply *de novo* review as could the Court of Appeals with respect to the judgment of the superior court. *See Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 464-65, 276 S.E.2d 404, 409-10 (1981) (stating that error in interpreting a statute is an error of law and the court may apply *de novo* review). Upon *de novo* review of the Chapel Hill Development Ordinance, we conclude the decision of the superior court must be reinstated.

The applicable ordinance provided as follows:

> 2.35 Dwelling: Any building or structure (except a mobile home) that is wholly or partly used or intended to be used for living or sleeping by one or more human occupants.
>
> 2.39 Dwelling, Two-Family—Duplex: A single dwelling consisting of two (2) dwelling units (other than a two-family dwelling—including accessory apartment—see Section 2.38 above), provided [that] the two dwelling units are connected by or share a common floor-to-ceiling wall, or, if the two units are arranged vertically, that they share a common floor/ceiling and not simply by [sic] an unenclosed passageway (e.g., covered walkway).
>
> . . . .
>
> 2.41 Dwelling Unit: A room or group of rooms within a dwelling forming a single independent habitable unit used or intended to be used for living, sleeping, sanitation, cooking, and eating purposes by one family only; for owner occupancy or for rental, lease or other occupancy on a weekly or longer basis; and containing independent kitchen, sanitary, and sleeping facilities; and provided such dwelling unit complies with Chapel Hill's Minimum Housing Code.

2.45 Family: An individual living alone or two (2) or more persons living together as a single housekeeping unit, using a single facility in a dwelling unit for culinary purposes. The term "family" shall include an establishment with support and supervisory personnel that provides room and board, personal care and habilitation services in a family environment for not more than 6 residents who are handicapped, aged, disabled, or who are runaway, disturbed or emotionally deprived children and who are undergoing rehabilitation or extended care. The term "family" shall not be construed to include a fraternity or sorority, club, rooming house, institutional group or the like.[1]

2.66 Lodging Unit: A room or group of rooms forming a separate habitable unit used or intended to be used for living and sleeping purposes by one family only, without independent kitchen facilities; or a separate habitable unit, with or without independent kitchen facilities, occupied or intended to be occupied by transients on a rental or lease basis for periods of less than one week.

2.108 Rooming House: A building or group of buildings containing in combination three (3) to nine (9) lodging units intended primarily for rental or lease for periods of longer than one week, with or without board. Emergency shelters for homeless persons and residential support facilities, as defined elsewhere in this ordinance, are not included.

Chapel Hill, N.C., Development Ord. art. 2 (1990).

In interpreting a municipal ordinance "[t]he basic rule is to ascertain and effectuate the intent of the legislative body." *Concrete Co. v. Board of Commissioners*, 299 N.C. at 629, 265 S.E.2d at 385. Intent is determined according to the same general rules governing statutory construction, that is, by examining (i) language, (ii) spirit, and (iii) goal of the ordinance. *Id.* Since zoning ordinances are in derogation of common-law property rights, limitations and

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1. This section was amended effective 29 October 1990 and now reads as follows:

> A duplex structure with more than three (3) bedrooms within either dwelling unit shall be classified as a Rooming House unless each dwelling unit is occupied by persons related by blood, adoption, or marriage, with not more than two unrelated persons.

restrictions not clearly within the scope of the language employed in such ordinances should be excluded from the operation thereof. *Yancey v. Heafner*, 268 N.C. 263, 266, 150 S.E.2d 440, 443 (1966).

Applying these principles, and turning first to the language of the ordinance, we note that lodging units are intended to be occupied by transients for periods of less than one week. Rooming houses are made up of lodging units intended primarily for rental or lease for periods of longer than one week with or without board. These definitions contemplate ongoing, on-site property management of the type usually associated with hotels, motels, and boarding houses. By contrast, dwelling units are not intended for transients and do not offer board. Dwelling units are intended for use by one family only, and a duplex is simply a unitary structure which includes two dwelling units. Families *live together as a single housekeeping unit and use a single facility in a dwelling unit for culinary purposes* but may not include sororities, fraternities, clubs, rooming house lodgers or institutional groups. As the Court of Appeals noted, in defining "family" Town's ordinance imposed neither a numerical nor relationship requirement and did not specifically define the term except to enunciate certain exclusions.

Admittedly, controlling density, traffic congestion, noise pollution and parking problems and preserving the residential character of neighborhoods are legitimate goals of zoning ordinances; and boarding houses, fraternity houses and the like present urban concerns particularly in university towns. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 39 L. Ed. 2d 797 (1974). Notwithstanding the worthiness of these goals, however, neither the court nor the adjustment board is authorized, under the guise of construction, "to supply what the legislative body might have provided but which the court cannot [by] reasonable construction say that it did provide." 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.128.10, at 523 (3d ed. 1991). Applying the rules of interpretation that words must be given their ordinary meaning and restrictions on usage construed in favor of the landowner, we find as a matter of law that Town's ordinance under scrutiny will not permit the interpretation urged by respondent.

No functional description is given of "single housekeeping unit" other than the sharing of a single culinary facility. Given that petitioner's duplexes included only one such facility, the proposed tenants were not excluded from "family" as defined in the or-

dinance. In addition, although groups of persons whose association is of an institutional nature are enumerated and regulated by the ordinance, the association of graduate students is not on its face of such a nature. Being of a noninstitutional nature, such an association is not specifically regulated and so, following the canons of construction, must be excluded from the operation of that part of the ordinance which affects persons in associations of an institutional type.

For the foregoing reasons we conclude the superior court's determination that petitioner's proposed duplexes constituted duplexes under Town's ordinance must be reinstated. Therefore, we reverse and remand to the Court of Appeals for affirmance of the decision of the superior court.

REVERSED.

IN THE MATTER OF THE WILL OF JOHN R. JARVIS, DECEASED

No. 310PA92

(Filed 2 July 1993)

1. Wills § 3 (NCI3d) — signing of will — testator assisted by attorney who also witnessed — directed verdict for propounder — no error

The trial court correctly directed a verdict for the propounders on the issue of whether a will's execution met the requirements of N.C.G.S. § 31-3.3 where the testator, Mr. Jarvis, suffered a stroke in 1970 which rendered him partially paralyzed; he was right-handed and the stroke left that hand useless and his walking impaired; he was able to articulate only yes or no; he died in 1986 leaving a will dated 1977; Jarvis' attorney testified that Mr. and Mrs. Jarvis came to his office one or two weeks prior to the execution of the document; the attorney advised them as to a will and they authorized him to draft a document reflecting their wishes; when the Jarvises returned to his office, the attorney directed them to read the draft of the will; after Mr. Jarvis indicated that he had done so, the attorney read the document to him item by item and asked whether this was what he intended to do and whether

he was satisfied; Jarvis indicated his assent to each item and affirmed that this was exactly what he wanted to do; the attorney called in his son, a law student, and asked Jarvis if the document he had just read was his Last Will and Testament and whether Jarvis wanted him and his son to be witnesses to the will; Jarvis again assented; the attorney asked whether Jarvis wanted the attorney to sign Jarvis' name to the will; Jarvis said that he did, then went around the attorney's desk, grasped the pen firmly in his left hand, and, guided by the attorney's hand on his, made his mark; the attorney then signed Jarvis' name on each page where Jarvis had made his mark; and the attorney and his son then signed as witnesses. Although caveators argue that the attorney's assisting Jarvis to form his mark and signing Jarvis' name beside each mark disqualified him as a witness, the validity of an instrument is not affected by the testator's receiving physical assistance in making his mark. Nothing in Chapter 31 indicates that a person assisting the testator either in forming his mark or by signing for him at his direction is thereby disqualified as a witness.

Am Jur 2d, Wills § 301.

2. Wills § 21.4 (NCI3d)— execution of a will—evidence of undue influence—insufficient

The trial court correctly directed a verdict for the propounders on the issue of whether a signature on a will was obtained by undue influence where the caveators did not identify the individual who allegedly asserted the invidious influence nor suggest how the manner in which the testator signed the document purporting to be his will manifested the intentions of anyone other than the testator himself.

Am Jur 2d, Wills § 479.

3. Wills § 22 (NCI3d)— execution of a will—mental capacity—directed verdict improper

The trial court should not have granted a directed verdict for propounders on the issue of testamentary capacity where the testimony of the testator's attorney, which recounted the circumstances under which the testator read and ultimately signed the will, tended to show that he had the mental capacity to make a will but other evidence showed that he did not. Whether the caveator's witnesses were credible and whether

the evidence was sufficient to rebut the presumption of testamentary capacity were questions for the jury.

Am Jur 2d, Wills §§ 70, 106, 151, 164.

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 a published decision of the Court of Appeals, 107 N.C. App. 34, 418 S.E.2d 520 (1992), affirming a judgment entered 20 December 1990 by Lamm, J., in Superior Court, Madison County, directing a verdict for the propounders of a will. Heard in the Supreme Court 11 May 1993.

Morris and Morris, by William C. Morris, Jr., for propounder-appellees Mozelle Jarvis and Jack M. Jarvis.

Roberts Stevens & Cogburn, P.A., by Max O. Cogburn and Vernon S. Pulliam, for caveator-appellants Kenneth R. Jarvis and James R. Jarvis.

WHICHARD, Justice.

This case presents the question whether the trial court properly directed a verdict for the propounders of a will on the issues of improper execution, testamentary capacity, and undue influence. We hold that the trial court properly directed verdicts as to the issues of improper execution and undue influence, but that a directed verdict on the question of whether the testator had the mental capacity to make a will was improper.

John R. Jarvis, the testator, suffered a stroke in 1970, which rendered him partially paralyzed. Jarvis was right-handed, and the stroke left that hand useless and his walking impaired. Jarvis' speech was also affected: after the stroke he was able to articulate only "yes" and "no." Jarvis died in December 1986. Probate of a paper writing dated 6 July 1977 purporting to be Jarvis' Last Will and Testament was opposed by the older two of Jarvis' three sons on grounds of improper execution under N.C.G.S. § 31-3.3, the testator's mental incapacity, and undue influence in obtaining the testator's signature.

After the presentation of evidence by both the propounders and the caveators, the trial court denied the caveators' motion

for directed verdict on the issue of failure to prove due execution of the paper writing, and it granted directed verdict for propounders on the issues of due execution, mental capacity, and undue influence. The Court of Appeals affirmed. *In re Will of Jarvis*, 107 N.C. App. 34, 418 S.E.2d 520 (1992). On 7 January 1993 this Court granted the caveators' petition for discretionary review.

A motion for directed verdict under N.C.G.S. § 1A-1, Rule 50 (1990), presents the question whether as a matter of law the evidence is sufficient to entitle the nonmovant to have a jury decide the issue. *E.g., United Labs v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). In passing on this motion the trial court must consider the evidence in the light most favorable to the nonmovant, resolving all conflicts in the evidence in his favor and giving him the benefit of all favorable inferences that may be reasonably deduced from the evidence. *Id.; Anderson v. Butler*, 284 N.C. 723, 730-31, 202 S.E.2d 585, 590 (1974). If the evidence is sufficient to support each element of the nonmovant's case, the motion for directed verdict should be denied. *E.g., Braswell v. Braswell*, 330 N.C. 363, 367, 410 S.E.2d 897, 899 (1991), *rehearing denied*, 330 N.C. 854, 413 S.E.2d 550 (1992). The credibility of the testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. *Cutts v. Casey*, 278 N.C. 390, 421, 180 S.E.2d 297, 314 (1971).

[1] Caveators first argue that the circumstances of the testator's signing the document failed to comport with the requirements of N.C.G.S. § 31-3. The document was drafted and witnessed by Jarvis' attorney. He testified that Mr. and Mrs. Jarvis came to his office one or two weeks prior to the execution of the document, seeking advice about executing a will. The attorney advised the Jarvises as to what he would recommend for them, and they authorized him to draft a document reflecting their wishes. When the Jarvises returned to his office on 6 July, the attorney directed them to read over the draft of the will he had prepared for Mr. Jarvis. When Mr. Jarvis indicated he had done so, the attorney read the document to him, item by item, and asked whether this was what he intended to do and whether he was satisfied. Jarvis indicated his assent to each item and affirmed that what he had heard the attorney read was exactly what he wanted to do. The attorney called in his son, a law student, and asked Jarvis if the document he had just read was his Last Will and Testament and whether Jarvis wanted him and his son to be witnesses to the will. Jarvis

again assented. The attorney then asked Jarvis whether he wanted him to sign Jarvis' name to the will. Jarvis said that he did. Jarvis then came around behind the attorney's desk, grasped the pen firmly in his left hand and, guided by the attorney's hand on his, made his mark. The attorney then signed Jarvis' name on each page where Jarvis had made his mark. The attorney and his son then signed as witnesses.

First, the caveators argue that the attorney's assisting Jarvis to form his mark and signing Jarvis' name legibly beside each mark disqualified him as a witness and that the will was therefore invalid for lack of two attesting witnesses. As the Court of Appeals noted, the validity of an instrument is not affected by the testator's receiving "physical assistance in making his mark." *In re Will of Jarvis*, 107 N.C. App. at 41, 418 S.E.2d at 524 (quoting *In re Will of King*, 80 N.C. App. 471, 476, 342 S.E.2d 394, 396, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986)). *See also In re Will of Knowles*, 11 N.C. App. 155, 180 S.E.2d 394 (1971) (physically incapacitated testator placed hand on pen while minister made his mark). The validity of the signature does not depend upon the testator's making his mark independently. Indeed, the statute expressly permits a testator not to sign at all, but to have "someone else" sign his name "in [his] presence and at his direction." N.C.G.S. § 31-3.3(b) (1984); *In re Will of Williams*, 234 N.C. 228, 234-35, 66 S.E.2d 902, 906 (1951). "The purpose of requiring the testator to sign his name is to eliminate, as far as possible, the offering of forged or incomplete instruments for probate." 1 Norman A. Wiggins, *Wills and Administration of Estates in North Carolina* § 71, at 106 (2d ed. 1983). This purpose was met in the manner Jarvis signed the document in the presence of two witnesses. Nothing in Chapter 31 indicates that a person assisting the testator either in forming his mark or by signing for him at his direction is thereby disqualified as a witness to the document. The evidence is uncontradicted that Jarvis "signed" the document he published as his Last Will and Testament and that two witnesses present at that time attested the signature and also signed the document. We therefore hold that the Court of Appeals correctly affirmed the judgment of the trial court directing a verdict for propounders on the issue of whether the document's execution complied with the requirements of N.C.G.S. § 31-3.3.

[2] We find the record similarly devoid of evidence that Jarvis' signature was obtained by undue influence. "Undue influence" is

"the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made." *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980) (quoting *In re Will of Kemp*, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951)). Although caveators contend certain factors "relevant on the issue of undue influence," *Andrews*, 299 N.C. at 55, 261 S.E.2d at 200, such as the testator's age and infirmity, were supported by the evidence, caveators neither identify the individual who allegedly asserted this invidious influence nor suggest how the manner in which the testator signed the document purporting to be his will manifested the intentions of anyone other than the testator himself. Again, we hold that the Court of Appeals correctly affirmed the trial court's directed verdict for propounders on this issue.

[3] Finally, the caveators argue that the trial court improperly directed a verdict for the propounders on the issue of the testator's testamentary capacity. A person has the mental capacity to make a will if he (1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate. *In re Will of Shute*, 251 N.C. 697, 699, 111 S.E.2d 851, 853 (1960).

The testimony of the testator's attorney, which recounted the circumstances under which Jarvis read and ultimately signed his purported will, tended to show Jarvis' mental capacity to make a will at that time. Other evidence, however, viewed in the light most favorable to caveators, as required, tended to show he did not.

Charles Eatmon, the testator's cousin, testified he doubted whether John Jarvis had sufficient mental capacity to form a plan for the disposition of his property by will, and he continued:

> I doubt if he was able to—to understand what it [his property] was. . . . Some things he could understand. He knew these roads, he could remember that. I think he knowed where his property was. But I don't believe he would have knowed what he was signing and what he wasn't.

Kenneth Jarvis, the testator's oldest son, testified that, in his opinion, his father did not have sufficient mental capacity to know the nature and extent of his property, and to know the natural objects of his bounty, and to form a plan for the disposition

of the property. Asked whether "in general . . . your father didn't have enough sense to make a Will in 1977," Kenneth Jarvis responded, "I'm saying due to the stroke he did not." Kenneth Jarvis testified that his father

> did not know the extent of the value of the property. . . . He didn't know where all of his property was. . . . I have had him out driving him enough times that it is my opinion. I drove him all over everywhere, I don't think he knew where all his property was.

James Jarvis, the testator's older son, testified he did not think his father had sufficient mental capacity to know what property he had, and to know who his people were and to work out a plan to dispose of his property

> because he had some property on top of the hill. I was up there one day squirrel hunting and the fence looked like it had been moved. I went back down there and told him, I said, 'If you will get in the car I can drive you right straight to it.' [He] wasn't interested, he didn't want to do that.

Both sons testified that their father sometimes got "confused" when he was asked questions and said "yes" when he meant "no."

Edward Jarvis, a nephew, testified that he did not think his uncle had sufficient mental capacity to know what property he had, to know who his people were, and to form a plan for the disposition of his property. Edward Jarvis concluded, without objection, that his uncle "didn't have the mental capacity to make a Will." He testified:

> Because he was like a kid, he didn't understand. . . . I knew him as well as anybody, and I couldn't get across to him on some things, and I couldn't understand him on some things. I don't know how that anybody could say that he was willing and able and wanted to do this, that and the other when—when nobody could understand him.

"The law presumes that a testator possessed testamentary capacity, and those who allege otherwise have the burden of proving by the preponderance or greater weight of the evidence that he lacked such capacity." *In re York's Will*, 231 N.C. 70, 70, 55 S.E.2d 791, 792 (1949). The evidence is to be considered in the light most favorable to the caveators, deeming their evidence to

be true, resolving all conflicts in their favor, and giving them the benefit of every reasonable, favorable inference. *In re Andrews*, 299 N.C. at 62-63, 261 S.E.2d at 204.

> [I]t is the duty of the judge alone to decide legal questions presented at the trial, and to instruct the jury as to the law arising on the evidence given in the case; [and] it is the task of the jury alone to determine the facts of the case from the evidence adduced.

In re Will of Bartlett, 235 N.C. 489, 491, 70 S.E.2d 482, 485 (1952).

We hold that the foregoing caveators' evidence of the testator's mental incapacity after his stroke and at the time he executed his purported will was sufficient to withstand the propounders' motion for a directed verdict. Whether caveators' witnesses were credible and whether the evidence, viewed in the light most favorable to caveators, was sufficient to rebut the presumption of Jarvis' testamentary capacity, were questions for the jury, and the trial court erred in directing a verdict for propounders on this issue.

Accordingly, the decision of the Court of Appeals as to the issues of improper execution and undue influence is affirmed. The decision of the Court of Appeals as to the issue of testamentary capacity is reversed, and the case is remanded to the Court of Appeals for further remand to the Superior Court, Madison County, for trial on the issue of Jarvis' testamentary capacity.

AFFIRMED IN PART; REVERSED IN PART.

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

STATE OF NORTH CAROLINA v. JEFFREY ALLEN LANE

No. 202A92

(Filed 2 July 1993)

1. **Criminal Law § 78 (NCI4th)— pretrial publicity about unrelated murder—denial of venue change**

The trial court did not err in the denial of defendant's motions for a change of venue of his first-degree murder case based on pretrial publicity surrounding the killing of a deputy sheriff in the same county by another person less than one month before defendant's trial where defendant's evidence showed only that publicity about the deputy's killing and funeral was extensive and that the person charged with the deputy's killing, like defendant, was a black, teenage male; all twelve jurors stated unequivocally that their decision would be unaffected by anything they heard or read; defendant referred to no responses by jurors to voir dire questions that would indicate prejudice against him because of pretrial publicity or community sentiment surrounding the killing of the deputy; and defendant thus failed to meet his burden of proving that there was a reasonable likelihood that due to existing prejudice he would not receive a fair trial in the county.

Am Jur 2d, Criminal Law §§ 372 et seq.

2. **Jury § 220 (NCI4th)— capital case—jury voir dire—appropriateness of death or life sentence—refusal to allow questions—harmless error**

Assuming *arguendo* that the trial court erred in refusing to allow defendant to question prospective jurors in a first-degree murder trial concerning the circumstances in which the death penalty or life imprisonment would be appropriate, such error was harmless since the jury recommended and defendant received a sentence of life imprisonment.

Am Jur 2d, Jury §§ 289, 290.

3. **Jury § 215 (NCI4th)— belief in death penalty—challenge for cause properly denied**

The trial court did not abuse its discretion in the denial of defendant's challenges for cause of a prospective juror in a capital case where the juror stated during examination by

the State that she would be able to return a verdict of life imprisonment; the juror then indicated during examination by defendant that the only time the death penalty was not appropriate was when the defendant acted in self-defense; the trial court rejected defendant's first challenge for cause and allowed the State to attempt to rehabilitate the juror; after the State clarified the role of mitigating circumstances, the juror stated that she would be able to consider each mitigating circumstance that she was instructed to consider and assured the court that she would be able to impose a sentence of life imprisonment; and the court thereafter denied defendant's renewed challenge for cause.

Am Jur 2d, Jury §§ 289, 290.

4. Evidence and Witnesses § 1240 (NCI4th)— incriminating statement—no custodial interrogation—Miranda warnings not required

Defendant's first incriminating statement during an interview by SBI investigators was not the result of custodial interrogation for *Miranda* purposes where the trial court found that defendant was told that he was free to leave on several occasions during the interview, that defendant did not ask to leave or request an attorney at any time, and that defendant was not placed under arrest after making his first statement but was taken home by the SBI investigators. Therefore, this statement was admissible even though defendant was not given the *Miranda* warnings.

Am Jur 2d, Criminal Law §§ 788 et seq.; Evidence §§ 555-557, 614.

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

Appeal of right, pursuant to N.C.G.S. § 7A-27(a), from a judgment imposing a sentence of life imprisonment entered by Ellis, J., on 24 July 1991, in Superior Court, Columbus County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court on 17 March 1993.

Michael F. Easley, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

Harry H. Harkins, Jr., for the defendant-appellant.

MITCHELL, Justice.

The defendant was tried upon proper bills of indictment charging him with first-degree murder and burglary. The jury found the defendant guilty of first-degree murder, based upon the felony murder theory, and of burglary. After a sentencing proceeding, pursuant to N.C.G.S. § 15A-2000 (1988), the jury recommended a sentence of life imprisonment for the murder. The trial court entered judgment accordingly and arrested judgment on the burglary conviction. The defendant appealed to this Court as a matter of right.

The State's evidence tended to show, *inter alia*, the following. On 10 July 1990, several neighbors found Janie B. McBride dead in her Chadbourn home. The medical examiner performed an autopsy and found that McBride had died from two stab wounds to the left side of her chest.

On 27 August 1990, two investigators from the State Bureau of Investigation (SBI) visited the defendant at his residence and asked if he would speak with them about the murder of Janie McBride. The defendant agreed and met the investigators at the Tabor City Police Department shortly thereafter. The investigators questioned the defendant from 8:45 p.m. until 12:25 a.m. The investigators did not advise the defendant of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), but they did tell the defendant several times during the interview that he was free to leave.

The defendant initially denied any involvement with the murder. However, after one and one-half hours of questioning, the defendant told the investigators that he and another man, Terry Campbell, had gone to the victim's house to steal money in order to buy crack cocaine. The defendant said that when he and Campbell broke into the victim's house, she awoke and said, "Who is that?" The defendant stated that Campbell rushed towards the victim and stabbed her several times. According to the defendant, Campbell then stole $40, and the two men fled from the home.

The defendant's description of his involvement in McBride's killing was summarized in a written statement which the defendant

agreed to sign. The statement contained an affirmation of the defendant's understanding that he was not under arrest and was free to leave at any time.

The next day, the SBI investigators learned that Terry Campbell had been in jail at the time of the McBride murder. As a result, the defendant was taken into custody and given the *Miranda* warnings. The defendant waived his rights and agreed to be interviewed a second time. The defendant then confessed to stabbing McBride.

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] The defendant first assigns as error the trial court's denials of his initial and renewed motions for change of venue made pursuant to N.C.G.S. § 15A-957. The defendant contends that pretrial publicity surrounding the killing of a Columbus County deputy sheriff less than one month before the defendant's trial was prejudicial. Although the defendant concedes that the publicity dealt with a crime entirely unrelated to the McBride murder and involving a different defendant, he nevertheless contends that he was denied his right to a fair trial by the pretrial publicity due to the similarities between the two defendants. Like the defendant in the present case, the defendant charged with the deputy's killing was a black, teenage male. Both defendants faced a capital trial in Columbus County.

On appeal, the defendant argues that the trial court's rulings deprived him of his constitutional right to a fair and impartial trial. Further, the defendant contends that the extensive pretrial publicity surrounding the deputy's killing and funeral produced a jury predisposed to decide the defendant's case based on something heard or seen outside the courtroom.

The defendant bears the burden of proof in a hearing on a motion for a change of venue due to existing prejudice in the county in which a prosecution is pending. *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991) (quoting *State v. Abbott*, 320 N.C. 475, 358 S.E.2d 365 (1987)). In order to prevail, the defendant must establish that there is a reasonable likelihood that due to existing prejudice he will not receive a fair trial. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33 (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600 (1966)); *accord State v. Hunt*, 325 N.C.

187, 381 S.E.2d 453 (1989). The determination of whether the defendant has carried his burden of proof rests initially within the discretion of the trial court. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. *Id.*

The Record on Appeal shows that the killing of the deputy received extensive publicity in Columbus County. However, the defendant has not established any specific prejudice against him as a result of the publicity. Although the defendant acknowledges with commendable candor that no specific prejudice against this defendant was demonstrated to the trial court, he contends that evidence concerning the pretrial publicity surrounding the unrelated murder of the deputy raised the likelihood that the jury based its decision in this case on information obtained outside the courtroom.

The record shows that of the twelve jurors who decided the present case, five jurors had no previous knowledge of this case. The remaining seven jurors had formed no opinion concerning this defendant from any pretrial publicity. All twelve jurors stated unequivocally that their decision would be unaffected by anything they had read or heard. Further, the defendant does not refer to any responses to *voir dire* questions that would indicate prejudice against him because of pretrial publicity or community sentiment surrounding the killing of the deputy. We conclude that the defendant has not met his burden of proof and that the trial court did not err by denying the motions for change of venue.

[2] The defendant next assigns as error the trial court's refusal to allow the defendant to question prospective jurors concerning circumstances in which the death penalty or life imprisonment would be appropriate. The defendant wished to ask prospective jurors: (1) for examples of cases where they might think the death penalty would be appropriate, (2) whether there was any situation in which they would not be willing to consider life imprisonment, (3) what type of crime justified imposition of the death penalty, and (4) under what circumstances they would consider the death penalty appropriate. The trial court refused to allow the defendant to ask these questions.

The defendant contends that the *voir dire* in the present case was constitutionally insufficient to enable the defendant to ascertain the circumstances wherein the jurors believed life or death

to be appropriate, or whether they could give proper weight to valid mitigating circumstances. Assuming *arguendo* that the trial court did err in refusing to allow the defendant to ask these questions of potential jurors, any error was harmless since the jury recommended a life sentence and the defendant was sentenced to life imprisonment. Therefore, we find no prejudicial error.

[3] The defendant next assigns as error the trial court's denial of his challenges for cause of prospective juror Melody Spivey. The trial court should excuse for cause any juror who is "unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15-1212(8) (1988). In *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991), we held that a judge "has broad discretion 'to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion.'" *Id.* (quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979)).

The trial court in the present case first instructed prospective juror Spivey on the procedures involved in the trial of a capital case. At that time, Spivey stated that she understood the procedures, specifically the capital sentencing procedure. Under further examination by the State, Spivey stated that she would be able to return a verdict of life imprisonment. However, under examination by the defendant, Spivey indicated that the only time the death penalty was not appropriate was when the defendant was acting in self defense.

The trial court then rejected the defendant's first challenge for cause and allowed the State to attempt to rehabilitate Spivey. After the State clarified the role of mitigating circumstances, Spivey stated that she would be able to consider each and every mitigating circumstance that she was instructed to consider. Spivey assured the court that she would be able to impose a sentence of life imprisonment. Thereafter, the court denied the defendant's renewed challenge for cause, and the defendant peremptorily challenged Spivey. From the record before us, we conclude that the defendant has not established any abuse of discretion by the trial court in denying defendant's challenges for cause as to juror Spivey. We find no error.

[4] The defendant next assigns as error the trial court's denial of his motion to suppress his first inculpatory statement to officers.

Specifically, the defendant contends that he was in custody without being advised of his *Miranda* rights during the first interview with the SBI investigators which concluded with his incriminating statement.

In *Miranda*, the Supreme Court of the United States held that "the prosecution may not use statements . . . stemming from *custodial* interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966) (emphasis added). To determine whether a suspect is in custody, a court must apply "an objective test of whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way or, to the contrary, would believe that he was free to go at will." *State v. Phipps*, 331 N.C. 427, 442, 418 S.E.2d 178, 185 (1992) (quoting *State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 581 (1982)).

The trial court found that the defendant in the present case was told that he was free to leave on several occasions during the interview on 27 August 1990. The trial court also found that the defendant did not ask to leave and did not request at any time that an attorney be present. Further, the defendant was not placed under arrest after making his first statement, but was taken home by the SBI investigators. Based on these findings of fact, the trial court concluded as a matter of law "that the statement made on 27 August 1990 did not require that *Miranda* warnings be given, that [the defendant] was not in custody and was free to leave and did leave."

The trial court's findings of fact following a *voir dire* hearing are binding on this court when supported by competent evidence. *State v. Mahaley*, 332 N.C. 583, 592, 423 S.E.2d 58, 64 (1992). As we clarified in *Mahaley*, the trial court's conclusions of law based upon those findings are fully reviewable on appeal. *Id.; see also State v. McKoy*, 323 N.C. 1, 372 S.E.2d 12 (1988), *vacated on other grounds*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990); *State v. Perdue*, 320 N.C. 51, 357 S.E.2d 345 (1989). In the present case, the evidence tended to show that the defendant was told several times during the 27 August 1990 interview that he was free to leave and that he was not under arrest. The evidence also showed that the defendant was not arrested on 27 August 1990, but was taken home

by the SBI investigators after the interview. Thus, the trial court's findings were supported by competent evidence. Further, the facts found by the trial court required its conclusion that the defendant did not undergo *custodial* interrogation for *Miranda* purposes on 27 August 1990. Accordingly, we find no error.

For the foregoing reasons, we conclude that the defendant received a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JEFFREY JAMES GINYARD

No. 365A92

(Filed 2 July 1993)

1. **Homicide §§ 254, 257 (NCI4th)— murder—evidence of premeditation and deliberation—wounds—possession of weapon**

There was sufficient substantial evidence of premeditation and deliberation to support the trial court's denial of the defendant's motion to dismiss at the conclusion of all of the evidence where evidence of the nature and number of the victim's wounds provides substantial evidence from which the jury could properly infer that defendant premeditated and deliberated before killing the victim, and the fact that defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation.

Am Jur 2d, Homicide §§ 437 et seq.

2. **Homicide § 528 (NCI4th)— murder—failure to charge on voluntary manslaughter—charged on first and second degree—conviction of first—harmless error**

Any error in not instructing the jury on voluntary manslaughter was harmless where the trial court instructed the jury on first-degree murder and second-degree murder and the jury convicted defendant of first-degree murder.

Am Jur 2d, Homicide §§ 482 et seq.

3. Appeal and Error § 147 (NCI4th)— murder—mistrial—motion not made at trial—not preserved for appellate review

A defendant in a murder prosecution did not preserve for appellate review the issue of whether the trial judge erred by not declaring a mistrial as a result of the prosecutor's improper closing argument where the defendant did not make a motion for a mistrial. Moreover, the court instructed the jury to disregard the improper argument.

Am Jur 2d, Appeal and Error §§ 545 et seq.

4. Criminal Law § 940 (NCI4th)— murder—appeal—motion for appropriate relief in trial court—denied

The trial court correctly denied a murder defendant's motion for appropriate relief alleging ineffective assistance of counsel where defendant was convicted on 26 March, filed notice of appeal on that same day, and filed the motion on 10 August. Once defendant entered notice of appeal, the Superior Court no longer had jurisdiction and could not consider the defendant's motion for appropriate relief. N.C.G.S. § 15A-1415(b)(3); N.C.G.S. § 15A-1418(a).

Am Jur 2d, Coram Nobis and Allied Statutory Remedies §§ 53 et seq.

Appeal of right, pursuant to N.C.G.S. § 7A-27(a), from a judgment entered by Kirby, J., in the Superior Court, Buncombe County, on 26 March 1992. Heard in the Supreme Court on 14 April 1993.

Michael F. Easley, Attorney General, by Mary Jill Ledford, Assistant Attorney General, for the State.

Dewitt W. Daniell for the defendant-appellant.

MITCHELL, Justice.

The defendant, Jeffrey James Ginyard, was tried in a capital trial upon a proper bill of indictment charging him with murder. 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 8 April 1991, at approximately 5:00 a.m., Gladys Brown and Earl Bowman returned to Brown's apartment at Hillcrest, a public housing project, and found Lewis Lytle waiting for them. The three of them entered the apartment, and Lytle used the telephone. Shortly thereafter, the defendant, Jeffrey James Ginyard, knocked on the door and asked Brown if she would tell Lytle that he would like to see him. Lytle went outside to speak with the defendant. Moments later, Brown heard a screeching sound outside. She looked out of a window and saw the defendant and Lytle engaged in a fist fight. In an attempt to stop the two men from fighting, Brown said, "you all stop before someone gets hurt." Brown testified that she saw both men glance at her, and then she saw "Jeff come from under his jacket with a knife and struck Lewis in his upper torso and Lewis grabbed the area and cringed." Lytle then started running, and the defendant followed him for a while, then ran behind another building.

At approximately 5:20 a.m., Tracy Clements heard a tapping on a bedroom window of his apartment in Hillcrest. Clements looked out of his window and saw Lytle, who was hurt and bleeding. Clements let Lytle into the apartment through the back door and took him into the kitchen. As he lay bleeding on the floor, Lytle said, "help me Tray, help me Tracy; they got me." Clements' girlfriend called 911 and, within fifteen minutes, an ambulance and paramedics arrived. Lytle was taken to a hospital where he died a short time later.

On 8 April 1991, Dr. Carl Biggers performed an autopsy on the body of the victim, Lewis Lytle. The autopsy revealed that Lytle had suffered the following wounds: (1) a cut on the left forearm, 2 centimeters in length; (2) a cut at the left armpit on the interior axillary fold which was 2.2 centimeters in length and 1.8 centimeters in width; (3) a wound in the lower abdomen described as an irregularity at the lower end of a surgical incision, beneath which there was a severed rib; and (4) a wound in the upper abdomen which was 2.2 centimeters in length, 10 centimeters in depth and had penetrated the victim's heart. Dr. Biggers testified that Lytle had died as a result of a loss of blood due to a stab wound to the left side of the heart.

The defendant's evidence presented at trial tended to show, *inter alia*, the following. The defendant presented Latonda Whitmire

as an alibi witness. Whitmire testified that she had spoken to the defendant at "Crankshaft's" home at Hillcrest at approximately 5:00 a.m. on 8 April 1991. Whitmire stated that she had conversed with the defendant while he was upstairs and she was downstairs. Whitmire went outside and waited for the defendant because he owed her husband some money. While waiting for the defendant, Whitmire heard the ambulance arrive to assist the victim, Lewis Lytle. The defendant also presented several witnesses in an effort to impeach the credibility of Gladys Brown.

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 the trial court erred in denying his motion to dismiss the first-degree murder charge at the conclusion of all of the evidence. Specifically, the defendant contends that the trial court erred by submitting the first-degree murder charge to the jury because the evidence introduced at trial would not support any reasonable finding that he intentionally killed the victim after premeditation and deliberation.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged. *E.g., State v. McPhail*, 329 N.C. 636, 406 S.E.2d 591 (1991); *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). Substantial evidence is such relevant evidence as a reasonable person might accept as adequate to support a conclusion. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991); *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). In making its determination, the trial court must consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

Premeditation and deliberation are usually proved by circumstantial evidence because they are mental processes that ordinarily are not readily susceptible to proof by direct evidence. *State v. Richardson*, 328 N.C. 505, 402 S.E.2d 401 (1991). On many occasions, this Court has enumerated some of the circumstances which tend to support a proper inference of premeditation and deliberation. *See, e.g., State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992); *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984). Among these are at least two circumstances that are directly ap-

plicable in this case: (1) the nature and number of the victim's wounds, and (2) the conduct and statements of the defendant before and after the killing.

Evidence of the nature and number of the victim's wounds in the present case provides substantial evidence from which the jury could properly infer that the defendant premeditated and deliberated before killing the victim. In *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), we held that there was sufficient evidence from which the jury could properly have inferred premeditation and deliberation, where the evidence showed that the killing was accomplished by stabbing the victim through the neck, partially removing the knife, and then plunging it home again. In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), this Court held that there was sufficient evidence from which the jury could properly have inferred premeditation and deliberation where there were multiple stab wounds, including two wounds to the chest, one of which hit the deceased's heart. Similarly, the deceased in the present case suffered four stab wounds, including a wound to his upper abdomen which pierced his heart and a wound to his lower abdomen which severed a rib. This evidence is substantial evidence tending to show that the defendant premeditated and deliberated.

In addition, evidence of the defendant's actions before the killing was substantial evidence supporting a proper inference of premeditation and deliberation. In *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1991), we stated that evidence tending to show that the defendant was carrying a gun supported an inference that he had anticipated a possible confrontation and given some forethought to how he would deal with a confrontation. Similarly, in this case, the fact that the defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation.

We conclude that there was sufficient substantial evidence of premeditation and deliberation to support the trial court's denial of the defendant's motion to dismiss at the conclusion of all of the evidence. The trial court did not err in permitting the jury to consider a possible verdict of first-degree murder based upon the theory that the defendant killed the victim after premeditation

and deliberation. Accordingly, this assignment of error is without merit.

[2] By his next assignment of error, the defendant contends that the trial court erred in denying his request to instruct the jury on a possible verdict of voluntary manslaughter. Instead, the trial court instructed the jury on possible verdicts finding the defendant guilty of first-degree murder, guilty of second-degree murder or not guilty.

When the jury is instructed on possible verdicts for first-degree murder and second-degree murder and the jury convicts on the basis of first-degree murder, any failure to instruct on a possible verdict for manslaughter cannot be harmful to the defendant. *State v. Young*, 324 N.C. 489, 380 S.E.2d 94 (1989); *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969). In the present case, the trial court instructed the jury on first-degree murder and second-degree murder, and the jury convicted the defendant of first-degree murder. Assuming *arguendo* that the trial court erred in failing to instruct on manslaughter, any error was harmless. Accordingly, this assignment of error is overruled.

[3] By his next assignment of error, the defendant contends that the trial court erred in failing to declare a mistrial as a result of the prosecutor's improper closing argument. The trial court sustained the defendant's objection to the prosecutor's argument in question and instructed the jury to disregard the argument. The defendant did not make a motion for a mistrial. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make. . . ." N.C. R. App. P. 10(b)(1). Since the defendant made no motion for a mistrial in the trial court, this issue is not properly before this Court. In any event, the trial court instructed the jury to disregard the improper argument, and the law assumes that the jury did so. *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988); *State v. Walker*, 319 N.C. 651, 356 S.E.2d 344 (1987). This assignment of error is overruled.

[4] By his next assignment of error, the defendant contends that the trial court erred in denying his motion for appropriate relief, in which he alleged that he had been denied effective assistance of counsel in violation of his state and federal constitutional rights. The defendant was convicted of first-degree murder and sentenced

to life imprisonment on 26 March 1992. On that same day, the defendant entered notice of appeal to this Court. On 10 August 1992, the defendant filed a motion for appropriate relief in the Superior Court, Buncombe County. This motion was denied by order of the Honorable C. Walter Allen, Superior Court Judge, on 14 August 1992.

Pursuant to N.C.G.S. § 15A-1415(b)(3), a defendant may make a motion for appropriate relief more than ten days after entry of judgment on the ground that he received ineffective assistance of counsel in violation of his state and federal constitutional rights. N.C.G.S. § 15A-1415(b)(3) (1988). However, "[w]hen a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division." N.C.G.S. § 15A-1418(a) (1988). In the present case, once the defendant entered notice of appeal to this Court on 26 March 1992, the Superior Court no longer had jurisdiction and could not consider the defendant's motion for appropriate relief. *See id.* Therefore, we affirm the trial court's denial of the defendant's motion for appropriate relief on jurisdictional grounds, without prejudice to the defendant's right to file a motion for appropriate relief in the Superior Court on this issue after this opinion has been filed and certified. Accordingly, this assignment of error is overruled.

No error.

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

BOGUE SHORES HOMEOWNERS ASSN. v.
TOWN OF ATLANTIC BEACH

No. 185P93

Case below: 109 N.C.App. 549

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

CANTWELL v. CANTWELL

No. 186PA93

Case below: 109 N.C.App. 395

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 1 July 1993.

CAROLINA SOLVENTS, INC. v. PERRY

No. 167P93

Case below: 109 N.C.App. 488

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

FAULKENBURY v. TEACHERS' &
STATE EMPLOYEES' RETIREMENT SYSTEM

No. 94A93

Case below: 108 N.C.App. 357

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 1 July 1993. Motion by defendants to dismiss appeal in part allowed 1 July 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

GASKILL v. STATE EX REL. COBEY

No. 210P93

Case below: 109 N.C.App. 656

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

GRAVITTE v. MITSUBISHI SEMICONDUCTOR AMERICA

No. 193P93

Case below: 109 N.C.App. 466

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

HINTON v. DUKE UNIVERSITY

No. 195P93

Case below: 109 N.C.App. 696

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

JONES v. SHOJI

No. 225A93

Case below: 110 N.C.App. 48

Petition by defendants 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 1 July 1993 as to issue No. 2 only in the issues to be briefed.

KING v. KOUCOULIOTES

No. 100PA93

Case below: 108 N.C.App. 751

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 1 July 1993.

LITTLE v. BENNINGTON

No. 191P93

Case below: 109 N.C.App. 482

Motion by defendants to dismiss the appeal for lack of substantial constitutional question allowed 1 July 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

LOWRY v. DUKE UNIVERSITY MEDICAL CENTER

No. 122P93

Case below: 109 N.C.App. 83

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

MARSH v. W. R. GRACE & CO.

No. 199P93

Case below: 109 N.C.App. 700

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

MITCHELL v. NATIONWIDE INS. CO.

No. 226A93

Case below: 110 N.C.App. 16

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 1 July 1993.

MONTI v. UNITED SERVICES AUTOMOBILE ASSN.

No. 91P93

Case below: 108 N.C.App. 342

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 July 1993.

MORRELL v. FLAHERTY

No. 203PA93

Case below: 109 N.C.App. 628

Petition by defendants for writ of supersedeas allowed 1 July 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 1 July 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 1 July 1993.

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

No. 112P93

Case below: 109 N.C.App. 114

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993. Motion by plaintiff to amend record denied 1 July 1993.

ROBERTS v. N.C. DEPT. OF AGRICULTURE

No. 215P93

Case below: 109 N.C.App. 700

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

SEALEY v. GRINE

No. 194P93

Case below: 109 N.C.App. 697

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993. Motion by plaintiff to amend record on appeal denied 1 July 1993.

SMITH v. McCULLEN

No. 108P93

Case below: 108 N.C.App. 788

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

SMITHEMAN v. NATIONAL PRESTO INDUSTRIES

No. 202P93

Case below: 109 N.C.App. 636

Petition by defendant (National Presto Industries) for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

STATE v. FARLOW

No. 246PA93

Case below: 110 N.C.App. 95

Petition by Attorney General for writ of supersedeas allowed 1 July 1993. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals allowed 1 July 1993.

STATE v. HOLMES

No. 200P93

Case below: 109 N.C.App. 615

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

STATE v. HUTCHENS

No. 234P93

Case below: 110 N.C.App. 455

Petition by Attorney General for writ of supersedeas and temporary stay denied 21 June 1993.

STATE v. RESPER

No. 175P93

Case below: 109 N.C.App. 489

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 1 July 1993.

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

STATE v. ROBINSON

No. 211PA93

Case below: 110 N.C.App. 284

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question denied 1 July 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed, and the Court further directs defendant to brief the issue of double jeopardy as well as the issue on the "year and a day" rule 1 July 1993.

STATE v. TALLEY

No. 214P93

Case below: 110 N.C.App. 180

Petition by defendant for writ of supersedeas and temporary stay denied 1 July 1993.

STATE v. TAYLOR

No. 212P93

Case below: 109 N.C.App. 692

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

TOWN OF NORTH WILKESBORO v. WINEBARGER

No. 201P93

Case below: 109 N.C.App. 702

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

WATSON ELECTRICAL CONSTRUCTION CO. v.
CITY OF WINSTON-SALEM

No. 132P93

Case below: 109 N.C.App. 194

Petition by defendant (City of Winston-Salem) for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

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

WOODARD v. LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM

No. 95A93

Case below: 108 N.C.App. 378

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 1 July 1993. Motion by defendants to dismiss appeal in part allowed 1 July 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

YARBOROUGH v. MOORE

No. 192P93

Case below: 109 N.C.App. 700

Motion by defendants (Moore & Richardson) to dismiss appeal for lack of substantial constitutional question allowed 1 July 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993. Motion by defendants (Moore & Richardson) for sanctions denied 1 July 1993.

PETITION TO REHEAR

BOWLES v. MUNDAY

No. 327PA92

Case below: 333 N.C. 788

Petition by plaintiff to rehear pursuant to Rule 31 denied 1 July 1993.

STATE OF NORTH CAROLINA v. FRANK W. PETERSILIE

No. 43PA92

(Filed 30 July 1993)

1. Appeal and Error §§ 48, 362 (NCI4th); Criminal Law § 67 (NCI4th)— misdemeanors—original trial in superior court—failure of record to show jurisdiction—prosecutor's statement insufficient to show presentment—vacation of judgment

The Court of Appeals did not err by vacating the superior court's judgment in a prosecution for publishing unsigned materials about a candidate for public office in violation of N.C.G.S. § 163-274(7) on the ground that the record on appeal showed that the superior court lacked subject matter jurisdiction where all the offenses charged were misdemeanors; the only charging documents in the record on appeal are grand jury indictments; and the superior court has no jurisdiction to try by indictment a defendant charged with a misdemeanor unless the charges which are the subject of an indictment are initiated by a presentment. A statement in the trial transcript by the district attorney informing the court that the misdemeanor charges originated by presentment was insufficient to comply with the requirement of Appellate Rule 9(a)(3)(e) that the record shall contain "copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court," since the rule contemplates that all charging documents must be copied and presented verbatim in the record on appeal, and mere references to such documents in the trial transcript cannot suffice for verbatim copies of the documents themselves or substitute for such copies when the copies are missing from the record.

Am Jur 2d, Criminal Law § 352; Justices of the Peace § 108.

2. Appeal and Error §§ 48, 367 (NCI4th)— motion to amend record—addition of presentment—denial by Court of Appeals not error—election by Supreme Court to allow amendment

The Court of Appeals did not err when it denied the State's motion to amend the record on appeal by adding copies of the presentment upon which misdemeanor charges were initiated against defendant to show that the superior court had jurisdiction over the case. However, the Supreme Court

elects to allow the amendment to reflect subject matter jurisdiction so that it may reach the substantive issues of the appeal.

Am Jur 2d, Appeal and Error §§ 482, 484; Justices of the Peace § 108.

3. **Elections § 13 (NCI4th)— unsigned publication of charge against election candidate—statute prohibiting—not unconstitutionally vague**

As used in the statute making it unlawful for anyone in the context of an election (1) to publish (2) any charge (3) derogatory to a candidate or calculated to affect the candidate's electoral chances (4) without signing the publication, N.C.G.S. § 163-274(7), the verb "to publish" is to be given its ordinary meaning, and the term "charge" is interpreted to mean an accusation of wrongdoing. When so interpreted, the statute defines the proscribed conduct with sufficient definiteness so that it is not unconstitutionally vague.

Am Jur 2d, Elections §§ 379, 380.

4. **Elections § 13 (NCI4th); Constitutional Law § 117 (NCI4th)— unsigned publication of charge against election candidate—statute prohibiting—no violation of free speech**

The statute making it unlawful for anyone to publish any charge derogatory to an election candidate or calculated to affect the candidate's electoral chances without signing the publication, N.C.G.S. § 163-274(7), is not constitutionally overbroad so as to violate free speech guarantees in the federal and state constitutions. The statute serves the compelling interest of the State of promoting fair and honest elections and is drawn no more broadly than is necessary to serve that interest. U.S. Const. amend. I; N.C. Const. art. I, § 14.

Am Jur 2d, Constitutional Law §§ 496, 497; Elections §§ 379, 380.

5. **Elections § 13 (NCI4th)— publishing unsigned materials about candidates—alternate theories—erroneous intent instruction on one theory—prejudice**

In a prosecution for publishing unsigned materials about two candidates for public office in violation of N.C.G.S. § 163-274(7), the trial court erred by instructing the jury that, in order to convict defendant, it must find that defendant

published "a charge *he intended* to be derogatory to a candidate for election to the Boone Town Council, or which he calculated would affect such candidate's chances of election," since the statute permits a conviction if the jury finds either (1) that the published material was a derogatory charge or (2) that the charge was "calculated" by defendant to affect a candidate's chances for nomination or election; the jury's determination of whether the material was a derogatory charge is not based on defendant's intention but on its objective interpretation of the publication; and the trial court's instruction permitted the jury to convict defendant upon a finding that defendant only intended the materials to be derogatory even if, objectively, the jury did not consider them to be so. Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its guilty verdict, it is assumed that the jury based its verdict on the theory for which it received an improper instruction.

Am Jur 2d, Elections §§ 379, 380.

6. Evidence and Witnesses §§ 906, 2047 (NCI4th)— unsigned materials about candidates—opinions of others as to whether derogatory or hurtful—inadmissible hearsay

In a prosecution for publishing unsigned materials about two candidates for public office, testimony by the candidates as to the actual opinions expressed by certain local residents out of court concerning whether the materials were derogatory or hurtful to the candidates' chances of being elected was admitted for the truth of what was said and was inadmissible hearsay. The statements were not admissible as lay witness opinion testimony under N.C.G.S. § 8C-1, Rule 701 because neither witness was testifying as to his or her own opinion.

Am Jur 2d, Evidence § 497; Expert and Opinion Evidence §§ 26, 53, 54.

Justice MITCHELL 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 of the decision of the Court of Appeals, 105 N.C. App. 233, 414 S.E.2d 41 (1992), vacating a judgment entered by Lamm, J., at the 19 October 1990 Criminal Session of Superior Court, Watauga County. Heard in the Supreme Court 11 September 1992.

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

Chester E. Whittle, Jr., for defendant-appellee.

EXUM, Chief Justice.

The substantive issue before us is whether N.C.G.S. § 163-274(7), prohibiting anonymous, derogatory charges against candidates for primary or general elections, violates the free speech guarantees of the First Amendment of the United States Constitution or Article I, § 14 of the North Carolina Constitution, or both. Before reaching this constitutional issue, however, we must first dispose of a procedural question: whether the Court of Appeals erred by vacating the judgment of the trial court on the ground of lack of subject matter jurisdiction. We conclude the Court of Appeals did not err on the record before it when it vacated the judgment of the trial court; but, for reasons of judicial economy and to reach the important constitutional question raised, we elect to allow the State's motion to amend the record on appeal, which amendment demonstrates that the trial court had jurisdiction over the case. As for the constitutional issue, we conclude the statute does not violate defendant's free speech rights under either the federal or state constitution. We do find, however, that the trial court committed reversible error by incorrectly stating the law in its jury instructions; and defendant therefore is entitled to a new trial. We also conclude that the trial court erred in admitting certain out-of-court opinion evidence.

I.

Defendant was convicted of eleven counts of publishing unsigned materials about a candidate for public office—all misdemeanors in violation of N.C.G.S. § 163-274(7). Judgment was entered imposing a sentence of two years' imprisonment which was suspended for three years upon the condition defendant serve six weekends in the county jail. The only charging documents contained in the record on appeal are grand jury indictments. The Court of Appeals

vacated the trial court judgment for lack of subject matter jurisdiction in the superior court. We allowed the State's petition for further review.

Evidence at defendant's trial tended to show as follows: Defendant owned a land development company, Property Services and Investments (PSI), in Boone, North Carolina, which was primarily engaged in the management of rental properties. Defendant was also among ten candidates running for three seats on the Boone Town Council in the 10 October 1989 election. Only one candidate, Ben Suttle, received a clear majority. A run-off election was required, but defendant did not receive enough votes to qualify for the run-off. Four other candidates did qualify for the run-off election, two of whom were Saul Chase and Louise Miller.

On 1 or 2 November 1989, defendant obtained a copy of a letter addressed to his mother with which was enclosed a copy of a Washington Post article written by Nan Chase, candidate Chase's wife. The article expressed Mrs. Chase's opinion about prayer in school. The accompanying letter stated:

> Chase wants to take away aggressive Christian influence from public buildings and gathering places, such as our schools.
>
> In an article published in the Washington Post, Mrs. Saul Chase ridiculed the people of Boone for their support of Christianity stating that here "Christianity is . . . intimidating and self-perpetuating."
>
> Calling herself an "unbeliever (in Christianity) in the midst of the pious", Mrs. Saul Chase states that she is unable to openly criticize "religious paraphernalia displayed in public offices and on state owned vehicles" and she also says that if (anyone) speak(s) out forcefully against what may be an unconstitutional mixing of church and state, they will be unable to enter the political mainstream that has the power to separate the two spheres".—This thought has not been spoken to the people of Boone by Mrs. Chase, only to the Washington Post. Why keep it from us? Because her husband is on our Town Council, and was just put in the run off for re-election. If he wins, he will have the power to take away any Christian influence from the town employees, buildings, etc. It can be assumed that Chase allegedly has a goal to wipe out Christian influence from our town, take it away form the very God-fearing

> Christian people who helped put him in office. Candidates should be open about all of their feelings of all issues and it appears that Saul Chase has been deceptive to us by not supporting the good, wholesome beliefs of our people. A deception that is allegedly a deliberate attempt to gain power to take our Christian atmosphere from us. We, the town, should stop him, keep him out of our town government and hold fast to our Christian freedoms. Vote against Saul Chase!

With the help of various members of his staff at PSI, defendant reproduced and mailed approximately thirty to seventy copies of the letter to persons who voted in the 10 October 1989 election. Defendant personally addressed several of the envelopes. He did not sign his name to the mailing or otherwise indicate that the mailing came from him.

On 3 or 4 November 1989 defendant received a copy of a flyer concerning candidates Miller and Chase. The flyer stated:

> **VOTE LIQUOR BY THE DRINK FOR BOONE.**
>
> FOUR YEARS AGO, WITH THE HELP OF SAUL CHASE, THE A.S.U. STUDENTS BROUGHT BEER TO BOONE. NOW IS THE TIME TO COMPLETE THE PARTY!
>
> SUTTLE, DUGGER & MARSH REFUSE TO ENDORSE THIS ISSUE AND WOULD WORK TO DEFEAT THE REFERENDUM.
>
> **VOTE SAUL CHASE AND LOUISE MILLER**
> **NOV. 7TH**
> **THE "PRO-LIQUOR" CANDIDATES**

Defendant copied and mailed out twenty to twenty-five unsigned copies of the flyer. Again, defendant did not sign his name to the mailing or otherwise identify himself as the person who sent it.

On 15 November 1989 Special Agent Steve Wilson of the North Carolina State Bureau of Investigation began investigating the mailings. Wilson spoke with defendant on 27 November 1989 at defendant's PSI office. When Wilson informed defendant that he had compared the handwriting on defendant's notice of candidacy to handwriting appearing on the flyers and anonymously mailed envelopes, defendant admitted addressing some of the anonymous letters. He said he was unaware that sending the anonymous material was a criminal violation.

The opinion of the Court of Appeals was filed 21 January 1992. Concluding that the record on appeal demonstrated a lack of jurisdiction in the superior court, the Court of Appeals vacated the superior court's judgment. On 22 January 1992 the State moved in the Court of Appeals to amend the record on appeal by adding certified copies of the presentment upon which charges were initiated against defendant. The Court of Appeals denied this motion on 23 January 1992.

II.

[1] The State contends the Court of Appeals erred by vacating the superior court proceedings for lack of jurisdiction. We conclude the Court of Appeals acted properly on the record before it.

Like the majority of states, North Carolina requires the State to prove jurisdiction beyond a reasonable doubt in a criminal case. *State v. Batdorf*, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977). Exclusive, original jurisdiction of all misdemeanors lies in the District Court Division of the General Court of Justice. N.C.G.S. § 7A-272 (1989). The superior court has jurisdiction to try a misdemeanor charge:

> (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
>
> (2) When the charge is initiated by presentment; or
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;
>
> (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
>
> (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.

N.C.G.S. § 7A-271(a) (1989).

"When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority." *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981). *See also State v. Hardy*, 298 N.C. 191, 257 S.E.2d 426 (1979) (Record on appeal shows lack of jurisdiction when a defendant is convicted

in superior court of committing a crime for which he is not charged; judgment arrested.); *State v. Guffey*, 283 N.C. 94, 194 S.E.2d 827 (1973) (Record on appeal shows lack of jurisdiction when the superior court convicts a defendant of a misdemeanor for which there is no conviction in district court; judgment arrested.); *State v. Evans*, 262 N.C. 492, 137 S.E.2d 811 (1964) (Record on appeal shows lack of jurisdiction when a defendant who is never tried in district court is tried in superior court upon a warrant; judgment arrested and vacated.).

Contrarily, "when the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed." *Felmet*, 302 N.C. at 176, 273 S.E.2d at 711. *See also State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957) (No copy of the bill of indictment contained in the record on appeal; appeal dismissed.); *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955) (Where Record failed to disclose jurisdiction in the court below; appeal dismissed.). In *Felmet*, we concluded the record was silent as to jurisdiction when the defendant was tried in superior court upon a warrant charging misdemeanor trespass because the record did not indicate whether the defendant had been tried in district court. We, therefore, held the Court of Appeals properly dismissed the appeal.

As did the Court of Appeals, we conclude this is a case in which the record affirmatively shows a lack of jurisdiction. According to the record, the only charging documents are indictments. All the offenses charged are misdemeanors. Under N.C.G.S. § 7A-271, the superior court has no jurisdiction to try by indictment a defendant charged with a misdemeanor unless the charges which are the subject of the indictment were initiated by a presentment.

The State contends the trial transcript shows that the charges against defendant were initiated by a presentment pursuant to N.C.G.S. § 7A-271(a)(2). The transcript does include a statement by the district attorney informing the court that the misdemeanor charges originated by presentment. Rule 9(a)(3)(e) of the North Carolina Rules of Appellate Procedure requires the record on appeal in criminal actions to include:

> so much of the evidence, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of the errors assigned, or a statement that the entire verbatim transcript of the proceedings is being filed with the record pursuant

> to Rule 9(c)(2), or designating portions of the transcript to be so filed . . . .

N.C. R. App. P. 9(a)(3)(e). Relying on this requirement, the State asserts that reference to the presentment contained in the trial transcript is a part of the record and, as such, is sufficient to confer jurisdiction.

We are not persuaded by this argument. Appellate Rule 9(a)(3) sets forth the requisite contents of the record on appeal in criminal actions. Subsection (e), relied on by the State, is directed only to the presentation of the evidence. Subsection (c) governs how charging documents must be presented, and it provides that the record shall contain "*copies* of all warrants, informations, presentments, and indictments upon which the case has been tried in any court." N.C. R. App. P. 9(a)(3) (emphasis added). It is clear that this rule contemplates that all charging documents must be copied and presented verbatim in the record on appeal. Mere references to such documents in the trial transcript cannot suffice for verbatim copies of the documents themselves, nor may such references substitute for such copies when the copies are missing from the record.

III.

[2] Having concluded that the Court of Appeals acted properly on the record before it in vacating the judgment in the trial court, we also conclude the Court of Appeals did not err when it denied the State's motion to amend the record.

In *Felmet*, the defendant moved for leave to amend the record to include "the judgment of the district court which reflected defendant's appeal therefrom to the superior court" to show how the superior court obtained subject matter jurisdiction over his case. *Felmet*, 302 N.C. at 174, 273 S.E.2d at 710. The Court of Appeals denied the motion. *Id.* We concluded that the denial was a decision within the discretion of the Court of Appeals and that we could find no abuse of that discretion. *Id.* at 176, 273 S.E.2d at 711. Nevertheless, we held the record should be amended to reflect subject matter jurisdiction so that we could reach the substantive issue of the appeal. In so holding, we stated, "[this] is the better reasoned approach and avoids undue emphasis on procedural niceties." *Id.*

While we find no abuse of discretion on the part of the Court of Appeals in denying the State's motion to amend, we elect as we did in *Felmet* to allow the State leave to amend.

When the record is amended to add the presentment, it is clear the superior court had jurisdiction over these misdemeanors under N.C.G.S. § 7A-272(2). Section 15A-641(c) of the North Carolina General Statutes provides:

> A presentment is a written accusation by a grand jury, made on its own motion and filed with a superior court, charging a person, or two or more persons jointly, with the commission of one or more criminal offenses. A presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment returned in his district and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so.

N.C.G.S. § 15A-641(c) (1988). Section 15A-628(a)(4) of the North Carolina General Statutes states that a grand jury

> may investigate any offense as to which no bill of indictment has been submitted to it by the prosecutor and issue a presentment accusing a named person or named persons with one or more criminal offenses if it has found probable cause for the charges made. *An investigation may be initiated upon the concurrence of 12 members of the grand jury itself or upon the request of the presiding or convening judge or the prosecutor.*

N.C.G.S. § 15A-628(a)(4) (1988) (emphasis added).

The amendment to the record shows that on 2 January 1990, the district attorney asked the Watauga County Grand Jury, pursuant to N.C.G.S. § 15A-628(a)(4), to investigate the charges against defendant. The grand jury did so and, pursuant to § 15A-641(c), filed with the superior court on 2 January 1992 a presentment against defendant charging him with violating N.C.G.S. § 163-274(7). Thereafter, the district attorney, pursuant to § 15A-641(c), submitted two bills of indictment to the grand jury dealing with the subject matter of the presentment; and the grand jury returned true bills of indictment on 19 February 1990 upon which defendant was tried and convicted.

The judgment of the superior court should not, on the record as amended, be vacated for lack of subject matter jurisdiction.

IV.

We now address the important constitutional questions raised in this case. Defendant raised the constitutional issues by moving before trial to dismiss the indictments on the ground of the unconstitutionality of the statute on which the indictments were based. He renewed the motion at the close of the State's evidence and at the close of all the evidence. All motions to dismiss were denied by the trial court, and defendant has assigned these denials as error.

[3] Defendant contends that N.C.G.S. § 163-274(7) is unconstitutionally vague and overbroad so as to violate the free speech guarantees in both the federal and state constitutions. We conclude that N.C.G.S. § 163-274(7), properly interpreted, is not unconstitutionally vague; and we think the statute serves a legitimate compelling interest of the State and is drawn no more broadly than is necessary for that purpose.

The statute at issue provides as follows:

§ 163-274. Certain Acts declared misdemeanors.

Any person who shall, in connection with any primary or election in this State, do any of the acts and things declared in this section to be unlawful, shall be guilty of a misdemeanor. It shall be unlawful:

. . . .

(7) For any person to publish in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge.

N.C.G.S. § 163-274(7) (1991).

This statute is part of Subchapter VIII, titled "Regulation of Election Campaigns," and of Article 22, titled "Corrupt Practices and Other Offenses against the Elective Franchise," of our General Statutes. First enacted in 1931 (*see* Chapter 348, section 9(10) of the 1931 Session Laws), it is in the general category of election reform statutes, which take many forms and which are designed

to prohibit various kinds of practices thought to be inimical to fair elections. *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1286-87 (1975); *see also Burson v. Freeman*, 504 U.S. ---, 119 L. Ed. 2d 5 (1992) for the Court's historical account of these reforms. Forty-three states have enacted legislation similar to N.C.G.S. § 163-274(7) with the clear intent of "promot[ing] honesty and fairness in the conduct of an election campaign." *Tennessee v. Acey*, 633 S.W.2d 306, 307 (Tenn. 1982). Additionally, the United States Congress has enacted a statute making it a criminal offense to make an expenditure to publish and distribute statements expressly advocating the election or defeat of a clearly identified candidate without stating the name of the person or persons responsible for its publication and distribution. 2 U.S.C. § 441d (1988); *United States v. Scott*, 195 F. Supp. 440 (D. N.D. 1961).

A.

Defendant first contends that certain terms in the statute are so vague that it fails to provide persons clear notice of the prohibited conduct.

The test for determining whether a statute is unconstitutionally vague has been stated as follows:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Connally v. General Construction Co., 269 U.S. 385, 391, 70 L. Ed. 322, 328 (1926); *accord Coates v. Cincinnati*, 402 U.S. 611, 29 L. Ed. 2d 214 (1971); *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969). While vagueness and uncertainty may invalidate a statute, *In re Burrus*, 275 N.C. at 531, 169 S.E.2d at 888, the Court will strive to interpret a statute to avoid serious doubts about its constitutionality. *Delconte v. State*, 313 N.C. 384, 402, 329 S.E.2d 636, 647 (1985). Thus if two reasonable constructions of the statute are possible, this Court will adopt the construction which renders the statute constitutional. *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388 (1978); *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E.2d 1 (1966).

The statute, properly interpreted, is not unconstitutionally vague. It prohibits anyone in the context of an election from (1) publishing (2) any charge (3) derogatory to a candidate or calculated

to affect the candidate's electoral chances (4) without signing the publication. Contrary to defendant's position, we see nothing vague about the statute's use of the verb, "to publish." To publish means simply "**1 a.** to declare publicly: make generally known: DISCLOSE, CIRCULATE . . . **b.** to proclaim officially . . . **c.** to make public announcement of . . . **d.** PUBLICIZE . . . to give publication to . . . ." *Webster's Third New International Dictionary* 1837 (1976). Clearly defendant's mailing the materials in question constituted their publication under the ordinary meaning of the term.

We find "charge" to be the only term in the statute whose meaning may not be commonly understood and which requires judicial interpretation. *See State v. Crawford*, 329 N.C. 466, 485, 406 S.E.2d 579, 590 (1991). We find the following definitions to be instructive: *The American Heritage Dictionary* 260 (2d college ed. 1985) ("**6.** An accusation or indictment: *a charge of conspiracy to defraud*"); *Webster's Ninth New Collegiate Dictionary* 227 (1988) ("**6** . . . **b** : a statement of complaint or hostile criticism <denied the *[charge]*s of nepotism that were leveled against him>"); *Webster's Third New International Dictionary* 377 (1966) ("**6 a** : an accusation of a wrong or offense : ALLEGATION, INDICTMENT <arrested on the *[charge]* of bribery> **b** : a statement of complaint or hostile criticism <the *[charge]* that earned incomes are based upon no principle of equity>"); *see also Black's Law Dictionary* 233 (6th ed. 1990) ("an accusation"); *Legal Thesaurus* 71 (1980) ("*Accusation* . . . allegation, arraignment, attack, blame, castigation, censure, citation, complaint, condemnation, count, countercharge"). The common thread in these definitions is that "charge" means an "accusation." An "accusation" is defined as "a charge of wrongdoing; imputation of guilt or blame." *Random House Webster's College Dictionary* 10.

A Kentucky statute provided: "Any person [could] prefer *charges* against a member of the police or fire department by filing them with the city manager" for purposes of having the accused "reprimanded, dismissed or demoted." *Mason v. Seaton*, 303 Ky. 528, 529, 198 S.W.2d 205, 206 (1946) (emphasis added). The Court of Appeals of Kentucky held that " 'charges' signify an accusation . . . of illegal conduct, either of omission or commission, by the person charged." *Id.* at 531, 198 S.W.2d at 207. In *Rosales v. City of Elroy*, 122 Ariz. 134, 593 P.2d 688 (1979), a former police officer who had been discharged for misconduct sued the city and the police chief, alleging libel and slander because the mayor and police chief had informed a newspaper that "charges" had been placed

against him. Both defendants contended that the officer could not prevail against them because no formal criminal charges had been filed against the officer. The Arizona court interpreted the word "charges" as follows: "The basic premise of appellees' argument is that the word 'charges' means 'the filing of criminal charges' . . . . We do not agree with this premise. The word 'charges' also denotes 'accusations' or 'allegations' and does not necessarily mean the filing of criminal charges." *Id.* at 136, 593 P.2d at 690.

Using the above definitions and analyses, we conclude the legislature intended the word "charge" to mean an accusation of wrongdoing.

As interpreted, the statute defines the proscribed conduct with sufficient definiteness so as to avoid arbitrary and discriminatory enforcement. *See Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 71 L. Ed. 2d 362 (1982). We therefore conclude the statute is not unconstitutionally vague.

B.

[4] Defendant next argues that the statute is not drawn narrowly enough and is constitutionally overbroad. Defendant agrees that the statute's goal of prohibiting anonymous pejorative campaign material is legitimate and concedes that "with more specificity in legislative drafting, that aim may be constitutionally sustainable." Defendant-Appellee's New Brief, p. 22. He contends that, as drawn, the statute "embraces protected speech which the government may not restrict." *Id.* at 21. The State contends to the contrary, arguing the statute is narrowly drawn so as to encompass only "anonymous, derogatory material that is directed toward specific candidates." Brief for the State, p. 31. The State's position is that the statute could not be drawn more narrowly and still serve the State's compelling interest in insuring as far as possible fair elections. For the reasons which follow we find ourselves in agreement with the State.

The parties agree the State's interest in promoting fair and honest elections is legitimate and compelling.[1] They disagree on whether the statute, as drafted, is necessary to serve that interest.

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1. Defendant states in his brief at p. 30: "The Defendant agrees with the State that '[i]t is well settled that a state has a compelling interest in preserving the integrity and orderliness of the election process.' "

This is the ultimate question for decision under the doctrines developed by the United States Supreme Court in interpreting the Free Speech Clause of the United States Constitution and which we adopt here for purposes of applying the Free Speech Clause of the North Carolina Constitution.

The First Amendment to the Federal Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press[.]

U.S. Const. amend. I. Similarly, Article I, § 14 of the North Carolina Constitution states:

> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, § 14.

Under the Federal Constitution, "freedom of speech . . . which [is] secured by the First Amendment against abridgement by the United States, [is] among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgement by a state." *Thornhill v. Alabama*, 310 U.S. 88, 95, 84 L. Ed. 1093, 1098 (1940). Where a statute regulating the time, place and manner of expressive activity is content-neutral in that it does not forbid communication of a specific idea, it will be upheld if the restriction is "narrowly tailored to serve a significant governmental interest," and it "leaves open ample alternatives for communication." *Burson v. Freeman*, 504 U.S. ---, ---, 119 L. Ed. 2d 5, 13 (1992); *United States v. Grace*, 461 U.S. 171, 177, 75 L. Ed. 2d 736, 743-44 (1983). A statute, however, which on its face regulates the content of protected speech in that it restricts communication of a specific idea "must be subjected to exacting scrutiny: the State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson*, 504 U.S. at ---, 119 L. Ed. 2d at 13-14, *quoting Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 804 (1983). A content-based regulation of speech occurs where restrictions are placed on the espousal of a particular viewpoint, or when there is a prohibition of public discussion on an entire topic. *Burson*, 504 U.S. at ---, 119 L. Ed. 2d at 13. In such a case, "a state must do more than assert a compelling state interest—it must demonstrate that its

law is necessary to serve the asserted interest." *Id.* at ---, 119 L. Ed. 2d at 15.

Because the statute expressly regulates political speech, it is content-based. *E.g., id.* at ---, 119 L. Ed. 2d at 13. We must give it exacting scrutiny; and we must be satisfied that it is necessary to serve the State's compelling interest in having fair, honest elections.

Our State Constitution offers similar free speech protection in Article I, Section 14. This provision is self-executing, and we have recognized a cause of action against state officials for its violation. *Corum v. University of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289, *cert. denied, Durham v. Corum*, --- U.S. ---, 121 L. Ed. 2d 431 (1992). In some of our cases, the Court has found the guarantees in the state and federal constitutions to be parallel and has addressed them as if their protections were equivalent. *Felmet*, 302 N.C. 173, 273 S.E.2d 708; *Andrews v. Chateau X*, 296 N.C. 251, 250 S.E.2d 603 (1979), *vacated on other grounds*, 445 U.S. 947, 63 L. Ed. 2d 782 (1980). We have also recognized that "in 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. Hicks*, 333 N.C. 467, 483, 428 S.E.2d 167, 176 (1993); *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984). "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." *Id.* at 484, 428 S.E.2d at 176. In this case, for the purpose of applying our State Constitution's Free Speech Clause we adopt the United State's Supreme Court's First Amendment jurisprudence.

The United States Supreme Court has long permitted certain regulations of protected speech for appropriate reasons. *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547 (1976). Thus, a paid lobbyist, a member of a specialized occupation, can be required to register and disclose his or her contributors. *United States v. Harriss*, 347 U.S. 612, 98 L. Ed. 989 (1954). A candidate for election can be required to disclose the sources of contributions so as to prevent corruption. *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659 (1976). A publisher of a newspaper can be required to make disclosures to obtain second-class mailing privileges. *Lewis Publishing Co. v.*

Morgan, 229 U.S. 288, 57 L. Ed. 1190 (1913). A grand jury can require disclosure of newspaper sources to aid in the prosecution of criminal activity. *Branzburg v. Hayes*, 408 U.S. 665, 33 L. Ed. 2d 626 (1972).

Even in the area of political speech, the United States Supreme Court has recognized that a state "indisputably has a compelling state interest in preserving the integrity and reliability of its election process." *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 231, 103 L. Ed. 2d 271, 287 (1989); *e.g.*, *Schuster v. Imperial County Airport*, 109 Cal. App. 3d 887, 896, 167 Cal. Rptr. 447, 451 (1980), *cert. denied*, 450 U.S. 1042, 68 L. Ed. 2d 239 (1981). While "there is practically universal agreement that a major purpose of the [First] Amendment [is] to protect the free discussion of governmental affairs . . . includ[ing] discussion of candidates," *Buckley v. Valeo*, 424 U.S. at 14, 46 L. Ed. 2d at 685, there is also agreement as to the compelling government interest in ensuring honest and fair elections. *Burson*, 504 U.S. at ---, 119 L. Ed. 2d at 14-15. Therefore, the Supreme Court has "upheld generally-applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9, 75 L. Ed. 2d 547, 557 n.9 (1983); *Burson*, 504 U.S. at ---, 119 L. Ed. 2d at 15.

We believe the statute before us is an example of such a evenhanded restriction. In arriving at this decision two cases decided by the United States Supreme Court have been our polar stars: *Burson*, 504 U.S. ---, 119 L. Ed. 2d 5, and *Talley v. California*, 362 U.S. 60, 4 L. Ed. 2d 559 (1960). *Burson* is the latest of several decisions of the Court sustaining the constitutionality of various election law reform statutes against free speech challenges. *Burson* holds that a state statute prohibiting the display and distribution of campaign materials and the solicitation of votes for or against a candidate or party within 100 feet from the entrance of the polling place did not violate the Free Speech Clause. A plurality of justices concluded the statute survived strict scrutiny and was necessary to serve the state's compelling interest in preventing voter intimidation and fraud and "in protecting the right to vote." *Burson*, 504 U.S. at ---, 119 L. Ed. 2d at 20. *Burson* relied heavily on the history of campaign abuses which election reform statutes like the one before it were designed to curb in concluding the statute was a necessary infringement on free speech.

Talley holds that a municipal ordinance banning the distribution of anonymous "handbill[s] in any place under any circumstances" violates the Free Speech Clause. 362 U.S. at 61, 65, 4 L. Ed. 2d at 561, 563. Relying on history demonstrating the need for certain persecuted groups at certain times "to criticize oppressive practices and laws either anonymously or not at all," *id.* at 64, 4 L. Ed. 2d at 563, the Court concluded the statute must fail because it prohibited too much. The municipality had argued that the ordinance was necessary to "identify those responsible for fraud, false advertising and libel." 362 U.S. at 64, 4 L. Ed. 2d at 562. The Supreme Court concluded there was no such necessity, saying:

> Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass upon the validity of an ordinance limited to prevent these or any other supposed evils. This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires.

364 U.S. at 64, 4 L. Ed. 2d at 562. *Talley* thus expressly left open the question whether a more narrowly drawn ordinance would be upheld. *Tennessee v. Acey*, 633 S.W.2d 306. Interestingly, the dissenters in *Talley* (Associate Justices Clark, Frankfurter and Whittaker) cited electoral reform statutes prohibiting the distribution of anonymous campaign material directed toward political candidates as an example of valid restrictions on speech, saying

> the several States have corrupt practices acts outlawing, inter alia, the distribution of anonymous publications with reference to political candidates. While these statutes are leveled at political campaign and election practices, the underlying ground sustaining their validity applies with equal force here.

362 U.S. at 70, 4 L. Ed. 2d at 566 (Clark, Frankfurter, Whittaker, JJ., dissenting).

The statute before us falls in between the ones considered, respectively, by *Burson* and *Talley*. Like the statute in *Burson* it is directed at serving the state's compelling interest in protecting the integrity of the electoral process. Like the statute in *Talley* it proscribes anonymity. *Burson*, however, involved a prohibition on *all* speech within certain geographic boundaries. *Talley* involved

a prohibition of *all* anonymous handbills. Our statute, on the other hand, proscribes only anonymous speech only if that speech involves an accusation of wrongdoing against an electoral candidate which is derogatory or which is calculated to affect the candidate's chances for election. We conclude our statute, being more akin to the statute in *Burson*, survives strict scrutiny in that it is a necessary enactment which could not be drawn more narrowly in order to serve the state's compelling interest in protecting electoral integrity.

Defendant and the dissenters complain that the statute covers even truthful statements, and it clearly does. *Burson* teaches that this alone is no ground for striking the statute, for the restrictions on speech upheld in *Burson* also applied to truthful campaign materials. In the context of a campaign it is necessary for accusers of candidates to identify themselves, even if they speak the truth, in order for the electorate to be able to assess the accusers' bias and interest. Why is it that the accuser comes forward with the accusation, even if it is true? What motivates the accuser? This kind of information is required in order for the electorate to determine what weight, if any, should be given the accusation, even if it is true. The source of the charge is as much at issue as the charge itself. Our statute, then, serves the compelling state interest of "providing voters with information to aid them in assessing the weight to be given a particular statement. *"There does not appear to be a less restrictive means of furthering this interest, and therefore, unlike the ordinance in Talley, campaign disclosure laws cannot be said to be overly broad."* Developments—Election Law, 88 Harv. L. Rev. 1111, 1290 (1975) (emphasis supplied).

The statute, consequently, is necessary to serve a compelling state interest. Albeit a restraint on speech, it comports with the free speech guaranties in both the United States Constitution and the Constitution of North Carolina.

We are bolstered in our conclusion by decisions from other jurisdictions sustaining similar statutes against the contention that they violate free speech guaranties; the courts conclude the statutes are necessary to serve a state's compelling interest in protecting the integrity of the electoral process. *See, e.g., Tennessee v. Acey*, 633 S.W.2d at 307; *United States v. Scott*, 195 F. Supp. at 443; *Canon v. Justice Ct.*, 61 Cal. 2d 446, 452, 458-59, 393 P.2d 428, 431, 416, 39 Cal. Rptr. 228, 231, 235 (1964).

In *Canon v. Justice Court*, the Supreme Court of California held that a statute which, like our own, prohibited publication of anonymous literature designed to injure or defeat any candidate for public office by reflecting on his personal character or political action, was a constitutional restraint on free speech. 61 Cal. 2d at 451, 393 P.2d at 430, 39 Cal. Rptr. at 229. Although the *Canon* Court did find the statute unconstitutionally discriminatory against all individuals other than California voters, the court held that the statute in no way was flawed by overbreadth. In so holding, the *Canon* Court stated:

> [The statute] requires identification so that (1) the electorate may be better able to evaluate campaign material by examination of the competence and credibility of its source, (2) irresponsible attacks will be deterred, (3) candidates may be better able to refute or rebut charges—so that elections will be the expression of the will of an undeceived, well-informed public. It is clear that the integrity of elections, essential to the very preservation of a free society, is a matter 'in which the State may have a compelling regulatory concern.' . . . [The statute] was intended to deter the scurrilous hit and run smear attacks which are all too common in the course of political campaigns. The primary concern is not for the candidate, however, although it is clearly in the public interest to create conditions conducive to the encouragement of good citizens to seek public office. The chief harm is that suffered by all people when, as a result of the public having been misinformed and misled, the election is not the expression of the true public will.
>
> . . . .
>
> "[A]nonymity all too often lends itself, in the context of attacks upon candidates in the preelection period, to smears, as a result of which the electorate is deceived. Identification permits confrontation and often makes refutation easier and more effective. It tends to reduce irresponsibility. It enables the public to appraise the source."

Id. at 452-53, 459, 393 P.2d at 431-32, 435, 39 Cal. Rptr. at 231-32, 235.

In *United States v. Scott*, the United States District Court upheld Section 612 of Title 18 of the United States Code which reads:

> Whoever willfully publishes or distributes . . . any card, pamphlet, circular, poster, dodger, advertisement, writing, or other statement relating to or concerning a person who has publicly declared his intention to do so to be publicly declared, which does not contain the names of the persons, associations, committees, and corporations responsible for the publication or distribution of the same, and the names of the officers of each such association, committee, or corporation, shall be fined not more than $1,000 or imprisoned not more than one year or both.

195 F. Supp. at 441. While 18 U.S.C.A. 612 considered by *Scott* was repealed in 1976, it has been replaced by a substantially similar statute. *See* 2 U.S.C.A. § 441d. The *Scott* Court held the statute was a constitutional enactment by the United States Congress that ensured "the electorate would be informed and [would] make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or group." *Id.* at 443. Although the statute in *Scott* was limited to candidates for the Executive Branch of the federal government and to candidates for United States Congress, the scope of its prohibition was not as narrow as section 163-274(7) in that it was not limited to "charges" against candidates.

In *Tennessee v. Acey*, the Supreme Court of Tennessee upheld a statute imposing criminal sanctions upon persons anonymously disseminating written statements about candidates for public office. 633 S.W.2d at 306. Recognizing the state's compelling interest in preserving the integrity of the electoral process and ensuring the existence of an informed electorate, the *Acey* Court concluded that the campaign literature disclosure law was the least restrictive means of furthering these interests. *Id.* at 307.

Defendant relies on *Talley v. California*, 362 U.S. 60, 4 L. Ed. 2d 559 (1960), and *Schuster v. Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), both of which we find distinguishable. We have already considered *Talley* and elaborated our reasons for believing that it does not control. *Schuster*, a California Court of Appeals case, dealt with a statute that prohibited "all anonymous political campaign literature" by all persons. 109 Cal. App. 3d at 890-91, 167 Cal. Rptr. at 448. Neither the *Talley* ordinance nor the *Schuster* statute was limited, as is our statute, to a far narrower spectrum of prohibited activity.

We recognize that other jurisdictions have found statutes proscribing anonymous publications to be unconstitutionally overbroad. We find these cases unpersuasive because, unlike our own, the statutes in question are considerably broader than ours. *Zwickler v. Koota*, 290 F. Supp. 244 (E.D. N.Y. 1968) (statute makes it a crime to distribute *any* handbill containing *any* statement concerning any candidate in connection with any election of public officers unless signed—not limited to charges), *rev'd on other grounds*, 394 U.S. 103, 22 L. Ed. 2d 113 (1969); *California v. Bongiorni*, 205 Cal. App. 2d Supp. 856, 23 Cal. Rptr. 565 (1962) (statute requires signature of person responsible on circulars or handbills that *seek to influence the result of elections*—not limited to a particular candidate); *Illinois v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987) (statute requires signature of any person who publishes or distributes *any* political literature *soliciting votes for or against any candidate or for or against any public questions to be submitted for the ballot* at an election—affects more than the chances of a particular candidate); *Louisiana v. Fulton*, 337 So. 2d 866 (1976) (statute proscribing any person from publishing *any* statement concerning *any* candidate for election unless it is signed—not restricted to charges); *Massachusetts v. Dennis*, 368 Mass. 92, 329 N.E.2d 706 (1975) (statute making it a crime to write or distribute any circular designed *to aid or defeat* any candidate or *any question submitted to voters* without name of officer of organization or name of voter responsible—not limited to charges against candidates); *New York v. Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (statute makes anonymity a crime when anyone prints or distributes *any literature* in quantity containing *any statement* concerning any candidate *or issue on the ballot* in connection with any party or governmental action—not limited to charges or candidates), *order aff'd*, 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974); *North Dakota v. Education Association*, 262 N.W.2d 731 (1978) (statute requires *all* political advertisements to disclose name of sponsor—not limited to charges or candidates); *Pennsylvania v. Wadzinski*, 492 Pa. 35, 422 A.2d 124 (1980) (statute proscribes any person from publishing *any statement* concerning any candidate for election without signature of person responsible—not limited to charges). Significantly we have found no case, state or federal, holding unconstitutional a statute with a prohibition drawn as narrowly as ours.

Finally, although the North Carolina Constitution holds freedom of speech and the press to be "great bulwarks of liberty" never

to be restrained, it also provides that "every person shall be held responsible for their abuse." N.C. Const. art. I, § 14. We believe the General Assembly has enacted section 163-274(7) in an effort to effect, by the narrowest possible means, the latter prong of this constitutional guarantee.

V.

[5] Defendant next contends the trial court committed reversible error by incorrectly defining the essential elements of the statute in its instructions to the jury. We agree.

Section 163-274(7) requires that the jury find beyond a reasonable doubt that defendant published "a charge derogatory to a candidate or calculated to affect the candidate's chances of nomination or election." For all eleven counts against defendant the trial court instructed the jury that it must find beyond a reasonable doubt that defendant published:

> a charge *he intended* to be derogatory to a candidate for election to the Boone Town Council, or which he calculated would affect such candidate's chances of election and that such publication was not signed by the party giving publicity to and being responsible for such charge it would be your duty to return a verdict of guilty of this count. . . .

(Emphasis supplied.)

Prior to delivery of the verdict sheets to the jury, defendant timely objected to the trial court's instructions on the ground that the trial court had "switched over from an objective standard set forth in the statute to a subjective standard. . . ." *See* N.C. R. App. P. 10(b)(2) (party may not assign as error any portion of jury charge unless objection is made before jury retires to consider its verdict). The trial court overruled the objection, stating that it understood the statute to require a finding that defendant intended the charge to be derogatory to a candidate or intended the material to affect the candidate's chances for election.

Defendant argues that the trial court's charge erroneously included a scienter requirement while no such requirement is present in the statute. Conversely, the State contends that the trial court's instruction required the jury to find more than the statute required and therefore placed a heavier burden on the State to prove defendant's guilt. We agree with defendant and conclude

the trial court erroneously instructed the jury to defendant's prejudice, thus entitling him to a new trial.

"When [the trial court] undertakes to define the law, [it] must state it correctly." *State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982). Failure to do so may be prejudicial error sufficient to warrant a new trial. *Id.* In *Earnhardt* defendant was convicted of being an accessory after the fact of voluntary manslaughter. *Id.* at 65, 296 S.E.2d at 651. One item of proof necessary for a conviction as accessory after the fact is that the defendant *knew* the felony had been committed by the person assisted. *Id.* at 69, 296 S.E.2d at 654. In instructing the jury, "the trial court stated that if defendant, 'knowing Horne and Lagree or Horne and Lagree *could* have committed the crime of voluntary manslaughter, assisted Horne or Lagree in escaping or attempting to escape detection, arrest or punishment by concocting a story which was not true . . .,' then he should be found guilty." Upon review, this Court held that the trial court's instruction was reversible error. *Id.* at 70, 296 S.E.2d at 654. Even though this was the only error found in defendant's trial, the Court held that the instructions incorrectly defined a crucial element of the crime with which the defendant was charged and allowed for the possibility of confusion among the jurors. *Id.*

Here, as in *Earnhardt*, we believe the incorrect instruction was "too prejudicial to be hidden by the familiar rule that the charge must be considered contextually as a whole." *Id.* Section 163-274(7) is framed both objectively and subjectively. Objectively, it requires conviction if the jury determines beyond a reasonable doubt that the material published by defendant was a charge and that such charge was derogatory to a candidate. Whether a defendant believed or intended such material to be a charge derogatory is irrelevant. The jury's determination is not based on the state of mind of defendant, but on its objective interpretation of the publication. The statute also includes a subjective inquiry. It requires conviction if the jury finds beyond a reasonable doubt that the publication was "calculated to affect the candidate's chances of nomination or election."

We do not agree with the trial court's conclusion that defendant's state of mind is relevant to both inquiries. Rather, we conclude the legislature drafted this statute giving the jury two distinct grounds upon which to convict. The jury could find that the pub-

lished material was a derogatory charge, and it could find that the charge was "calculated" by defendant to affect a candidate's chances for nomination or election. Were the jury to find that defendant did not intend the published material to affect the candidate's electoral chances, it could only find defendant guilty of violating the statute if it were to find that the published materials contained a derogatory charge.

In the instant case defendant testified that at the time he mailed the offending materials he did not think candidates Chase or Miller would win the election in any event. Based on this testimony, the jury could have found that the published materials were not calculated by defendant to affect either candidate's chances for election. If such were the case, defendant only could have been convicted if the jury determined beyond a reasonable doubt that the charge was objectively derogatory. Because, however, of the trial court's erroneous instructions, the jury would have been required to convict defendant upon a finding beyond a reasonable doubt that defendant only intended the materials to be derogatory even if, objectively, the jury did not consider them to be so.

Because the trial court incorrectly instructed the jury regarding one of two possible theories upon which defendant could be convicted and it is unclear upon which theory or theories the jury relied in arriving at its verdict, we must assume the jury based its verdict on the theory for which it received an improper instruction. *State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990) (submitting case to jury on alternative theories, including one not supported by evidence, was reversible error requiring new trial); *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) (possibility that felony murder conviction was based on predicate felony improperly submitted to jury warranted new trial); *State v. Belton*, 318 N.C. 141, 162-63, 347 S.E.2d 755, 768-69 (1986) (possibility that jury relied on unsupported theory to convict defendant required new trial); *Williams v. North Carolina*, 317 U.S. 287, 87 L. Ed. 279 (1942) (conviction cannot stand merely because it could have been supported by one theory submitted to jury if another invalid theory was also submitted and general verdict does not specify theory upon which verdict is based).

VI.

[6] Defendant next contends the trial court's failure to exclude the testimony of candidates Chase and Miller relating out-of-court

declarations of others on the effect of the publications constituted prejudicial error. We conclude that the witnesses' testimony constituted inadmissible hearsay and should have been excluded. Because defendant is entitled to a new trial on other grounds, we express no opinion as to whether the admission of this testimony was reversible error.

During the presentation of the State's case, candidate Miller was directly examined as follows:

> Q. Ma'am, the people who contacted you—you said a moment ago that there were several people who called you about the flyer?
>
> A. Yes.
>
> Q. The people who contacted you about the flyer, did they indicate it was helpful or hurtful to your election chances?
>
> MR. WHITTLE: Your Honor, I OBJECT to that as calling for hearsay and it's opinion hearsay.
>
> THE COURT: Well, you don't offer it for the truth of what was stated—
>
> MR. WILSON: No, sir—
>
> THE COURT: —but for what they said?
>
> MR. WILSON: For what they said.
>
> THE COURT: OVERRULED.
>
> Q. Yes, ma'am, go ahead.
>
> A. Ahh people asked if I had sent that out, and I said no I didn't. Ahh they were surprised, they thought maybe I had sent it out.
>
> Q. But my question was, ma'am, did they indicate to you whether it was helpful or hurtful to your election chances?
>
> MR. WHITTLE: OBJECTION to that.
>
> A. Oh, they didn't think it was helpful—
>
> THE COURT: OVERRULED.
>
> A. They did not think it was helpful at all and they were quite surprised.

Q. How many people did you talk to concerning the flyer?

A. I think about eight people that evening.

MR. WHITTLE: MOVE TO STRIKE.

THE COURT: DENIED.

Candidate Chase was examined similarly:

Q. Did you discuss, sir, with your supporters and with the voting public in Boone generally [the flyer concerning liquor by the drink]?

A. Not to as great an extent because it came later compared to the date of the election.

Q. Those that you did discuss it with, sir, did you find it helpful or derogatory to your candidacy?

MR. WHITTLE: OBJECTION, Your Honor.

THE COURT: OVERRULED.

A. That evening I only discussed it with one member of the public and he, and he found, he was, he was—the best that I can recall he said—

Q. Well, don't tell us what he said, but just whether or not he felt it was derogatory, whether or not you found it to be derogatory or helpful to your candidacy.

A. He found it to be derogatory.

MR. WHITTLE: OBJECTION.

THE COURT: OVERRULED.

MR. WHITTLE: MOVE TO STRIKE.

THE COURT: DENIED.

Under our Rules of Evidence, "[h]earsay is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802 (1988); *State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992). Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1988). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an asser-

tion." N.C.G.S. § 8C-1, Rule 801(a) (1992). Here, candidates Miller and Chase testified as to the actual opinions expressed by certain local residents out of court concerning whether the materials were derogatory and hurtful to the candidate's chances of being elected. We conclude these statements were admitted for the truth of what was said; therefore, they were inadmissible hearsay.

We further conclude the evidence does not fall within any recognized exception to the hearsay rule. The State contends the statements were admissible as lay witness opinion testimony under N.C.G.S. § 8C-1, Rule 701. We conclude these statements do not fall within the scope of Rule 701. Rule 701 allows a lay witness to testify as to his or her opinion if it is "(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 (1992). Here, Miller and Chase were not testifying as to their own opinions. Rather, both witnesses were repeating the out-of-court opinions expressed by non-testifying declarants. These opinions should have been subject to cross-examination by defendant. Because neither witness was testifying as to their own opinion, Rule 701 is inapplicable.

For the foregoing reasons the decision of the Court of Appeals vacating the judgment of the superior court is reversed. The case is remanded to the Court of Appeals for further remand to the superior court in order that defendant may be given a new trial.

REVERSED; REMANDED; NEW TRIAL.

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

Justice MITCHELL dissenting.

The majority errs in its conclusion that N.C.G.S. § 163-274(7) is a constitutionally permissible restriction on free expression. Although I agree that the State has an interest in preserving the integrity of the electoral process by promoting openness, honesty and fairness in the conduct of elections, I reject the majority's conclusion that this interest justifies the limitations on First Amendment rights imposed by this statute.

The statute at issue in the present case makes it a criminal offense *punishable by imprisonment* "[f]or any person to publish

in a newspaper or pamphlet or otherwise, any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election, unless such publication be signed by the party giving publicity to and being responsible for such charge." N.C.G.S. § 163-274(7) (1991). The statute prohibits anonymous exposure in a public forum of truthful information about public figures. Therefore, it is a restriction on pure political expression which forms the innermost core of protected free speech. I have grave reservations as to whether, consistent with the First Amendment, any public purpose can justify such a limitation on pure political expression; I am convinced that the state interest advanced in the present case is insufficient to sustain the statute against this First Amendment challenge. Further, the definition that the majority has given the word "charge" as used in the statute, to include only accusations[1] of wrongdoing, guilt or blame, causes the statute to be an even more impermissible denial of First Amendment rights.

The majority acknowledges that the statute plainly places a restriction on publications which convey *truthful* information to the public about important public issues—the election of public officials. Such publications constitute pure political expression which is protected by the most basic tenets of the First Amendment to the Constitution of the United States.

In *N.A.A.C.P. v. Claiborne Hardware Co.*, the Supreme Court of the United States emphasized the importance of free debate of such public issues:

> This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v Brown, 447 US 455, 467, 65 L Ed 2d 263, 100 S Ct 2286. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v Louisiana, 379 US 64, 74-75, 13 L Ed 2d 125, 85 S Ct 209. There is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co.

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1. The decision as to whether a publication is such an accusation and, thus, a "charge" will still lie in the eye of the beholder of the statement. Is a statement that a candidate is a "practicing heterosexual" or a statement that a candidate is a "known" communist a negative statement of the type amounting to a "charge" within the meaning of the statute? I leave such questions to the majority.

> v Sullivan, 376 US 254, 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412.

458 U.S. 886, 913, 73 L. Ed. 2d 1215, 1236 (1982). As a result of this "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," the Supreme Court has held that even *false* charges, when made in relation to a public figure and without knowledge of or reckless disregard for the statement's falsity, are protected by the First Amendment. *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 52-53 (1988); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964). The Supreme Court has done so because "erroneous statement is inevitable in free debate, . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *Sullivan*, 376 U.S. at 271-72, 11 L. Ed. 2d at 701 (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 418 (1963)). This nation is committed "to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 270, 11 L. Ed. 2d at 701.

James Madison emphasized the importance of unrestricted freedom of expression concerning candidates for public office when he stated the following in his Report on the Virginia Resolutions:

> "Let it be recollected, lastly, that the right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively."

Sullivan, 376 U.S. at 275 n.15, 11 L. Ed. 2d at 703 n.15 (quoting 4 *Elliot's Debates on the Constitution* 575 (1876)). The Supreme Court of the United States also has recognized the importance of the right to freely discuss candidates for political office:

> [D]ebate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution. . . . In a republic where the people are sovereign, the ability of the citizenry to make informed choices among

candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Buckley v. Valeo, 424 U.S. 1, 14-15, 46 L. Ed. 2d 659, 685 (1976) (per curiam). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates." *Mills v. Alabama*, 384 U.S. 214, 218, 16 L. Ed. 2d 484, 488 (1966). " 'It can hardly be doubted that the constitutional guarantee has its *fullest and most urgent application* precisely to the conduct of campaigns for political office.' " *Buckley*, 424 U.S. at 14-15, 46 L. Ed. 2d at 685 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 28 L. Ed. 2d 35, 41 (1971)) (emphasis added).

The right to anonymity has long been recognized in this country as a necessary component of the constitutional rights of free speech and a free press. In *Talley v. California*, the Supreme Court of the United States stressed that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." 362 U.S. 60, 64, 4 L. Ed. 2d 559, 563 (1960). Even before the Revolutionary War, many authors in England, including such well-known authors as Defoe, Swift, and Johnson, published anonymous pamphlets criticizing political affairs. Notes and Comments, *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 Yale L. Rev. 1084, 1085 (1961) (citing Courtney, *The Secrets of Our National Literature* 151-77 (1908)). By the time the First Amendment to the Constitution of the United States was proposed by Congress in 1789, anonymously published political criticisms were a familiar source of information.[2] *Id.* Both before and after the First Amendment became effective on 15 December 1791, the founders of this country often were compelled to exercise their

2. In *Talley*, the Supreme Court of the United States noted that "[b]efore the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along that time the Letters of Junius were written and the identity of their author is unknown to this day." 362 U.S. at 65, 4 L. Ed. 2d at 563.

right to criticize governmental officials *anonymously*. "[B]etween 1789 and 1809 no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings either unsigned or under pen names." *Id.* (citing 4 *Beveridge, The Life of Marshall*, 313-19 (1919)). Anonymous publications of that time included the following: The Federalist Papers, written by Alexander Hamilton, James Madison, and John Jay, which were originally published as letters to the editor and signed "Publius"; The Letters of Pacificus, written by Hamilton in defense of Washington's proclamation of neutrality, and Madison's responding Letters of Helvidius; and anonymous exchanges between Chief Justice Marshall, writing as "a friend to the Republic" and in defense of Supreme Court decisions, and Spencer Roane, who anonymously attacked certain Supreme Court decisions. *Id.* The Justices of the Supreme Court of the United States have demonstrated their firm grasp of such historical facts when repeatedly concluding that regulations requiring the disclosure of a speaker's identity are restrictions on the exercise of the right to free speech. *E.g., Hynes v. Mayor of Oradell*, 425 U.S. 610, 628-29, 48 L. Ed. 2d 243, 258 (1976) (Brennan, J., concurring) ("Restraints implicit in identification requirements, . . . extend beyond restrictions on time and place—they chill discussion itself."); *Talley*, 362 U.S. at 64, 4 L. Ed. 2d at 563 ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression."); *see Bates v. City of Little Rock*, 361 U.S. 516, 523, 4 L. Ed. 2d 480, 485 (1960) (" 'It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association.' " (quoting *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 462, 2 L. Ed. 2d 1488, 1499 (1958))).

The type of communications restricted by N.C.G.S. § 163-274(7)—anonymous publications of "any charge derogatory to any candidate or calculated to affect the candidate's chances of nomination or election"—encompasses both true statements and honest misstatements of fact relating to public figures. Both of these types of statements are forms of core political expression which are entitled to the greatest protection provided by the First Amendment. The statute's requirement that "the party giving publicity to and being responsible for" such publications always either "sign" them or face imprisonment for failure to do so undoubtedly will prevent many individuals from exercising their constitutionally

protected right to attack a candidate with the truth.[3] Furthermore, in addition to the deterrent effect of a disclosure requirement on the exercise of protected core political expression, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of the Blind*, 487 U.S. 781, 797, 101 L. Ed. 2d 669, 689 (1988). Both because N.C.G.S. § 163-274(7) chills the exercise of protected free expression and because it mandates the content of such expression, this statute is subject to "exacting First Amendment scrutiny." *Id.* at 797-98, 101 L. Ed. 2d at 690; *Buckley v. Valeo*, 424 U.S. at 18, 46 L. Ed. 2d at 687.

The statute at issue here, among other things, makes it a criminal offense punishable by imprisonment for any person to publish a *completely truthful* charge against any candidate for nomination or election to office, unless the person signs the publication. N.C.G.S. § 163-274(7) (1991). As authoritatively construed by the majority, the statute does not prohibit anonymous publications praising candidates or otherwise not amounting to a charge of wrongdoing or an imputation of guilt or blame. Therefore, under any recognized constitutional test, the challenged statute is a *content-based* restriction on pure *political expression* in a *public forum*. *See, e.g., Boos v. Barry*, 485 U.S. 312, 99 L. Ed. 2d 333 (1988); Laurence H. Tribe, *American Constitutional Law*, § 12-2 (2d ed. 1988); Melville B. Nimmer, *Nimmer on Freedom of Speech; A Treatise on the First Amendment* § 2.04 (1984 & Supp. 1992); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. Pa. L. Rev. 615 (1991). Accordingly, the statute "must be

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3. Regardless of whether such fears are well founded, everyone who is not somnambulant knows that many citizens fear reprisals if they openly criticize those having positions of power over them. In his concurring opinion in *Hynes v. Mayor of Oradell*, 425 U.S. 610, 626, 48 L. Ed. 2d 243, 256 (1976), Justice Brennan noted that "Deplorably, apprehension of reprisal by the average citizen is too often well founded. The national scene in recent times has regrettably provided many instances of penalties for controversial expression in the form of vindictive harassment, discriminatory law enforcement, executive abuse of administrative powers, and intensive government surveillance." Another commentator has noted that "public identification with the unorthodox may bring with it substantial . . . pressures. Moreover, a citizen with a prudent concern for the future and a knowledge of history may feel these pressures even in times of relative tolerance." Seth F. Kreimer, *Sunlight, Secrets and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1, 87 (1991). As an example, Professor Kreimer refers to the recent successful use of the description "card carrying member of the ACLU" as an epithet in political discourse.

subjected to the most exacting scrutiny." *Boos v. Barry*, 485 U.S. at 321, 99 L. Ed. 2d at 345. The State must bear the burden of showing that the " 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " *Burson v. Freeman*, 504 U.S. ---, ---, 119 L. Ed. 2d 5, 14 (1992) (plurality opinion) (quoting *Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45, 74 L. Ed. 2d 794, 804 (1983)). The Supreme Court of the United States has expressly emphasized that "it is the rare case in which . . . a law survives strict scrutiny." *Id.* at ---, 119 L. Ed. 2d at 22. This is no such "rare case."

In *Burson v. Freeman*, the Supreme Court of the United States recognized that it has "upheld generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself." *Id.* at ---, 119 L. Ed. 2d at 15 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, n.9, 75 L. Ed. 2d 547, 557-58, n.9 (1983)). The statute under challenge in the present case, however, clearly is neither generally applicable nor evenhanded. As construed by the majority, the statute prohibits anonymous publication of truthful charges against a candidate, but does not reach the anonymous publication of untruthful praise for a candidate. Surely this statute cannot be an example of the sort of "generally applicable and evenhanded restrictions" protecting the integrity of the electoral process which the Supreme Court of the United States finds constitutionally acceptable.

In *Burson*, a decision relied upon by the majority here, the Supreme Court of the United States upheld a statute forbidding political campaigning at polling places on election day. In doing so, however, the plurality opinion for the Court expressly emphasized that the Court's "examination of the evolution of election reform, both in this country and abroad, demonstrates the necessity of restricted areas in or around polling places." *Id.* at ---, 119 L. Ed. 2d at 15. It is clear to me that no similar demonstration of necessity for the restrictions embodied in the statute under attack here has been or could be made.

In my view, the State has made nothing remotely approaching a showing in the present case that the statute at issue is *necessary* to serve a compelling state interest or that it is narrowly drawn to achieve that end. Instead, it is apparent to me that the statute in question, which prohibits anonymous but truthful charges against political candidates, falls within the class of statutes properly deemed

by the Supreme Court to be an "obvious and flagrant abridgement" of the rights guaranteed by the First Amendment. *Mills v. Alabama*, 384 U.S. at 219, 16 L. Ed. 2d at 488.

I agree that the State has a compelling interest in maintaining the integrity of the electoral process and in encouraging openness, honesty and fairness in elections. This state interest itself is grounded in one of the First Amendment's most fundamental purposes: to encourage unfettered discussion on the qualifications of candidates for public office in order to enable the citizenry to make informed choices among candidates. *See Buckley v. Valeo*, 424 U.S. at 14-15, 46 L. Ed. 2d at 685. However, the burdensome restrictions[4] of N.C.G.S. § 163-274(7) are not "necessary" to serve that interest and most certainly are not "narrowly drawn to achieve that end." The statute unconstitutionally tramples on the right to publish anonymously and, thus, freely on issues of public concern.

The State acknowledges in its brief before this Court that the purpose of the statute is to eliminate "the opportunity for

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4. The restrictions at issue in the present case are significantly more burdensome than the individual disclosure requirement upheld in *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659 (1976). As construed, the regulation at issue in *Buckley* required individuals who were not candidates or political committees to report expenditures only when (1) they made contributions, in excess of $100, earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee; or (2) they made expenditures, in excess of $100, for communications that expressly advocated the election or defeat of clearly identified candidates. 424 U.S. at 80, 46 L. Ed. 2d at 722-23. The Court upheld this regulation on the basis that it furthered the governmental interests of stemming corruption in the election process and in disclosing candidates' supporters to the voters.

In the present case, the State asserts neither of the interests present in *Buckley* in support of N.C.G.S. § 163-274(7). Additionally, the *Buckley* regulation applied only to expenditures in excess of $100 either made at the behest of a candidate or used for communications "that *expressly advocated the election or defeat* of a clearly identified candidate." *See* 424 U.S. at 44 n.52, 46 L. Ed. 2d at 702 n.52 (Court held that this construction was necessary to prevent the statute's being unconstitutionally vague; restricts application of statute to communications containing express words of advocacy of election or defeat). The regulation at issue in the present case applies to any person publishing any derogatory "charge" *or* any "charge . . . calculated to affect the candidate's chances of nomination or election," regardless of the expense of the publication and regardless of whether the charge *expressly advocates* the election or defeat of the candidate. Furthermore, the regulation in *Buckley* did not require that communications be "signed" as does the regulation in the present case. *See Riley v. National Federation of the Blind*, 487 U.S. at 800-01, 101 L. Ed. 2d at 691-92 (requiring disclosure during communication itself is more burdensome than a requirement that a disclosure form be filed).

a person to remain hidden while disseminating derogatory material about a specific candidate." The State argues, and the majority of this Court agrees, that such a limitation is necessary, because a voter who reads anonymous, derogatory publications regarding a candidate "has no context within which to evaluate the bias of the source of anonymous information," and because "the candidate has no opportunity fully to rebut such material by showing the motives of the sender." The essence of the argument is that the statute in question will encourage openness in the election process by requiring that additional information—the identity of the publisher of any charge concerning a candidate for public office—be submitted to the voters. This argument fails to recognize the obvious and undeniable fact that the disclosure requirement will prevent many individuals from making truthful and highly relevant statements crucial to the public's ability to judge the qualifications of candidates for public office.[5] Rather than being necessary to encourage openness, honesty and fairness in the electoral process, the criminal statute at issue here frustrates those goals by *reducing* the amount of relevant truthful information about candidates for public office that will reach the voting public. Absent the right to criticize a candidate anonymously, some truthful messages "may never enter the marketplace of ideas at all." Kreimer, 140 U. Pa. L. Rev. at 87.

The statute as construed by the majority here will deter many individuals from publishing negative facts about a candidate which are clearly true and relevant to that candidate's fitness for public office. The State acknowledges that the statute has such an effect and even suggests that it is a *desirable* effect. The State points out in its brief before this Court that "disparaging and belittling material about a particular candidate may often be true; its very truthfulness can make it more derogatory and hurtful than lies." Although perhaps an accurate analysis, this is all the more reason

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5. The following is a hypothetical example of a statement concerning a candidate's qualifications which might not be made as a result of the regulation at issue in the present case. Citizen X is an employee of Candidate Y and is aware that Y has participated in unethical practices. However, Y is a powerful member of the community and could effectively prevent X from finding other employment in the community. X fears losing her job if she openly criticizes Y but is even more afraid that she will be subjected to a criminal prosecution if she sends an anonymous letter or publishes some other form of anonymous communication truthfully describing Y's unethical conduct. X remains silent, and the voters elect Y without being aware of Y's unethical conduct.

why it is crucial to the openness and honesty of elections to give such information to the voting public. The truthful information will be harmful only if the voting public deems the information relevant to a candidate's fitness for office, and the public must have such information in order to make an informed selection at the polls. Rather than damaging the integrity of the electoral process, access to truthful but anonymous charges concerning a candidate clearly *promotes* that integrity by providing the public with more complete information about the candidate.

Despite the fact that the statute restricts individuals wishing to publish truthful but anonymous charges about political candidates and, thereby, places a limitation upon their exercise of First Amendment rights, the State has offered no evidence in support of its contention that disclosure of the author's identity is necessary to enable voters to evaluate the reliability or weight to be given such charges. One commentator, citing several studies indicating that voters are not at all subject to being so easily misled, has concluded, to the contrary, that "[i]t seems unlikely that our media-saturated electorate will be duped into self-destruction by nefarious forces" which are concealing their identities. Kreimer, 140 U. Pa. L. Rev. at 88.

The State has not shown that voters are more easily misled by anonymous statements than by statements which are attributed. However, even if it is assumed that voters are more likely to be misled by anonymous statements, the statute as interpreted by the majority permits an individual to make *laudatory* anonymous statements about a candidate freely. Therefore, the statute results in "viewpoint discrimination" and unquestionably is a "content-based" regulation of expression. *R.A.V. v. St. Paul*, 505 U.S. ---, 120 L. Ed. 2d 305 (1992). "The First Amendment generally prevents government from proscribing speech . . . because of disapproval of the ideas expressed. *Content-based regulations are presumptively invalid.*" *Id.* at ---, 120 L. Ed. 2d at 317 (emphasis added). Therefore, for example, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government. *Id.* at ---, 120 L. Ed. 2d at 318. The State has offered no evidence showing that *false* anonymous statements *praising* a particular candidate are less damaging to the integrity of the electoral process than the truthful "charges" of wrongdoing by a candidate which are made imprisonable offenses by the statute. Indeed, it is inconceivable that any such

showing could be made. *See id.* The State has failed utterly to establish a rational basis for these distinctions under the statute, and it most certainly has failed to overcome the presumption of the invalidity of this content-based statute by making the required showing that such discrimination is *necessary* to insure open and fair elections and narrowly drawn to reach that end.

The State also has failed to show that disclosure of the author's identity is necessary to enable candidates to refute false statements. A candidate can rebut allegations contained in negative campaign material without knowing the identity of the author of that material. Furthermore, although the candidate may have difficulty showing the bias of an unidentified author, the fact that the author of a statement is unwilling to reveal his or her identity in itself serves to put every recipient of voting age on notice that the statement may be less believable than one which has been signed.

Finally, none of the State's purported justifications for the statute at issue explain why a requirement that *truthful* publications be signed is necessary to promote openness, honesty and fairness in the electoral process. It would seem that anonymous but truthful and relevant information about the candidates would promote rather than detract from that goal. The State has not shown that the criminal penalties imposed by N.C.G.S. § 163-274(7) are either "necessary" to promote any compelling interest or "narrowly drawn" to achieve any such end. To the contrary, the statute's requirements are "prophylactic, imprecise, and unduly burdensome." *Riley v. National Federation of the Blind*, 487 U.S. at 800, 101 L. Ed. 2d at 691.

In sum, the type of "danger" presented by the publication of a truthful anonymous statement about a candidate for public office which is an imprisonable criminal offense under the statute at issue " 'is precisely one of the types of activity envisioned by the Founders in presenting the First Amendment for ratification.' " *Landmark Communications v. Virginia*, 435 U.S. 829, 845, 56 L. Ed. 2d 1, 14 (1978) (quoting *Wood v. Georgia*, 370 U.S. 375, 388, 8 L. Ed. 2d 569, 579 (1962)). The statute criminalizes protected "core" or fundamental political expression of a type which cannot be prohibited and thereby violates the guarantees of the First Amendment to the Constitution of the United States.

Additionally, and of equal constitutional importance, this statute permits the imprisonment of a person solely because of the content

of his or her anonymous publications criticizing a candidate. As authoritatively construed by the majority of this Court, the statute would permit a person to anonymously praise a candidate with impunity even if the praise is false. This criminal statute prohibiting anonymous expression about a candidate on the ground that its content includes a charge against the candidate is directly contrary to the principles of the First Amendment as quite clearly interpreted by a *majority* of the Supreme Court of the United States. *R.A.V. v. St. Paul*, 505 U.S. ---, 120 L. Ed. 2d 305.

Until today, I thought that no reasonable lawyer or judge would have imagined that a statute such as the one in question here could possibly pass First Amendment scrutiny. Obviously, I was wrong in this regard as my colleagues on this Court ordinarily are reasonable people.

Before the majority upholds this statute allowing defendants to be imprisoned for publishing political pamphlets such as those at issue in the present case, it would do well to recall the following words of James Madison, who understood as well as anyone ever has the evils which led to the adoption of the First Amendment:

> Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press.
>
> It has accordingly been decided . . . that it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigor of those yielding the proper fruits.

Renwick v. News and Observer, 310 N.C. 312, 326, 312 S.E.2d 405, 413, *cert. denied*, 469 U.S. 858, L. Ed. 2d 121 (1984) (quoting 4 *Elliot's Debates on the Constitution* 571 (1876 Ed.)). I am convinced that Madison and the other founders of our nation believed that the First Amendment was adopted to prohibit the enactment of statutes precisely such as the one which the majority of this Court declares constitutionally acceptable in the present case.

The decision of the majority to uphold this flagrant violation of the First Amendment opens a sad chapter in the history of this Court. I can only pray that this chapter and the inevitable harm that will result to this State's people and their government will be brief.

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

STATE OF NORTH CAROLINA v. HENRY LEE McCOLLUM

No. 2A92

(Filed 30 July 1993)

1. **Criminal Law § 1338 (NCI4th)— capital sentencing proceeding—aggravating circumstance—murder to avoid arrest—adoption of another's stated motive**

The trial court properly submitted to the jury in a capital sentencing proceeding the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest where the evidence tended to show that after defendant and three companions had raped the eleven-year-old victim, one of the companions said that they had "to kill her to keep her from telling the cops on us"; in response to this statement, the defendant and a companion held the child's arms while another companion forced her panties down her throat with a stick until she was dead; and defendant's actions following the companion's statement were thus evidence of his adoption of the companion's stated motive for killing the victim and constituted substantial competent evidence from which the jury could find that the defendant participated in the killing to avoid detection and apprehension for the felony of rape.

Am Jur 2d, Criminal Law §§ 598, 599.

2. **Criminal Law § 1338 (NCI4th)— capital sentencing proceeding—aggravating circumstance—murder to avoid arrest—failure to convict on premeditation and deliberation theory**

There was no merit to defendant's contention that since the jury failed to convict him of first-degree murder under a theory of premeditation and deliberation, the jury could not reasonably find that he acted intentionally and with premeditation during the sentencing phase and thus could not

find the aggravating circumstance that he participated in the killing to avoid arrest where, contrary to the trial court's instructions and the requirements of the verdict sheet itself, the jury failed to give a "yes" or "no" answer with regard to whether it found the defendant guilty on the basis of premeditation and deliberation but stated only that it had found defendant guilty under the felony-murder rule; premeditation and deliberation are only theories by which one may be convicted of first-degree murder, and defendant was not convicted or acquitted of a theory; and a conclusion that the jury rejected the theory that defendant acted with premeditation and deliberation would amount to sheer speculation unsubstantiated by anything in the record.

Am Jur 2d, Criminal Law §§ 598, 599.

3. Criminal Law § 1343 (NCI4th) — capital trial — especially heinous, atrocious or cruel aggravating circumstance — instruction on "this murder"

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could find the especially heinous, atrocious or cruel aggravating circumstance if "this murder" was especially heinous, atrocious or cruel rather than requiring the jury to find that this aggravating circumstance was supported by the defendant's own conduct where all of the evidence at trial tended to show that defendant was physically present when the killing of the eleven-year-old victim took place and was an active participant in the murder, and defendant's statement to officers shows that he raped the victim and then held her arms so that another male could carry out the expressly stated intention to kill the child by forcing her panties down her throat with a stick.

Am Jur 2d, Criminal Law §§ 598, 599.

4. Criminal Law § 1318 (NCI4th) — capital sentencing proceeding — instructions — when death penalty appropriate

The trial court did not err in a capital sentencing proceeding by instructing the jury that the imposition of the death penalty would be proper if the State proved beyond a reasonable doubt, *inter alia*, that "the defendant himself killed the victim, or intended to kill the victim, or was a major

participant in the underlying felony and exhibited reckless indifference to human life."

Am Jur 2d, Trial §§ 1077, 1142.

5. **Criminal Law § 454 (NCI4th)— capital sentencing proceeding—prosecutor's jury argument—imagining victim as own child—no due process violation**

Assuming *arguendo* that it was improper for the prosecutor to repeatedly ask the jurors during his closing argument in a capital sentencing proceeding to imagine the eleven-year-old victim as their own child, these portions of the prosecutor's argument did not deny defendant due process where the arguments did not manipulate or misstate the evidence and did not implicate other specific rights of the accused such as the right to counsel or the right to remain silent; the trial court instructed the jurors that their decision was to be made on the basis of the evidence alone and that the arguments of counsel were not evidence; defendant's own statement to police officers established that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious or cruel; and all of these factors reduced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument.

Am Jur 2d, Criminal Law § 825; Trial §§ 192, 228, 490.

6. **Criminal Law § 447 (NCI4th)— capital sentencing proceeding—prosecutor's jury argument—impact of death on victim's father**

The prosecutor's remarks during his closing argument in a capital sentencing proceeding regarding the impact of the child victim's death on her father and the fact that he wanted revenge were not so grossly improper as to require the trial court to intervene *ex mero motu.*

Am Jur 2d, Trial § 280.

7. **Criminal Law § 454 (NCI4th)— capital sentencing proceeding—prosecutor's jury argument—imposition of punishment—no misstatement of law**

The prosecutor's closing argument in a capital sentencing proceeding that "you aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the court . . ." did not misstate the law and did not tend

to diminish the jury's responsibility since the prosecutor informed the jury that its recommendation would be binding on the trial court and did not suggest that the jurors could depend upon judicial or executive review to correct any errors in their verdict.

Am Jur 2d, Trial §§ 490, 533.

8. **Criminal Law § 442 (NCI4th) — capital sentencing proceeding — prosecutor's jury argument — jury as conscience of community**

The prosecutor's jury argument during a capital sentencing proceeding that "if you let this man have his life, you will be doing yourself, your community a disservice" was not improper. Furthermore, any possible error was cured when the trial court immediately sustained the defendant's objection to the prosecutor's statement.

Am Jur 2d, Trial §§ 490, 554, 555.

9. **Criminal Law § 452 (NCI4th) — capital sentencing proceeding — prosecutor's jury argument — weighing aggravating and mitigating circumstances — divide and conquer approach**

The prosecutor's argument to the jury during a capital sentencing proceeding that it should weigh each individual mitigating circumstance against all of the aggravating circumstances in a "divide and conquer" approach was not so grossly improper as to require the trial court to intervene *ex mero motu.*

Am Jur 2d, Trial §§ 490, 554, 555.

10. **Criminal Law § 441 (NCI4th) — capital sentencing proceeding — prosecutor's jury argument — attempt to discredit expert witness**

Where defendant's expert psychologist testified during a capital sentencing proceeding regarding the dates of her meetings with defendant and the length of his imprisonment, and both parties acknowledged that the murder occurred eight years earlier, the prosecutor's jury argument asking the jury to consider why the expert had waited seven years to examine the defendant was a permissible challenge to the accuracy of the psychologist's conclusions in light of the passage of time between the crime and her first examination of defendant

and was not an improper attempt to alert the jury to the fact that defendant had been tried on a previous occasion.

Am Jur 2d, Trial §§ 554, 555.

11. Criminal Law § 452 (NCI4th)— capital sentencing proceeding—arguments for death penalty—no improper statements of personal opinion

The prosecutor's jury arguments during a capital sentencing proceeding that "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do" and that "I won't have the opportunity to again get in front of you and try to convince you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with" were not improper statements of the prosecutor's personal opinions but were proper arguments that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case.

Am Jur 2d, Trial §§ 497, 499.

12. Evidence and Witnesses § 1695 (NCI4th)— photographs of victim's body—admission for illustrative purposes

A photograph showing a homicide victim's neck and throat during the autopsy was properly admitted to illustrate the medical examiner's testimony that the cause of death was asphyxiation and to illustrate an SBI agent's testimony explaining his collection and retrieval of the physical evidence, specifically a pair of panties from the victim's windpipe. Two photographs of the victim's body at both the crime scene and at the time of the autopsy, depicting the decomposition process, were properly admitted for illustrative purposes where an SBI agent utilized the crime scene photograph to illustrate his testimony concerning the body's appearance when it was found, and the medical examiner utilized the autopsy photograph to illustrate her testimony concerning the autopsy, the length of time the body lay in a field, and the reason for her failure to detect any sperm in the victim's body even though she had been raped.

Am Jur 2d, Homicide §§ 417-419.

13. Criminal Law § 681 (NCI4th)— capital sentencing proceeding—impaired capacity mitigating circumstance—peremptory instruction—failure of jury to find

The failure of the jury in a capital sentencing proceeding to find the impaired capacity mitigating circumstance did not violate defendant's Eighth and Fourteenth Amendment rights even though the trial court gave a peremptory instruction on this circumstance where defendant relied on the uncontradicted testimony of a psychologist to support submission of this circumstance; the psychologist's testimony was not manifestly credible in light of the fact that she did not examine defendant until seven years after the killing; and the peremptory instruction did not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility.

Am Jur 2d, Criminal Law § 628.

14. Constitutional Law § 327 (NCI4th)— delay between grant of retrial and retrial—not unreasonable or unjust—absence of prejudice

Defendant was not denied his Sixth Amendment right to a speedy trial by the delay between a 3 February 1988 Supreme Court decision awarding defendant a new trial for first degree murder and the 8 October 1990 date initially selected by the State for his retrial where defendant made no attempt to assert his right to a speedy trial during the 32-month delay between the Supreme Court decision and his written motion to dismiss for failure to afford him a speedy trial; subsequent postponements of the trial until 4 November 1991 were at the request of defendant or with his consent; the delays in retrying defendant were occasioned in substantial part by numerous motions of defendant which were still pending; a pending motion for change of venue was subsequently decided in defendant's favor and venue was moved to another county; a pending motion to dismiss due to racial prejudice in the selection of the grand jury which originally indicted defendant was apparently deemed by the State to have some merit since the State later obtained a superseding indictment returned by a different grand jury; and there was no merit to defendant's contention that he was prejudiced by the delay because he was not allowed to impeach a State's witness who had died before the retrial and whose testimony at the first trial

was admitted at the retrial where the trial court admitted into evidence the deceased witness's record of criminal convictions amassed since the first trial, a district court judge testified that he had represented the witness as an attorney and in his opinion the witness "was not a truthful person," defendant had full opportunity and motive to cross-examine the witness at the first trial, and defendant impeached the witness as effectively as if he had survived to testify.

Am Jur 2d, Criminal Law §§ 652, 654.

15. Constitutional Law § 343 (NCI4th)— capital sentencing proceeding—depositions taken outside defendant's presence—introduction by defendant—harmless error

Any violation of defendant's right under N.C. Const. art. I, § 23 to be present at every stage of his capital trial by the admission into evidence of videotaped depositions taken outside defendant's presence was harmless where defendant introduced the depositions in support of mitigating circumstances during the capital sentencing proceeding; all of the deposition testimony tended to support mitigating circumstances; and the admission of the depositions was thus favorable to defendant.

Am Jur 2d, Criminal Law §§ 696, 697, 910.

16. Jury § 150 (NCI4th)— capital trial—jury selection—death penalty views—excusal for cause without rehabilitation by defendant

The trial court did not abuse its discretion in a capital trial by excusing for cause two prospective jurors who had expressed unequivocal opposition to the death penalty without allowing defendant to propound further questions in an attempt to rehabilitate them where defendant made no showing that further questioning by him would likely have produced different answers to the questions propounded to the prospective jurors.

Am Jur 2d, Jury §§ 195, 196.

17. Jury § 248 (NCI4th)— peremptory challenges—Batson violation—new panel of jurors—refusal to seat excused jurors—harmless error

When the trial court determines that the State improperly exercised peremptory challenges to remove prospective jurors

on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79, the better practice is for the court to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation rather than to seat the jurors who were improperly excused. Assuming *arguendo* that the trial court erred in failing to reinstate three improperly removed jurors and seat them on the jury in defendant's case, such error was harmless beyond a reasonable doubt and not prejudicial to this defendant where the trial court's order that the jury selection process begin again with a new panel provided defendant with exactly the same remedy which defendant now contends he should receive—trial by a jury selected on a nondiscriminatory basis.

Am Jur 2d, Jury §§ 233, 235.

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

18. Evidence and Witnesses § 1341 (NCI4th)— confession—mental capacity to waive rights—sufficiency of evidence and findings

The trial court did not err by failing to exclude from evidence defendant's statements to police officers on the ground that defendant's mental retardation and emotional disabilities prohibited him from knowingly and intelligently waiving his constitutional rights where the trial court found from substantial evidence introduced during a *voir dire* hearing that the officers told defendant that he could accompany them to the police station if he wished to do so; defendant chose to go with them and appeared to have no problems understanding what the officers talked about or any instructions given by the officers; the officers read each of defendant's constitutional rights to him, and he indicated that he understood them and then signed a waiver of rights form; and during the interview, all of defendant's answers were reasonable in relation to the questions asked by the officers. These findings supported the trial court's conclusion that defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to the officers.

Am Jur 2d, Evidence § 585.

19. Constitutional Law § 349 (NCI4th)— deceased witness—testimony at former trial—impeachment evidence at new trial—no violation of right to confrontation

Assuming *arguendo* that the trial court erred by failing to exclude in defendant's retrial testimony given at defendant's first trial by a witness who died before the retrial, this error was harmless and defendant's Sixth Amendment right to confront this witness was not denied where defendant tendered and the trial court admitted into evidence at the retrial the deceased witness's record of convictions amassed since the first trial; a district court judge testified during the retrial that, as an attorney, he had represented the witness and that in his opinion the witness was not a truthful person; defendant has not pointed to any additional information not available to him in the first trial which would have tended to impeach the witness or otherwise would have been of assistance to defendant had the witness been present during the new trial; defendant had ample opportunity to cross-examine the witness during the first trial; and defendant thus impeached the witness as effectively as if he had survived to testify and be cross-examined at the retrial.

Am Jur 2d, Criminal Law §§ 956-959.

20. Criminal Law § 1373 (NCI4th)— first-degree murder—underlying felony of rape—death penalty not excessive or disproportionate

A sentence of death imposed on defendant for first-degree murder was not excessive or disproportionate considering the crime and the defendant where the jury found defendant guilty of felony murder premised upon the felony of first-degree rape; the jury found as aggravating circumstances that the murder was committed for the purpose of avoiding arrest and that it was especially heinous, atrocious, or cruel; and all the evidence tended to show: defendant and three other males "gang" raped and sodomized the eleven-year-old victim while she begged them not to and called out for her "Mommy"; the defendant then helped to hold the victim's arms while one of the other men took a stick, with the victim's panties attached to the end of it, and shoved it down her throat until she stopped breathing; and the men then dragged the victim's body away from the crime scene and hid it in a field.

Am Jur 2d, Criminal Law §§ 627, 628.

Chief Justice EXUM concurring in part and dissenting in part.

Justice FRYE joins in this concurring and dissenting opinion.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment and sentence of death upon the defendant's conviction of first-degree murder, entered by Thompson, J., in the Superior Court, Cumberland County, on 22 November 1991. Heard in the Supreme Court on 15 February 1993.

Michael F. Easley, Attorney General, by David Roy Blackwell, Special Deputy Attorney General, for the State.

Robert H. Tiller for the defendant-appellant.

MITCHELL, Justice.

The defendant was indicted by the Robeson County Grand Jury for the first-degree murder and the first-degree rape of Sabrina Buie and was tried during the 8 October 1984 Criminal Session of Superior Court, Robeson County. The jury returned verdicts finding him guilty of first-degree murder on both the theory of premeditation and deliberation and the theory of felony murder and of first-degree rape. At the conclusion of a separate capital sentencing proceeding, the jury recommended a sentence of death, and the trial court entered a sentence in accord with the recommendation. The trial court also entered judgment sentencing the defendant to imprisonment for life for first-degree rape. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial for errors committed in the trial court and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988).

After our remand, the defendant was indicted by the Robeson County Grand Jury in a superseding indictment for the first-degree murder of Sabrina Buie. Following an order changing venue to Cumberland County, the defendant was tried capitally at the 4 November 1991 Criminal Session of Superior Court, Cumberland County. The jury convicted the defendant of first-degree rape and of first-degree murder on the felony murder theory. At a separate capital sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court entered a sentence of

death upon the verdict finding the defendant guilty of first-degree murder. The trial court arrested judgment on the conviction of first-degree rape. The defendant appealed to this Court as a matter of right from the judgment sentencing him to death for first-degree murder.

The State's evidence introduced at trial tended to show, *inter alia*, the following. On Sunday, 25 September 1983 at approximately 12:20 a.m., Ronnie Lee Buie noticed that his eleven-year-old daughter, Sabrina Buie, was missing from their home in Robeson County when he returned home from working the midnight shift at a nearby business. On 26 September 1983, James Shaw, a friend of Ronnie Lee Buie, found Sabrina Buie's nude body in a soybean field.

An autopsy was performed upon the body of Sabrina Buie. Linear abrasions on her back and buttocks revealed a pattern indicating that the body had been dragged over a rough surface. There was a tear or laceration deep within the victim's vagina and a tear or laceration in her anal canal. Petechial hemorrhaging, characterized as the bursting of small blood vessels caused by pressure, was observed in the victim's eyes. Similar hemorrhaging caused by a pressure mechanism was also observed in the heart and lungs. The brain appeared slightly swollen due to a lack of oxygen.

A stick and pair of panties were wedged in the victim's throat, completely obstructing the airway. Dr. Deborah Radisch, Chief Assistant Medical Examiner for the State of North Carolina, testified that the victim died of asphyxiation.

The defendant, Henry Lee McCollum, gave a statement to law enforcement officers on 28 September 1983. In this statement, the defendant McCollum said that he saw Sabrina Buie and Darrell Suber come out of Suber's house at approximately 9:30 p.m. on 24 September 1983. McCollum, Chris Brown, Louis Moore and Leon Brown joined Sabrina Buie and Darrell Suber, and the group then went to a "little red house near the ballpark." The five males tried to convince Sabrina to have sexual intercourse with them, but she refused. Two of the males went to a store and purchased some beer. When they returned, the males discussed having sexual intercourse with Sabrina. Louis Moore refused to participate and left.

The four remaining males and Sabrina then walked across a soybean field and sat in some bushes where they drank beer.

Suber stated that he was going to have sexual intercourse with Sabrina. At this point, the defendant McCollum grabbed Sabrina's right arm and Leon Brown grabbed her left arm. Eleven-year-old Sabrina then began to yell, "Mommy, Mommy" and "Please don't do it. Stop." Suber then raped Sabrina while the defendant and Brown held her arms. Subsequently, each man raped Sabrina while the others held her. Leon Brown then sodomized the child while Chris Brown held her.

After the men had raped and sodomized Sabrina, Suber said "we got to do something because she'll go uptown and tell the cops we raped her. We got to kill her to keep her from telling the cops on us." The defendant McCollum grabbed Sabrina's right arm while Leon Brown grabbed her left arm. Chris Brown knelt over Sabrina's head and pushed her panties down her throat with a stick while Leon Brown and the defendant held her down. After determining that the child was dead, the defendant and Chris Brown dragged her body away to a bean field to hide it from view.

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 the trial court erred in the capital sentencing proceeding by submitting to the jury the aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant argues that since the jury declined to convict him under a theory of premeditation and deliberation, the jury could not subsequently find that the murder was committed for the purpose of avoiding or preventing a lawful arrest. The defendant also argues that since the only person expressing the intent to avoid arrest as a basis for the murder was Darrell Suber, not the defendant, there is no evidence that the defendant acted in an attempt to avoid a lawful arrest.

N.C.G.S. § 15A-2000(e)(4) provides that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the "capital felony was committed for the purpose of avoiding or preventing a lawful arrest. . . ." N.C.G.S. § 15A-2000(e)(4) (1988). However, before the trial court may instruct the jury on this aggravating circumstance, there must be substantial competent evidence from which the jury can infer that at least

one of the defendant's purposes for the killing was the defendant's desire to avoid subsequent detection and apprehension for his crime. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

In the present case, evidence tended to show that after the defendant and the other males had raped Sabrina Buie, Darrell Suber said, "we got to kill her to keep her from telling the cops on us." In response to Suber's statement, the defendant and Leon Brown held the child's arms while Chris Brown forced her panties down her throat with a stick until she was dead. The defendant's actions following Suber's statement were evidence of his adoption of Suber's stated motive for killing Sabrina Buie. Therefore, evidence of the defendant's actions following Suber's statement was substantial competent evidence from which the jury could find that the defendant participated in the killing to avoid detection and apprehension for the felony of rape.

[2] The defendant also argues in support of this assignment of error that the jury "declined to convict him of murder with malice, premeditation and deliberation" and, in so doing, rejected the theory that he participated in the killing of the victim after premeditation and deliberation. The defendant contends that: "In so doing, the jury rejected the argument that Mr. McCollum 'intentionally killed the victim or that he intended that she be killed . . . and that he acted with malice after premeditation and deliberation.' " The defendant argues that, as a result, the jury's verdict "shows that there was not sufficient evidence to find that Mr. McCollum acted with premeditation and deliberation. *A fortiori*, there was also not sufficient evidence to find that 'one of the purposes motivating the killing was defendant's desire to avoid subsequent detection and apprehension for the crime.' " The defendant reasons that, having failed to find that the defendant "acted intentionally and with premeditation in the guilt phase, the jury could not then reasonably find that he acted intentionally and with premeditation in the sentencing phase." Therefore, the defendant argues that the trial court erred by permitting the jury to consider finding the aggravating circumstance that the defendant participated in the killing to avoid arrest. We do not agree.

The pertinent portions of the verdict form submitted to the jury in connection with the first-degree murder charge and the answers the jury recorded thereon were as follows:

We, the jury return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER

Answer: yes

IF YOU ANSWER "YES," IS IT:

A. On the basis of malice, premeditation and deliberation?

ANSWER: _____

B. Under the first-degree felony murder rule?

ANSWER: yes

Contrary to the trial court's instructions and the requirements of the verdict sheet itself, the jury failed to give either a "yes" or "no" answer with regard to whether it found the defendant guilty of first-degree murder on the basis of premeditation and deliberation. Instead, the jury stated that it had found the defendant guilty of first-degree murder under the felony murder rule without giving any indication as to whether it had reached or decided the question of whether the defendant participated in the killing with malice and after premeditation and deliberation.

This Court has taken the position that: "Premeditation and deliberation is a theory by which one may be convicted of first degree murder; felony murder is another such theory. Criminal defendants are not convicted or acquitted of theories; they are convicted or acquitted of crimes." *State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 561 (1989) (citations omitted). Therefore, the defendant here was convicted of first-degree murder and has not been acquitted of anything. *See id.*

More to the point, we cannot know from the jury's failure to follow the trial court's instructions to give a "yes" or "no" answer to the question relating to premeditation and deliberation what, if any, consideration the jury gave to this issue or what, if any, decision it reached. To conclude, as the defendant would have us conclude, that the jury rejected the theory that the defendant acted with premeditation and deliberation would require us to engage in sheer speculation unsubstantiated by anything in the

record before us. This we may not do. Accordingly, we conclude that this assignment of error is without merit.

[3] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by submitting the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. N.C.G.S. § 15A-2000(e)(9) provides that the jury may consider as an aggravating circumstance justifying the imposition of the death penalty the fact that the murder was "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (1988). The defendant does not contend that the murder of the eleven-year-old victim by the men who had just raped and sodomized her was not especially heinous, atrocious or cruel. Instead, he contends that the trial court erred by instructing the jury that it could find this aggravating factor if "this murder" was especially heinous, atrocious or cruel, because the trial court's "instruction" failed to require the jury to find this aggravating circumstance only if it was supported by the defendant's own conduct.

As authority for his argument, the defendant relies upon *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed. 2d 1140 (1982). In *Enmund*, the Court held that capital punishment must be tailored to the particular defendant's personal responsibility and moral guilt. *Enmund*, 458 U.S. at 801, 73 L. Ed. 2d at 1154. However, the defendant's reliance on *Enmund* is misplaced. *Enmund* involved the propriety of a death sentence, based upon a felony murder conviction, imposed upon a defendant who did not commit the homicide, was not physically present when the killing took place, and did not intend that a killing take place or that lethal force be employed.

In the present case, entirely unlike the situation in *Enmund*, all of the evidence at trial tended to show that the defendant was physically present when the killing took place and was an active participant in Sabrina Buie's murder. The defendant's statement to law enforcement officers shows that he raped Sabrina Buie and then held her arms so that Chris Brown could carry out the expressly stated intent to kill the child. In light of the uncontroverted evidence of the defendant's active participation in Sabrina Buie's murder, coupled with the brutal nature of the crime, the manner in which the trial court submitted the aggravating circumstance was not error. This assignment of error is without merit.

[4] By another assignment of error, the defendant contends that the trial court erred in the capital sentencing proceeding by instructing the jury that the imposition of the death penalty would be proper if the State proved beyond a reasonable doubt that the defendant "was a major participant in the underlying felony and exhibited reckless indifference to human life."

In *Enmund* the Court held that the Eighth Amendment forbids the imposition of the death penalty on a defendant who aids and abets in the commission of a felony in the course of which a murder is committed by others, when the defendant does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. *Enmund*, 458 U.S. at 801, 73 L. Ed. 2d at 1154. In a later case, however, the Court further construed its holding in *Enmund* and held that major participation in the felony committed, combined with reckless indifference to human life, is sufficient grounds for the imposition of the death penalty. *Tison v. Arizona*, 481 U.S. 137, 158, 95 L. Ed. 127, 145 (1987).

In the instant case, the trial court instructed the jury that before it could recommend that the defendant be sentenced to death, the State must, *inter alia*, prove beyond a reasonable doubt that "the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life." This instruction comports with *Enmund* and *Tison*, as well as with the North Carolina Pattern Instructions. *See* N.C.P.I.—Crim. 150.10 (1988). Accordingly, this assignment of error is without merit.

By another assignment of error, the defendant contends that the trial court erred in permitting the prosecutor to make several prejudicial statements during closing arguments in the capital sentencing proceeding. The defendant contends that the prosecutor's closing argument contained statements which tended to inflame the jury, misstate the applicable law, or had no evidentiary basis in the record.

As a general proposition, counsel is allowed wide latitude in the jury argument during the capital sentencing proceeding. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). In order for a defendant to receive a new sentencing proceeding, the prosecutor's comments must have

"so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 91 L. Ed. 2d 144, 157 (1986). In the present case, the defendant argues that several portions of the prosecutor's closing argument were prejudicial. We will address each of the defendant's contentions individually.

[5] On several occasions, the prosecutor asked the jurors to imagine that the victim was their child. Specifically, the prosecutor asked the jurors the following questions: "How many of you would want your child to be drug across a wooded field, a wooded area, to have the skin scraped off her young back like that after these defendants had raped her and abused her body." "The photographs that you've seen during the course of this trial, the photographs showing Sabrina bleeding from her nose, from her mouth, how many of you would like to have to see your child looking like that?" "How many of you would want your child to end up in a morgue looking like that and have to have her body split open to determine how she died?" The trial court overruled the defendant's objections to these arguments. However, the trial court subsequently sustained the defendant's objections to substantially similar arguments.

An argument "asking the jurors to put themselves in place of the victims will not be condoned. . . ." *United States v. Picknarcek*, 427 F.2d 1290, 1291 (9th Cir. 1970). In the present case, the prosecutor repeatedly asked the jury to imagine the victim as their own child. We assume *arguendo* that these arguments were improper. At issue in this case, therefore, is whether these portions of the prosecutor's closing argument denied the defendant due process. *See Darden v. Wainwright*, 477 U.S. 168, 91 L. Ed. 2d 144 (1986).

The prosecutor's arguments here did not manipulate or misstate the evidence, nor did they implicate other specific rights of the accused such as the right to counsel or the right to remain silent. The trial court instructed the jurors that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence. Moreover, the weight of the evidence against the defendant with respect to the two aggravating circumstances submitted to the jury was heavy; the defendant's own statement to police officers established that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious or cruel. All of these factors re-

duced the likelihood that the jury's decision was influenced by these portions of the prosecutor's closing argument. Therefore, the prosecutor's closing argument did not deny the defendant due process. *Id.*

[6] The defendant next argues that the trial court should have excluded the prosecutor's comments regarding the impact of Sabrina's death on her father and the fact that he wanted revenge. The defendant contends that these statements sought to inflame the jury. However, there were no objections made to these portions of the prosecutor's argument during the capital sentencing proceeding. If a party fails to object to a closing argument, we must decide whether the argument was so improper as to warrant the trial judge's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The standard of review is one of "gross impropriety." *Id.* In *State v. King*, 299 N.C. 707, 264 S.E.2d 40 (1980), this Court held that the prosecutor's remarks during closing concerning what the victim must have been thinking as he was dying and what the family of the victim experienced following the loss were not grossly improper. Similarly, we conclude that the prosecutor's remarks regarding the impact of Sabrina's death on her father and the fact that he wanted revenge were not so grossly improper as to require the trial court to intervene *ex mero motu*.

[7] The defendant next argues in support of this assignment that the prosecutor made several misstatements of law during closing arguments in the capital sentencing proceeding. It is well settled that the trial court is required to censor remarks not warranted either by the law or by the facts. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). First, the defendant argues that the prosecutor's comments tended to diminish the jury's responsibility during the sentencing phase of this capital case in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 86 L. Ed. 2d 231 (1985). In *Caldwell* the Court held that it is unconstitutional to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Id.* at 328, 86 L. Ed. 2d at 239. In the present case, the prosecutor told the jury that "you aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the Court, but it is a fair recommendation if you recommend the death penalty in this case." The prosecutor's statement that the jury's recommendation is binding

on the Court is consistent with N.C.G.S. § 15A-2000(b), which provides that "[a]fter hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court. . . ." N.C.G.S. § 15A-2000(b) (1988). Moreover, the prosecutor's statement informed the jury that its recommendation would be binding on the trial court and did not suggest to the jurors that they could depend upon judicial or executive review to correct any errors in their verdict. The prosecutor did not misstate the law in this portion of the closing argument.

[8] The defendant next argues that the prosecutor improperly suggested to the jury during the capital sentencing proceeding that its decision should be made with reference, not just to the evidence, but also to the desires of their community. The prosecutor stated, "and if you let this man have his life, you will be doing yourself, your community a disservice." It is well settled that the prosecutor's remarks reminding the jury that, for purposes of the defendant's trial, it was acting as the voice and conscience of the community are permissible. *Soyars*, 332 N.C. at 61, 418 S.E.2d at 488; *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985). In addition, the trial court in this case immediately sustained the defendant's objection to the prosecutor's statement. Therefore, any possible error was cured.

[9] The defendant next argues that the prosecutor improperly argued to the jury during the capital sentencing proceeding that it should weigh each individual mitigating circumstance against all of the aggravating circumstances in a "divide and conquer" approach. For example, in arguing that the jury should give little weight to the defendant's mental disabilities, the prosecutor stated that "the aggravating circumstances substantially outweigh that factor." The defendant did not object to the prosecutor's statements. Therefore, we must determine whether the trial court was required to intervene *ex mero motu*. *See State v. Craig*, 308 N.C. 446, 457 S.E.2d 740 (1983). We conclude that there was no such gross impropriety here.

[10] The defendant next argues that during the capital sentencing proceeding the prosecutor improperly attempted to alert the jury to the fact that the defendant had been tried on a previous occasion. In an attempt to discredit Dr. Faye Sultan, the defendant's expert psychologist, the prosecutor asked the jury to consider why the

expert had waited seven years to examine the defendant. The defendant notes that the prosecutor did not ask this question during cross examination.

Counsel is permitted to argue from the evidence which has been presented, as well as reasonable inferences that can be drawn therefrom. *Williams*, 317 N.C. at 481, 346 S.E.2d at 410. Dr. Sultan testified regarding the dates of her meetings with the defendant and the length of his imprisonment. In addition, both parties had acknowledged that the murder occurred in September 1983. Consequently, it was permissible for the prosecutor to challenge the accuracy of Dr. Sultan's conclusions in light of the passage of seven years between the commission of the crime and her first examination of the defendant.

[11] The defendant next contends that the prosecutor improperly expressed his personal opinions during closing arguments in the sentencing proceeding. The defendant argues that the following statements were improper: First, the prosecutor stated, "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do." Second, the prosecutor stated, "I won't have the opportunity to again get in front of you and try to convince you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with." The defendant did not object at trial to these statements. Therefore, the gross impropriety standard applies. The prosecutor's comments in this case were proper in light of his role as a zealous advocate for convictions in criminal cases. *See Scott*, 314 N.C. at 311, 333 S.E.2d at 297. The prosecutor was not stating his personal opinion, but merely arguing that the jury should conclude from the evidence before it that the imposition of the death penalty was proper in this case. For the foregoing reasons, we conclude that the arguments of the prosecutor during the capital sentencing proceeding in this case, which are the subject of this assignment of error, did not amount to prejudicial error. Accordingly, this assignment of error is overruled.

[12] By another assignment of error, the defendant contends that the trial court erred by admitting photographs of the victim's body into evidence. For the limited purpose of illustrating the testimony of the medical examiner and Agent Leroy Allen, the trial court admitted three photographs of the victim's body into evidence. The defendant contends that admission of these photographs was

error because their probative value was substantially outweighed by their unfair tendency to inflame the jury. N.C.G.S. § 8C-1, Rule 403 (1988).

Photographs of a homicide victim's body may be introduced into evidence to explain or illustrate testimony. *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984). Moreover, photographs may be introduced into evidence even if they are gruesome, so long as they are used by a witness to illustrate his testimony and an excessive number are not used solely to arouse the passions of the jury. *State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988).

In the present case, the medical examiner, Dr. Deborah Radisch, utilized a photograph showing the victim's neck and throat during the autopsy to illustrate her testimony concerning the cause of death. A stick and a pair of panties had been found lodged in the victim's throat and Dr. Radisch determined that the cause of death was asphyxiation. State Bureau of Investigation Agent Leroy Allen utilized the photograph to illustrate and explain his collection and retrieval of the physical evidence, specifically the panties from the victim's windpipe. This photograph was properly admitted for the limited purpose of illustrating the witness's testimony.

The defendant also contends that photographs of the victim's face, at both the crime scene and at the time of the autopsy, depicting the decomposition process, were introduced for the sole purpose of inflaming the jury. On the contrary, Agent Allen utilized the crime scene photograph to illustrate his testimony concerning the body's appearance when it was found at the crime scene. Similarly, Dr. Radisch utilized the photograph taken at the autopsy to illustrate her testimony regarding the autopsy. Specifically, the presence of decomposition bears directly upon the length of time the body lay in the field and further explained Dr. Radisch's testimony concerning her failure to detect any sperm in the victim's body. Since the photographs were not excessive in number and were used for the purpose of illustrating the testimony of Dr. Radisch and Agent Allen, the trial court did not err in admitting the photographs into evidence. This assignment is without merit.

[13] By another assignment of error, the defendant contends that the jury's failure to find clearly proven mitigating circumstances violated his rights under the Eighth and Fourteenth Amendments. The trial court instructed the jury that

All of the evidence tends to show that the capacity of the defendant to appreciate the criminality of his conduct or to conform to the requirements of law was impaired.

Therefore, as to this circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show, you would so indicate by having your foreman write "yes" in the space provided after this mitigating circumstance on the issues and recommendation form.

However, if none of you find this circumstance to exist even though there is no evidence to the contrary, then you would so indicate by having your foreman write "no" in that space.

Despite the trial court's peremptory instruction, the jury failed to find the mitigating circumstance.

It is well settled that a peremptory instruction does not deprive the jury of its right to reject the evidence because of a lack of faith in its credibility. *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979). In the present case, the defendant relied upon the testimony of Dr. Faye Sultan to support the submission of the mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired at the time the victim was killed. Contrary to the defendant's contention, the jury was not required to accept Dr. Sultan's testimony. *See id.* Even though Dr. Sultan's testimony was uncontradicted, we cannot say, in light of the fact that she did not examine the defendant until seven years after the killing, that her testimony was manifestly credible. Accordingly, this assignment of error is without merit.

[14] By another assignment of error, the defendant contends that his Sixth Amendment right to a speedy trial was violated. The defendant was originally tried during the 8 October 1984 Criminal Session of Superior Court for Robeson County and sentenced to death on 25 October 1984. In an opinion filed on 3 February 1988, this Court granted the defendant a new trial and remanded this case to the Superior Court, Robeson County. *State v. McCollum*, 321 N.C. 557, 364 S.E.2d 112 (1988). A superseding indictment for murder was returned against the defendant by the Robeson County Grand Jury on 7 January 1991. Thereafter, venue for trial was transferred from Robeson County to Cumberland County.

Although the record on appeal is less than complete, the defendant's motion for speedy trial included in the Record on Appeal in this case contains a statement by counsel for the defendant that he was informed in August of 1990 that the State intended to bring this case to trial (apparently in Robeson County) during the week of 8 October 1990. Subsequently, counsel for the defendant informally requested that the trial date be set later in October or in November. The motion for speedy trial asserts that as a result of a later conference telephone call between the court and counsel for the defendant and for the State, counsel for the defendant suggested a 26 November 1990 trial date "as an accommodation for the defendant," which "was agreed to by the Court and counsel for the state." The record on appeal is silent as to when, why or how the trial date was moved to the time the case was actually tried in November of 1991. However, it is clear that the case was tried at that time upon the superseding indictment for murder returned by the grand jury in January of 1991.

The Record on Appeal includes an order entered in the Superior Court, Robeson County, on 31 July 1991 which states that as of the date of that order "the defendant's motions to dismiss because of racial discrimination in the Grand Jury make-up and for change of venue are presently pending motions for which the court has not ruled upon, along with other pending motions." The order of 31 July 1991 also recites that "the defendant's trial was scheduled to begin on November 26, 1990, 1,027 days from the decision rendered on the defendant's appeal, but the case has been postponed further by motion and consent of defendant through his attorneys." The Superior Court went on to conclude in the 31 July 1991 order:

> That even though the delay of defendant's trial has been a long delay, it has not been an inordinate delay based on the seriousness of the charges and the complexities of the issues to be resolved concerning motions and rulings on those motions and other rulings of law.
>
> That there has been reasonable justification for failure to bring the defendant to trial sooner in that the former prosecutor of the case, The Honorable Joe Freeman Britt, is now a North Carolina Superior Court Judge and a new prosecutor, Assistant District Attorney John Carter, has been assigned to prosecute the charges against the defendant.

That there appears to have been no prejudice to the defendant, Henry Lee McCollum, because of the delay of the trial.

Based upon its conclusions, the Superior Court denied the defendant's motion that the case against him be dismissed for failure to afford him a speedy trial.

From the record before us, it appears, although it is by no means certain, that the trial of this case was first scheduled for retrial during the week of 8 October 1990. The record indicates that any continuances of the date for trial to dates after that time were at the request of or with the acquiescence and consent of the defendant.

The Sixth Amendment to the Constitution of the United States provides, in pertinent part, that "[i]n all criminal prosecutions the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. In determining whether a delay in a trial violates the Sixth Amendment, this Court must examine the following interrelated factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice resulting from the delay. *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972).

From the Record on Appeal in the present case, it appears that the defendant made no attempt to assert his right to a speedy trial during the 32-month interval between 3 February 1988, the date on which this Court entered its decision granting him a new trial, and September 1990, when the defendant filed his written motion to dismiss for failure to afford him a speedy trial. Delays in trying the case thereafter were at the request of the defendant or with his consent. The delay between our decision awarding the defendant a new trial and the initial date selected by the State for the defendant's retrial in this case was substantial. However, given the reasons for the delay found to have existed by the trial court, we conclude that the delay was not unreasonable or unjust and did not deny the defendant the right to a speedy trial guaranteed by the Sixth Amendment.

The order of the trial court denying the defendant's motion to dismiss for lack of a speedy trial makes it clear that the delays in retrying the defendant were occasioned in substantial part by reason of numerous motions *of the defendant* which were still

pending. One of these motions, the motion for change of venue, was subsequently decided in the defendant's favor and venue was moved to Cumberland County. In addition, the motion to dismiss the action due to racial prejudice in the selection of the Grand Jury which initially indicted the defendant was apparently deemed by the State to have some merit since the State later obtained a superseding indictment returned by a different Grand Jury. Therefore, we do not believe that either the length of delay or the reasons for the delay argue strongly in favor of a conclusion that the defendant was denied his right to a speedy trial as guaranteed by the Sixth Amendment.

With respect to prejudice resulting from the delay, the defendant contends that he has been prejudiced because he was not allowed to impeach one of the State's witnesses, L.P. Sinclair. Sinclair, who had died before the defendant's retrial, had given testimony during the defendant's first trial to the effect that Sinclair had overheard the defendant and others planning to rape Sabrina and that the defendant later described the murder of the child to Sinclair. The trial court allowed the prosecution to introduce portions of Sinclair's former testimony. We conclude, however, that the defendant did not suffer any prejudice because the trial court admitted into evidence Sinclair's record of criminal convictions amassed since the defendant's first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." Further, the defendant had full opportunity and motive to cross-examine Sinclair at the first trial. The defendant impeached Sinclair as effectively as if Sinclair had survived to testify. We conclude that the defendant has not suffered any prejudice by reason of pretrial delay. This assignment of error is without merit.

[15] By another assignment of error, the defendant contends that his right under the Constitution of North Carolina to be present at all stages of his capital trial was violated by the admission into evidence of video-taped depositions taken outside his presence. In these depositions, counsel for both sides questioned the defendant's relatives and former teachers regarding his upbringing and character. These depositions were taken in New Jersey while the defendant was imprisoned in North Carolina.

The Confrontation Clause of the Constitution of North Carolina, article I, section 23, guarantees the defendant's presence at every stage of his capital trial. *State v. Huff*, 325 N.C. 1, 381 S.E.2d 635 (1989), *vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). In the present case, the *defendant* introduced the depositions in support of mitigating circumstances during the capital sentencing proceeding. Nevertheless, the defendant now contends that the admission of the depositions which were taken without his presence violated his right to be present at every stage of his capital trial. This Court has previously held that the "induced error" or "invited error" doctrine, now codified as N.C.G.S. § 15A-1443(c), does not apply to the non-waivable right of a defendant to be present at every stage of his capital trial as guaranteed by the Constitution of North Carolina. *Huff*, 325 N.C. at 34, 381 S.E.2d at 654. Therefore, we turn to the issue of whether any error in the admission of the depositions in question was harmless error. In determining whether a violation of the state constitutional requirement that the defendant be present at every stage of his capital trial was harmless, we must determine whether the State has borne the burden of showing that the error was harmless beyond a reasonable doubt. *Id.* at 34-35, 381 S.E.2d at 654.

For purposes of our consideration of the defendant's argument that his right under the Constitution of North Carolina to be present at every stage of his capital trial was violated, we assume *arguendo* that the taking of the depositions in New Jersey in the absence of the defendant amounted to a "stage" of his capital trial. However, it is clear that all of the testimony of the witnesses during the taking of those depositions tended to support mitigating circumstances. The admission of those depositions into evidence was favorable to the defendant and in no way adverse to his interests. Therefore, we conclude that any error involved in the admission of the depositions into evidence during the capital sentencing proceeding in the present case could not possibly have harmed the defendant. Accordingly, we conclude that the State has borne its burden of showing that any error here was harmless beyond a reasonable doubt. Accordingly, this assignment of error is without merit.

[16] By another assignment of error, the defendant contends that the trial court erred in refusing to allow him to examine and attempt to rehabilitate jurors who had been successfully challenged

for cause by the State. *See Gray v. Mississippi*, 481 U.S. 648, 95 L. Ed. 2d 622 (1987) (plurality opinion). We do not agree.

This Court has consistently held that:

> [w]hen challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter].

State v. Cummings, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990) (quoting *State v. Oliver*, 302 N.C. 28, 40, 274 S.E.2d 183, 191 (1983)). We conclude that the plurality decision in *Gray* does not invalidate this statement of the law.

Under this assignment of error, the defendant specifically complains of the trial court's action in excusing prospective jurors Barbour and Godbolt for cause. Before she was excused for cause, Barbour stated, in response to a question by the prosecutor, that she could not vote for a death sentence. After further questioning by the prosecutor and the trial court, she made it clear that, although she did not want to violate the law concerning the imposition of a death sentence, this was still her feeling. Additionally, she expressly acknowledged that her views on capital punishment would substantially impair her ability to perform her duties as a juror. Nothing in the record suggests that any further proper questioning would have altered her responses.

Prospective juror Godbolt also acknowledged strong personal feelings about the death penalty that would probably affect her impartiality. Upon questioning by the trial court, she reiterated that position. Nothing in the record suggests that further proper questioning would have caused her to alter her beliefs.

The defendant having made no showing that further questioning by him would likely have produced different answers, the trial court did not abuse its discretion by excusing the prospective jurors in question, who had expressed unequivocal opposition to the death penalty, without allowing the defendant to propound further questions in an attempt to rehabilitate them. *See id.* This assignment of error is without merit.

[17] By another assignment of error, the defendant contends that the trial court erred in refusing to seat jurors who previously had been excused as a result of improper peremptory challenges by the State. During jury selection, the State exercised three consecutive peremptory challenges to remove black prospective jurors. The defendant objected on the ground that the prosecutor's peremptory challenges established a prima facie case of racial discrimination in the jury selection in violation of principles discussed in *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986). The trial court agreed. The prosecutor attempted to articulate a nondiscriminatory basis for his peremptory challenges, but the trial court was unpersuaded and concluded that a *Batson* violation had occurred. The trial court then inquired as to how the defendant and the State desired to proceed to correct the *Batson* violation. At this point, the defendant requested that the three black jurors the State had removed by peremptory challenges be seated. However, the trial court declined to seat these jurors and ordered that the jury selection process begin again with a new panel of forty prospective jurors.

In *Batson* the Supreme Court of the United States held that the Equal Protection Clause forbids a prosecutor to peremptorily challenge potential jurors on account of their race. *Id.* at 96, 90 L. Ed. 2d at 88. However, the *Batson* court stated that

> we express no view on whether it is more appropriate in a particular case, upon a finding of discrimination against black jurors, for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case, or to disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire.

Id. at 100 n. 24, 90 L. Ed. 2d at 90 n. 24. Since its holding in *Batson*, however, the Supreme Court has held that a prospective juror has a right under the Equal Protection Clause of the Fourteenth Amendment not to be excluded from jury service on account of race. *Powers v. Ohio*, 499 U.S. ---, ---, 113 L. Ed. 2d 411, 424 (1991). Although the prospective juror's right is independent of the rights of the criminal defendant on trial, the defendant has standing to raise the equal protection claim of a prospective juror improperly excluded on the basis of race. *Id.*

We believe that the better practice is that followed by the trial court in this case, and that neither *Batson* nor *Powers* requires a different procedure. We recognize and endorse the equal protection right of prospective jurors explained in detail in *Powers*. However, we conclude that the primary focus in a criminal case—particularly a capital case such as this—must continue to be upon the goal of achieving a trial which is fair to both the defendant and the State. To ask jurors who have been improperly excluded from a jury because of their race to then return to the jury to remain unaffected by that recent discrimination, and to render an impartial verdict without prejudice toward either the State or the defendant, would be to ask them to discharge a duty which would require near superhuman effort and which would be extremely difficult for a person possessed of any sensitivity whatsoever to carry out successfully. As *Batson* violations will always occur at an early stage in the trial before any evidence has been introduced, the simpler, and we think clearly fairer, approach is to begin the jury selection anew with a new panel of prospective jurors who cannot have been affected by any prior *Batson* violation.

Assuming *arguendo* that the trial court erred in failing to reinstate the prospective jurors previously excused and seat them on the jury in the defendant's case, however, we conclude that the error was harmless beyond a reasonable doubt and, therefore, not prejudicial *to this defendant*. N.C.G.S. § 15A-1443(b) (1988). If we held that the trial court's failure to reinstate the improperly removed jurors constituted error, the only practicable remedy we could provide at this point would be a new trial with a new jury selected on a nondiscriminatory basis. In the present case, after finding that there was *Batson* error, the trial court ordered that a new jury be selected on a nondiscriminatory basis. Therefore, the trial court's order provided the defendant with exactly the same remedy which the defendant now contends he should receive—trial by a jury selected on a nondiscriminatory basis. Consequently, the defendant has not suffered any prejudice by the action of the trial court which gave him the same remedy he now seeks. This assignment of error is overruled.

[18] By another assignment of error, the defendant contends that the trial court erred in failing to exclude from evidence the defendant's statements made to police officers because they were obtained in violation of his constitutional rights. Specifically, the defendant contends that his mental retardation and emotional disabilities pro-

hibited him from making a knowing and intelligent waiver of his constitutional rights.

Based upon evidence introduced during the *voir dire* hearing on the admissibility of the defendant's statements, the trial court made findings and concluded that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made the statements in question. The trial court found from substantial evidence introduced during the *voir dire* that the officers told the defendant that he could accompany them to the police station if he wished to do so. He chose to go with them and he appeared to have no problems understanding what the officers talked about or any instructions given by the officers. While at the police station, the officers read each of the defendant's constitutional rights to him, and he indicated that he understood them and then signed a waiver of rights form. During the interview, all of the defendant's answers were reasonable in relation to the questions asked by the officers.

It is well established that mental retardation is a factor to be considered in determining the voluntariness of a confession, but this condition standing alone does not render an otherwise voluntary confession inadmissible. *E.g., State v. Allen*, 322 N.C. 176, 367 S.E.2d 626 (1988); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975). We have also repeatedly held that the trial court's findings of fact following a *voir dire* hearing concerning the admissibility of a confession are conclusive and binding on the appellate courts when, as here, they are supported by substantial competent evidence. *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal. *Id.* Those conclusions of law will be sustained on appeal if they are correct in light of the findings. *Id.*

In the present case, the trial court's findings were amply supported by substantial evidence presented on *voir dire*. Furthermore, the trial court's conclusion that the defendant knowingly and intelligently waived his constitutional rights and voluntarily made his statements to the officers was a correct conclusion of law in light of the findings. Therefore, we conclude that the trial court did not err in this regard. This assignment of error is without merit.

[19] By another assignment of error, the defendant contends that the trial court violated his Sixth Amendment confrontation right in failing to exclude the former testimony of State's witness L.P. Sinclair. Sinclair testified during the first trial of this case, in which the defendant was convicted and sentenced to death. However, Sinclair died prior to the new trial which is the basis of the defendant's current appeal to this Court. The defendant contends that he did not have an adequate opportunity to cross-examine Sinclair during the new trial of this case because new evidence concerning Sinclair's reputation for untruthfulness had surfaced since the first trial.

Assuming *arguendo* that the trial court erred in failing to exclude Sinclair's former testimony, this error was harmless beyond a reasonable doubt. We have pointed out previously in this opinion, the defendant tendered and the trial court admitted into evidence Sinclair's record of convictions amassed since the first trial. Further, District Court Judge Stanley Carmical testified during the new trial of this case that, as an attorney, he had represented Sinclair in April 1989 and that in his opinion Sinclair "was not a truthful person." The defendant has not pointed to any additional information not available to him in the first trial of this case which would have tended to impeach Sinclair as a witness or otherwise would have been of assistance to the defendant had Sinclair been present and subject to cross-examination during the defendant's new trial. We conclude, therefore, that the defendant impeached Sinclair as effectively as if he had survived to testify and be cross-examined. Given the defendant's opportunity to cross-examine Sinclair at the time Sinclair testified during the first trial of this case, and in light of the fact that the defendant was permitted to offer the foregoing evidence in the new trial tending to impeach Sinclair's credibility, we conclude that the defendant was not denied his Sixth Amendment right to confront this witness. This assignment of error is without merit.

We have addressed the foregoing assignments of error in the order they were presented in the defendant's brief before this Court in this appeal. The defendant has also brought forward on this appeal other assignments of error which he correctly acknowledges have previously been decided by this Court contrary to his position, but which he nonetheless brings forward in order to preserve them for further appellate review. We acknowledge that those assignments are properly preserved, but as we have

previously found them to be without merit we do not address them here.

Having concluded that the defendant's trial and capital sentencing proceeding were free from prejudicial error, we turn to the duties reserved by N.C.G.S. § 15A-2000(d)(2) exclusively for this Court in capital cases. *See State v. Williams*, 308 N.C. 47, 79, 301 S.E.2d 335, 354-55, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). It is our duty in this regard to ascertain (1) whether the record supports the jury's findings of the aggravating circumstances on which the sentence of death was based, (2) whether the death sentence was entered under the influence of passion, prejudice, or other arbitrary consideration, and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. *Id.*

We have thoroughly examined the record, transcripts, and briefs in the present case. We conclude that the record fully supports the aggravating circumstances found by the jury. Further, we find no indication that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration.

[20] We turn now to our final statutory duty of proportionality review. 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." *Id.*

> In essence, our task on proportionality review is to compare the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the defendant's character, background, and physical and mental condition.

State v. Lawson, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985).

In the present case, the defendant was convicted of first-degree murder (upon the theory of felony murder) and of first-degree rape. The jury found as an aggravating circumstance that the murder was committed for the purpose of avoiding or preventing a lawful arrest. Further, the trial court having given the jury instructions properly limiting and defining the "especially heinous, atrocious or

cruel" aggravating circumstance in accord with *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214 (1981), the jury found that the murder was especially heinous, atrocious or cruel. The jury found the following mitigating circumstances: (1) The defendant has no significant history of prior criminal activity; (2) The capital felony was committed while the defendant was under the influence of a mental or emotional disturbance; (3) The defendant is mentally retarded; (4) The defendant is easily influenced by others; (5) The defendant has difficulty thinking clearly when under stress; (6) Shortly after arrest, and at an early stage of the criminal process, the defendant voluntarily cooperated with the police by making a confession; and (7) The defendant has adapted to the disciplined environment of prison, and has committed no infractions during the period from 1983 to 1991.

In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue. This case is not particularly similar to any case in which this Court has found the death penalty disproportionate and entered a sentence of life imprisonment. Each of those cases is distinguishable from the present case.

In *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988), the evidence tended to show that the defendant hid in the bushes at a bank for about two hours waiting for the victim to make his nightly deposit. When the victim arrived at the bank, the defendant demanded the money bag. The victim hesitated, so the defendant fired a shotgun, striking him in the upper portion of both legs. The victim later died of cardiac arrest caused by the loss of blood from the shotgun wounds. The jury found only one aggravating circumstance, murder for pecuniary gain. The defendant also pleaded guilty during the trial and acknowledged his wrongdoing before the jury. *Benson* is easily distinguishable from the present case. In *Benson*, unlike in the present case, some evidence tended to show that the defendant did not intend to kill the victim because he shot him in the legs rather than a more vital part of his body. In addition, the jury here found two aggravating circumstances.

In *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987), 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, killing him. *Stokes* is also easily distinguishable from the present

case, because Stokes' co-defendant, whom the majority of this Court seemed to believe equally culpable with Stokes, was sentenced to life imprisonment. In addition, the jury in *Stokes* found only one aggravating circumstance, that the murder was especially heinous, atrocious, or cruel, while the jury here found that aggravating circumstance plus one additional aggravating circumstance.

In *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), the only aggravating circumstance found by the jury was that the murder for which Rogers was convicted was part of a course of conduct which included the commission of violence against another person or persons. In the present case, the jury found two aggravating circumstances—the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985), the defendant and two companions went to the victim's home intending to rob and murder him. After gaining entry into the victim's home, the men killed the victim and stole his money. The jury found as aggravating circumstances that the murder was committed during the commission of a robbery or burglary and that it was committed for pecuniary gain. In concluding that the death penalty was disproportionate, this Court distinguished that case from cases where the death sentence had been upheld. We focused on the failure of the jury in *Young* to find either the aggravating circumstance that the murder was especially heinous, atrocious, or cruel, or the aggravating circumstance that the murder was committed as part of a course of conduct which included the commission of violence against another person or persons. The present case is easily distinguishable from *Young* because, among other things, the jury found that the murder in this case was especially heinous, atrocious, or cruel.

In *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984), the single aggravating circumstance found by the jury was that the murder was committed against a law enforcement officer engaged in the performance of his official duties. In the present case, the jury found two entirely different aggravating circumstances. *Hill* is easily distinguishable from this case in which the defendant and others "gang" raped and strangled an eleven-year-old child to death.

In *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983), the defendant was on foot and waved down the victim as the victim passed in his truck. Shortly thereafter, the victim's body was discovered in his truck. He had been shot twice in the head and his wallet was gone. The single aggravating circumstance found was that the murder was committed for pecuniary gain. In contrast, the jury here found that the murder was committed for the purpose of avoiding lawful arrest and that the murder was especially heinous, atrocious, or cruel.

In *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983), the evidence tended to show that the defendant and a group of friends were riding in a car when the defendant taunted the victim by telling him that he would shoot him and questioning whether the victim believed that the defendant would shoot him. The defendant shot the victim, but then immediately directed the driver to proceed to the emergency room of the local hospital. In concluding that the death penalty was disproportionate there, we focused on the defendant's immediate attempt to obtain medical assistance for the victim and the lack of any apparent motive for the killing. In contrast, the jury in the present case found that the defendant and his friends killed the victim to prevent her from telling the police that they had raped her.

For the foregoing reasons, we conclude that each of the cases in which we have found the death penalty to be disproportionate is distinguishable from the present case. The present case bears little similarity to any of those cases.

In performing our statutory duty of proportionality review, it is also appropriate for us to compare the case before us to other cases in the pool used for proportionality review. *Lawson*, 310 N.C. at 648, 314 S.E.2d at 503. If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate.

The defendant relies on four cases in which the jury recommended life sentences: *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991);

State v. Harris, 319 N.C. 383, 354 S.E.2d 222 (1987); and *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983). We find each of those cases distinguishable from the present case.

In *Fincher*, the jury found the defendant guilty of first-degree murder on the theory of felony murder, premised upon the felony of rape. The jury, however, recommended a sentence of life imprisonment. At trial, the defendant presented psychiatric testimony which tended to show that he was mentally retarded and suffered from a schizophreniform disorder. Moreover, the defendant's mental illness caused a disturbance of his mood and behavior, sometimes to the extent that the defendant suffered from auditory hallucinations. The defendant in the present case does not suffer from a schizophreniform disorder. Further, unlike Fincher, who acted alone, the defendant in the present case acted with the assistance of three other males in raping and sodomizing the child victim and then assisted in killing her and hiding her body in order to avoid detection and arrest.

In *McKinnon*, the defendant was convicted of first-degree murder on the theory that the killing was committed during the course of second-degree rape and second-degree sex offense. The jury recommended a sentence of life imprisonment. Unlike McKinnon, the defendant in the present case acted with others in "gang" raping and killing an eleven-year-old child. In addition, the underlying felony supporting the defendant's conviction on the felony murder theory was first-degree rape and not second-degree rape as was the case in *McKinnon*.

In *Harris*, the defendant was found guilty of first-degree murder, premised upon the felony of attempted rape. The jury recommended life imprisonment. The evidence tended to show that the victim died as a result of multiple stab wounds. Unlike the defendant in *Harris* who attempted to rape the victim prior to killing her, the defendant in the present case and his friends "gang" raped and sodomized a child and then, acting together, strangled her so that she could not tell the police.

In *Franklin*, the defendant was found guilty of first-degree murder under the felony murder theory, premised upon first-degree sexual offense. The jury recommended a sentence of life imprisonment. According to the defendant's statement to law enforcement officers, he stabbed the victim several times after forcing her to perform oral sex. In contrast, the defendant in the present case

and his friends "gang" raped and sodomized a child and then, acting together to avoid detection, strangled her by shoving her panties on a stick down her throat.

For the foregoing reasons, we conclude that each of the cases relied upon by the defendant in which the jury recommended life imprisonment is distinguishable from the present case. The present case is not strikingly similar to any of those cases.

We also compare this case with the cases in which we have found the death penalty to be proportionate. Although we review all of the cases in the pool of "similar cases" when engaging in our statutorily mandated duty of proportionality review, we have previously stated, and we reemphasize here, that we will not undertake to discuss or cite all of those cases each time we carry out that duty. *State v. Williams*, 308 N.C. 47, 81, 301 S.E.2d 335, 356, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983). Here, it suffices to say we conclude that the present case is more similar to certain cases in which we have found the sentence of death proportionate than to those in which we have found the sentence of death disproportionate. *E.g.*, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987) (death sentence upheld where defendant stabbed and killed a seven-year-old girl during the commission of the felony of first-degree rape); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983) (first-degree felony murder conviction and death sentence upheld even though the jury found that the defendant was under the influence of mental or emotional disturbance when he committed the murder and that the defendant's capacity to appreciate the criminality of his conduct or to conform to the requirements of law was impaired).

All of the evidence presented in the present case was to the effect that the defendant and three other males "gang" raped and sodomized eleven-year-old Sabrina Buie while she begged them not to and called out for her "Mommy." The defendant then helped to hold Sabrina's arms while one of the other men took a stick, with Sabrina's panties attached to the end of it, and shoved it down her throat until she stopped breathing. The men next dragged Sabrina's body away from the crime scene and hid it in a field. After comparing this case carefully with all others in the pool of "similar cases" used for proportionality review, we conclude that it falls within the class of first-degree murders for which

we have previously upheld the death penalty. For the foregoing reasons, we conclude that the sentence of death entered in the present case is not disproportionate.

Having considered and rejected all of the defendant's assigned errors, we hold that the defendant's trial and capital sentencing proceeding were free of prejudicial error. Therefore, the sentence of death entered against the defendant must be and is left undisturbed.

No error.

Chief Justice EXUM concurring in part and dissenting in part.

I concur in the result reached by the majority on the guilt phase of this case. Given defendant's age, mental retardation, the compelling mitigating circumstances found by the jury and that juries in this state have consistently returned life sentences under similar circumstances, I believe that the death penalty here is excessive and disproportionate. I respectfully dissent from the majority opinion insofar as it sustains the imposition of the sentence of death and vote to remand the case for the imposition of a sentence of life imprisonment.

I recognize that defendant has been convicted of at least actively assisting in the commission of first-degree murder and that the crime was committed in an especially brutal manner against an especially vulnerable victim by defendant and three accomplices.[1] The crime cries out for punishment. If the defendant were a mature adult with full mental faculties rendering him capable of fully appreciating the wrongfulness of his act, and if the mitigating circumstances found were less compelling, I would conclude, as does the majority, that the death penalty is not disproportionate.

The question is not whether this mentally retarded defendant, nineteen years old at the time of the crime, will be punished; the question as always in these cases is which punishment will he receive—death or life imprisonment. Under the power given us by statute to determine whether a death sentence is excessive

1. Only one of defendant's accomplices, Leon Brown, was tried for the offenses, the other two apparently being juveniles. Leon Brown was convicted only of rape; he was not convicted of murder. *State v. Brown*, 83 CRS 15822, 15827 (Superior Court, Bladen County).

or disproportionate, I conclude the statute requires that this defendant be sentenced to life imprisonment.

I first note my disagreement with the majority's position that the jury might not have rejected the premeditation and deliberation theory of first-degree murder. I believe the record reflects that the jury rejected this theory and convicted defendant only on the felony murder theory.

The verdict form, which is partially reproduced in the majority opinion, appears in the record as follows:

STATE OF NORTH CAROLINA)
VS)
HENRY LEE MCCOLLUM) V E R D I C T
defendant)

We, the jury, return the unanimous verdict as follows:

1. GUILTY of FIRST DEGREE MURDER

Answer: yes

IF YOU ANSWER "YES," IS IT:

A. On the basis of malice, premeditation and deliberation?

ANSWER: _____

B. Under the first degree felony murder rule?

ANSWER: yes

OR

2. GUILTY of SECOND DEGREE MURDER

Answer: _____

OR

3. NOT GUILTY

ANSWER: _____

This the 18 day of Nov, 1991.

s/ Carl M. Moses
FOREPERSON OF THE JURY

The form shows that the jury rejected verdicts of second-degree murder and not guilty by leaving the answer lines to these verdicts blank and returned a verdict of guilty of first-degree murder by writing "yes" in the answer line to this verdict. Just as clearly it seems to me, the jury rejected the premeditation and deliberation theory by leaving the answer line to sub-verdict "A" blank and convicted defendant solely on the theory of felony murder by writing "yes" on the answer line to sub-verdict "B."

It is true, as the majority states, that juries do not convict or acquit of theories; they convict and acquit of crimes, as we said in *State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (1989). Here, for example, defendant has not been acquitted of first-degree murder; he has been convicted of it. Juries, however, do frequently reject some theories of guilt and accept others; and often it is necessary for purposes of appellate review to know which theories were rejected and which were accepted. The verdict form here was designed for that purpose, and the trial court instructed the jury that it might convict defendant of first-degree murder on either or both theories submitted. While the trial court also instructed the jury to write answers, either "yes" or "no," in all the blanks, I am satisfied, after considering the jury's responses to other answer lines on the verdict form, that the jury's leaving an answer line blank on this form is the equivalent of its writing "no" on that line.

I have no disagreement, however, with the result reached by the majority on the question of whether the evidence supports the aggravating circumstance that the murder was committed to avoid arrest. That the jury rejected the theory of premeditation and deliberation does not mean it could not have legitimately found the aggravating circumstance. The findings are not, as defendant seems to argue, mutually exclusive. A defendant can commit a murder for the purpose of avoiding arrest and still not premeditate and deliberate the killing.

N.C.G.S. § 15A-2000(d)(2) mandates that we consider 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). This requires a comparison of "the case at bar with other cases in the pool which are roughly similar with regard to the crime and the defendant, such as, for example, the manner in which the crime was committed and the

defendant's character, background, and physical and *mental condition.*" *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), *cert. denied*, 471 U.S. 1120, 86 L. Ed. 2d 267 (1985) (emphasis added). A comparison of this case to those in other capitally tried cases in our proportionality pool in which both crimes and defendants are similar to the crime and defendant in the instant case compels the conclusion that the sentence of death here is excessive and disproportionate.

Defendant was convicted of felony murder based on the underlying felony of rape. The evidence tended to show the murderous act itself was committed by someone other than defendant, although defendant actively assisted by holding the victim and was clearly guilty as an aider and abettor. At the time of the crime defendant was nineteen years old. He suffered from mental retardation and functioned at a mental age of eight to ten years. Defendant's intelligence quotient (IQ), which was tested on two different occasions, was scored at 61 and 69. Achievement test results showed defendant functioned at a third grade level with the reading comprehension level of a second grader.

At sentencing, the jury found two aggravating circumstances—that the murder was committed to avoid arrest and that it was especially heinous, atrocious or cruel. It also found seven mitigating circumstances—no significant history of prior criminal activity, commitment of the felony murder under the influence of mental or emotional disturbance, that defendant was mentally retarded, that he was easily influenced by others, that he had difficulty thinking clearly under stress, that he cooperated with police, and that he had adapted to his prison environment. Notwithstanding, the jury recommended a sentence of death.

Upon reviewing prior felony murder convictions based on acts similar in nature to the instant case and perpetrated by defendants having similar characteristics to those of defendant McCollum, I am compelled to draw the conclusion that a sentence of death under these circumstances is disproportionate.

Of all capital cases involving felony murder convictions with an underlying felony of a sex offense, only five have involved defendants who were less than or equal to twenty years of age. All five of these cases resulted in a jury recommendation of life imprisonment. *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984) (seventeen-year-old defendant); *State v. Fincher*, 309 N.C. 1, 305

S.E.2d 685 (1983) (eighteen-year-old-defendant); *State v. Hunt*, 324 N.C. 343, 378 S.E.2d 754 (1989) (twenty-year-old defendant); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (nineteen-year-old defendant).

Defendant was also found to be mentally and emotionally disturbed at the time of the offense. In sexual offense felony murder cases where evidence of mental and emotional disturbance on the part of the defendant has been present, juries have repeatedly recommended life imprisonment even where the defendant was the actual perpetrator of an especially heinous, atrocious or cruel killing. *State v. Thomas*, 332 N.C. 544, 423 S.E.2d 75 (1992) (mentally or emotionally disturbed defendant sentenced to life imprisonment for felony murder of victim even though jury found killing to be especially heinous, atrocious or cruel); *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991) (jury recommended life sentence for emotionally and mentally disturbed defendant who raped and murdered victim under especially heinous, atrocious or cruel circumstances); *State v. Flack*, 312 N.C. 448, 322 S.E.2d 758 (1984) (emotionally, mentally disturbed defendant sentenced to life imprisonment for the especially heinous and atrocious strangulation, beating and sexual assault of eighty-eight-year-old woman); *State v. Forney*, 310 N.C. 126, 310 S.E.2d 20 (1984) (codefendant of *Flack* also found to be emotionally, mentally disturbed and sentenced to life imprisonment).

While here the jury did not find that defendant's capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law was impaired, it did find, along with six other mitigating circumstances, that defendant was mentally retarded. Significantly, where a jury of this state has been charged in the past with the task of capitally sentencing a defendant whom it found to be mentally retarded, it has recommended life imprisonment. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1984). In *Fincher* the defendant was convicted of first-degree murder on the theory of felony murder based on the underlying felony of rape. Unlike defendant McCollum, defendant Fincher actually committed the murderous act. *Id.* at 13, 305 S.E.2d at 693. Similar to defendant McCollum, however, Fincher was a mentally retarded seventeen-year-old, suffering from a schizophreniform disorder, with an IQ measured at 50 and 65. *Id.* at 7, 305 S.E.2d at 690. As in this case, the jury found as an aggravating circumstance that the murder was heinous, atrocious or cruel and as a mitigating circumstance

that the murder was committed while the defendant was mentally or emotionally disturbed. The jury returned a sentence of life imprisonment.

Of fifteen cases involving a capitally tried defendant in which there was evidence that the defendant was mentally retarded, I have found only one, *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), where this Court sustained a sentence of death. Significantly, in *Spruill* the jury rejected this evidence and refused to find the mental retardation mitigating circumstance submitted to it. Indeed, the jury failed to find any mitigating circumstances at all.

In its proportionality review, the majority has relied on two cases, *State v. Zuniga*, 320 N.C. 233, 357 S.E.2d 898, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987), and *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983), both of which I find quite unlike the case at bar. In *Zuniga* the defendant was sentenced to death for the stabbing and killing of a seven-year-old girl during the commission of the felony of first-degree rape. Unlike the present case, defendant Zuniga was convicted of first-degree murder on the theory of premeditation and deliberation. At the time of the offense, Zuniga was twenty-seven years old; and there was no evidence of, nor did the jury find the existence of, any mental or emotional disturbance or mental impairment on the part of the defendant. In *McDougall*, the defendant, who was twenty-five, was convicted of first-degree felony murder and sentenced to death even though the jury found the defendant was under the influence of a mental or emotional disturbance at the time the offense was committed. However, unlike the instant case, there were two underlying felonies—kidnapping and rape—instead of the one felony of sex offense. After voluntarily injecting cocaine, the defendant in *McDougall* tricked two women into letting him into their home before he "commenced a campaign of terror against [them], cutting, stabbing and slashing them with a butcher knife." 308 N.C. at 37, 301 S.E.2d at 319. The *McDougall* jury found the existence of three aggravating circumstances, one of which was the defendant's prior conviction for the felony of rape. The jury in the present case found as a mitigating circumstance that defendant had no prior history of criminal activity.

We said in *State v. Lawson*, 310 N.C. 632, 648, 314 S.E.2d 493, 503 (1984), that if, after making the comparisons with similar

cases, considering both the crimes committed and the defendants who committed them,

> 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.

In cases like the one before us, considering both the crime and the defendant, juries have consistently been returning verdicts of life imprisonment. I conclude, therefore, that the sentence of death against this defendant is disproportionate under N.C.G.S. § 15A-2000(d)(2).

I also believe that a strong argument can be made that the imposition of the death penalty upon a defendant whom the jury finds to be mentally retarded constitutes cruel or unusual punishment violative of Article I, Section 27, of the North Carolina Constitution, which provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

"The law's humanity would seem to dictate that rarely if ever should death be the appropriate punishment for a defendant who kills under the influence of a mental or emotional disturbance and whose capacity to appreciate the wrongness of his act and to conform his conduct to the requirements of law is impaired. Punished he should be. But *execution of a defendant whose crime is the product of a mentally and* emotionally defective personality and who suffers from an incapacity to control his conduct is excessively vindictive." *State v. Rook*, 304 N.C. 201, 246-47, 283 S.E.2d 732, 759 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982) (Exum, J., now C.J., dissenting) (emphasis supplied).

Recently the United States Supreme Court visited the question whether execution of the mentally retarded violated the United States Constitution's prohibition in the Eighth Amendment of "cruel and unusual punishment"; by a five to four majority, the Court concluded that it did not. *Penry v. Lynaugh*, 492 U.S. 302, 106 L. Ed. 2d 256 (1989). A great deal that can be said on this issue

was said in the opinions delivered in that case. The Amicus Curiae Brief filed in *Penry* by the American Association on Mental Retardation, The American Psychological Association, the Association for Retarded Citizens of the United States, and other organizations with expertise on the subject is compelling. So is information contained in Conley, Luckasson and Bouthilet, *The Criminal Justice System and Mental Retardation* (Paul H. Brooks 1992), containing a forward by Dick Thornburgh written when he was Attorney General of the United States, published since, and critical of, the decision in *Penry*.

The four dissenters in *Penry* make a powerful case for the proposition that execution of the mentally retarded violates the Eighth and Fourteenth Amendments. We, of course, are bound by the majority's decision in *Penry* that it does not insofar as the federal document is concerned. We are able to decide, however, that such executions violate our state's constitutional prohibition against cruel or unusual punishments.

Defendant, however, did not raise this argument at trial nor on appeal; and it has not been briefed or argued in this case. The question, therefore, is not properly before us; and until it has been briefed and argued, I am unwilling to address it definitively.

Justice Frye joins in this concurring and dissenting opinion.

STATE OF NORTH CAROLINA v. LARRY DALE SHOEMAKER

No. 422A92

(Filed 30 July 1993)

1. Evidence and Witnesses § 2089 (NCI4th)— demeanor of defendant—opinion evidence

Testimony by various witnesses that defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring" on the night of a shooting was admissible opinion evidence based on the witnesses' observations of defendant's demeanor.

Am Jur 2d, Expert and Opinion Evidence §§ 359-361, 364.

2. Evidence and Witnesses § 2803 (NCI4th)— demeanor of defendant—questions not leading

Questions asking witnesses about defendant's emotional state or demeanor on the night of a shooting were not leading because they did not suggest a desired response. Furthermore, assuming *arguendo* that these questions were leading, it was within the discretion of the trial court to allow these questions on direct examination.

Am Jur 2d, Witnesses §§ 429-431, 509, 510.

3. Evidence and Witnesses § 165 (NCI4th)— note written by murder victim—victim's state of mind—premeditation and deliberation—probative value not outweighed by prejudice

The trial court in a first-degree murder prosecution did not err by denying defendant's motion to suppress a note written by the victim on the date of her death on the ground that its probative value was substantially outweighed by the danger of unfair prejudice to defendant where the note was evidence of the victim's state of mind in that it indicated that the victim was scared of defendant because he had threatened to kill her with a gun earlier that evening, and the note could be used by the jury to consider whether the victim provoked defendant in determining whether defendant's acts were premeditated and deliberate.

Am Jur 2d, Evidence § 360.

4. Evidence and Witnesses § 3106 (NCI4th)— corroboration—addition of specific details

An SBI agent's testimony was properly admitted for the purpose of corroborating defendant's ex-wife's earlier testimony about a gun owned by defendant where the ex-wife had already identified defendant's gun in court and stated that she had talked with a law officer about the gun on the telephone; the SBI agent's testimony adds specific details to her description of defendant's gun; and the SBI agent's testimony thus adds both weight and credibility to the ex-wife's testimony.

Am Jur 2d, Witnesses §§ 632 et seq.

5. Evidence and Witnesses § 2265 (NCI4th)— expert testimony—unlikely wounds self-inflicted

The trial court in a first-degree murder case did not err by admitting a forensic pathologist's opinion that it was highly

unlikely that the victim's wound was self-inflicted where the opinion was based on findings from his autopsy of the victim concerning the location of the wound, the distance from which the shot was fired, and the awkward angle that the victim would have had to hold the gun to inflict such a wound.

Am Jur 2d, Expert and Opinion Evidence § 263.

Admissibility, in homicide prosecution, of opinion evidence that death was or was not self-inflicted. 56 ALR2d 1447.

6. **Evidence and Witnesses § 876 (NCI4th)— victim's statement of intent—state of mind exception to hearsay rule**

Testimony that a murder victim told a friend approximately a week before she was killed that she intended to end her relationship with defendant when he returned from a trip was admissible under N.C.G.S. § 8C-1, Rule 803(3) as evidence of the victim's mental or emotional condition at the time she made the statement. A period of approximately a week between the time of the statement and the victim's death is not so great as to render the statement irrelevant.

Am Jur 2d, Evidence §§ 497 et seq.

7. **Homicide § 250 (NCI4th)— first-degree murder—premeditation and deliberation—sufficiency of evidence**

The evidence was sufficient to take the issue of premeditation and deliberation to the jury in a first-degree murder prosecution where it tended to show that there was a lack of provocation on the part of the victim; a note written by the victim on the date of her death indicated that defendant had pulled a gun on her and threatened her life; after the killing, defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring" to officers and medical personnel and defendant never inquired as to the health or status of the victim; and the killing was done in a brutal manner in that the victim was shot in the face from a distance of two to six inches.

Am Jur 2d, Homicide §§ 437 et seq.

8. **Homicide § 226 (NCI4th)— first-degree murder—defendant as perpetrator—sufficiency of evidence**

There was sufficient circumstantial evidence for the jury to find that defendant was the perpetrator of a first-degree

murder where the evidence tended to show that defendant was the only person in the house with the victim when the police arrived; the .22-caliber bullet removed from the victim had the same rifling characteristics and similar barrel markings as a bullet taken from a box of ammunition found in defendant's truck and fired from defendant's gun; the nine-shot .22-caliber pistol found on the floor of the master bedroom had eight live rounds and one fired cartridge in the cylinder; defendant's ex-wife identified the pistol found in the bedroom as belonging to defendant; a pathologist testified that it was highly unlikely that the victim's gunshot wound was self-inflicted; the victim left a handwritten note explaining that defendant had pulled a gun on her earlier in the evening and had threatened to kill them both; defendant first told officers on the scene that he did not know what happened but later told a detective that he heard a gunshot while watching television, found the victim's body, and caught a glimpse of a figure running up the hill; defendant later told the detective that he pled "no contest"; and defendant claimed that he had no knowledge about the gun that was found, but when asked how the gun could have gotten into the master bedroom without his noticing it, admitted that he moved it.

Am Jur 2d, Homicide § 435.

9. Homicide §§ 558, 706 (NCI4th)— first-degree murder—refusal to instruct on voluntary manslaughter

The trial court in a first-degree murder prosecution did not err in denying defendant's request for an instruction on the lesser included offense of voluntary manslaughter where there was no evidence of defendant being under the influence of passion or in the heat of blood produced by adequate provocation. Assuming *arguendo* that there was some evidence to support an instruction on voluntary manslaughter, the trial court's failure to so instruct was harmless error where the court instructed on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder.

Am Jur 2d, Homicide §§ 525 et seq.

10. Homicide § 658 (NCI4th)— first-degree murder—voluntary intoxication—instruction not required

The trial court in a first-degree murder prosecution did not err by failing to instruct the jury on voluntary intoxication

because the evidence would not support a reasonable finding that defendant was "utterly incapable" of forming a premeditated and deliberated intent to kill where the only evidence of defendant's use of alcohol was one detective's testimony that he smelled alcohol on defendant and defendant's statement to that detective that he had consumed at least six beers since 2:30 the day of the killing and did not have supper that evening; when the detective was asked on cross-examination if defendant appeared to have had too much to drink, the detective replied, "Not really," and upon further questioning stated that although he felt that defendant was "under the influence," defendant "was not drunk, or sloppy drunk"; defendant engaged in a lengthy conversation with the detective and provided the detective with his full name, date of birth, driver's license number, address, telephone number, and information regarding his employer; there is nothing in the record to indicate that any of the other officers at the scene felt that defendant was under the influence of alcohol; and it was defendant who called the emergency dispatchers to report that the victim was shot.

Am Jur 2d, Homicide § 517.

Appeal as of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a life sentence entered by Rousseau, J., at the 1 June 1992 Criminal Session of Superior Court, Wilkes County. Heard in the Supreme Court 13 May 1993.

Michael F. Easley, Attorney General, by Michael S. Fox, Associate Attorney General, for the State.

Frye, Kasper & Booth, by Leslie G. Frye and Granice Geyer-Smith, for defendant-appellant.

MEYER, Justice.

On 3 February 1992, defendant, Larry Dale Shoemaker, was indicted for the first-degree murder of Jane Elizabeth Copeland. Defendant was tried noncapitally in the Superior Court, Wilkes County, in June 1992 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 facts and circumstances. On 21 August 1991, shortly

after 11:00 p.m., the Wilkes County Sheriff's Department received a call from defendant, notifying them that there had been a shooting. Lieutenant Jeff Hemric responded to the call and discovered the body of the victim lying in the doorway of her residence. Defendant was in the next room talking to the Wilkes County Communications Center on the telephone.

Dane Mastin, the Sheriff of Wilkes County, arrived at the victim's home shortly after Lieutenant Hemric. In the master bedroom, the sheriff found a .22-caliber handgun lying on the floor next to a gym bag. Near another bedroom, the sheriff found a packed Pierre Cardin travel bag with a handwritten note just inside the bag. The note read as follows:

> 8/21/91
>
> If I should die of a violent death, please see that Larry Dale Shoemaker gets psychiatric help. This night he has pulled a gun out in my home & said he would end it for both of us! I got him to put the gun in his truck & tried to talk to him—he said he loved me & I wouldn't leave him. I told him I didn't want to leave him & I loved him but why did he want to scare me!
>
> Jane Copeland

Chris Shew, a detective for the Wilkes County Sheriff's Department, participated in the investigation of the crime scene that evening. He began talking with defendant, and when he asked defendant what happened, defendant responded, "No comment." After talking to some of the other officers, Detective Shew again talked with defendant, and defendant described the incident to him. Defendant stated that he began drinking about 2:30 p.m. that afternoon and that he had at least six beers. Defendant told Detective Shew that he had arrived at the victim's residence at approximately 5:30 p.m. and that the victim had arrived home at approximately 6:00 p.m. Defendant, who was a truck driver, stated that he had been living there with the victim since 1990 when he was in town between trips. He further stated that he had watched television and had not eaten supper. He stated that neither he nor the victim left the house nor did they have any company that evening. Defendant stated that he was sitting in a recliner in the living room when he saw the victim walk by, and about two minutes later he heard a shot. Defendant stated

that after he heard the shot, he ran to the room, where he found the victim lying in front of the door. He stated that he moved her back, went out the door, and caught a glimpse of someone running up the hill. Defendant stated that he called the emergency operator at least twice and perhaps a third time. Detective Shew asked defendant about the gun that was found in the bedroom. Defendant stated that he did not know where it came from or how it got there and that he had never seen it before. Detective Shew took defendant into the room where the gun was found and let him see it on the floor; defendant again claimed that he had never seen it before. Detective Shew told defendant that he assumed the gun was the murder weapon but that he could not figure out how the gun could have gotten from the victim's body to the bedroom without defendant having seen someone put it there. Defendant stated that he did not know how the gun got there and then changed his story, saying that he moved the gun. When asked why he moved the gun, defendant stated that he did not know.

Detective Shew testified that during the interview, defendant became belligerent and told him to "cut the bullshit." When Detective Shew asked defendant what he meant, defendant again stated, "You know what I mean. . . . Cut the bullshit. I plead no contest." When asked a second time what he meant, defendant stated again, "I just plead no contest."

Agent Eugene Bishop testified that he received and examined the gun found at the victim's house and found that it was a .22-caliber revolver that held nine rounds. When he opened the cylinder, he discovered eight live rounds and one fired cartridge case. Agent Steve Cabe testified that a box of .22-caliber ammunition was taken from defendant's pickup truck. Agent Bishop testified that the cartridges found in defendant's truck were the same caliber and type as the rounds found in the gun.

Charles McClelland, Jr., a special agent with the State Bureau of Investigation, testified that he received the test kit containing the hand-wiping samples taken from defendant and performed the gunshot residue analysis. Agent McClelland testified that the results were not significant enough to indicate whether defendant had fired the weapon that evening. Agent McClelland further testified that he examined the gunshot residue kit taken from the victim

and that nothing was present in significant concentrations to indicate that the victim had fired the gun.

Pamela Cox, defendant's ex-wife, identified State's exhibit #21, the .22-caliber pistol found at the victim's residence, as being defendant's gun. She testified that defendant had owned it before they were married.

Several officers and agents who were at the scene the night of the shooting testified that defendant appeared "extremely calm" and "nonchalant."

Dr. Patrick Lantz, assistant professor of pathology at Bowman Gray School of Medicine, testified as an expert in forensic pathology. He performed the autopsy on the victim on 22 August 1991. Dr. Lantz testified that the victim had an intermediate range, small-caliber gunshot wound to the head. The entrance was located just to the right of the midline of the chin, below the lip. Dr. Lantz further testified that, in his opinion, it was highly unlikely that the victim's wound was self-inflicted. He based his opinion on the evidence concerning the location of the wound, the distance from which the gun was fired, and the type of wounds that are normally encountered when wounds are self-inflicted.

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 admitting the testimony of several law enforcement officers regarding defendant's state of mind, emotional state, and demeanor on the night of the shooting. Defendant contends that the testimony was elicited by leading or suggestive questions and that the testimony was unresponsive to questions asked. We disagree.

Several law enforcement officers and medical personnel who investigated the scene of the shooting testified for the State in this case. Each was asked whether he saw defendant the night of the shooting, and each was asked to describe either defendant's emotional state or defendant's demeanor. The various witnesses described defendant as being "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring."

"Opinion evidence as to the demeanor of a criminal defendant is admissible into evidence." *State v. Stager*, 329 N.C. 278, 321,

406 S.E.2d 876, 900 (1991). This Court in *Stager* restated the rule as follows:

> "The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, matters of fact, and are admissible in evidence.
>
> "A witness may say that a man appeared intoxicated or angry or pleased. In one sense the statement is a conclusion or opinion of the witness, but in a legal sense, and within the meaning of the phrase, 'matter of fact,' as used in the law of evidence, it is not opinion, but is one of the class of things above mentioned, which are better regarded as matters of fact. The appearance of a man, his actions, his expression, his conversation—a series of things—go to make up the mental picture in the mind of the witness which leads to a knowledge which is as certain, and as much a matter of fact, as if he testified, from evidence presented to his eyes, to the color of a person's hair, or any other physical fact of like nature."
>
> *State v. Leak*, 156 N.C. 643, 647, 72 S.E. 567, 568 (1911) (quoting J. McKelvey, Handbook of the Law of Evidence § 132 (rev. 2d ed. 1907)).

State v. Stager, 329 N.C. at 321, 406 S.E.2d at 901. This Court held in *Stager* that the testimony that defendant was calm and not crying described defendant's emotional state shortly after her husband was killed and was based upon the witnesses' observations of her demeanor at that time. The Court reasoned that such evidence tends to shed light upon the circumstances surrounding the killing and is relevant and admissible. In the case *sub judice*, the witnesses testified that defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring." Based on the foregoing reasoning in *Stager*, this testimony was properly admitted by the trial court.

[2] Defendant further contends that the questions about defendant's emotional state and demeanor were leading. Defendant argues that by asking each witness about defendant's emotional state, rather than asking if the witness made any observations or noticed

anything about defendant's appearance, the prosecutor was leading the witness. We disagree.

Each witness was asked if he observed defendant on the night in question, and each was asked about defendant's emotional state or his demeanor. "A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Riddick*, 315 N.C. 749, 755, 340 S.E.2d 55, 59 (1986). Asking a witness, "[W]hat was his [defendant's] emotional state at the time?" or "What, if anything, did you notice about his emotional state at that time?" does not suggest a desired response. Furthermore, it is within the trial judge's discretion to allow leading questions on direct examination, and the trial judge may be reversed for abuse of discretion only upon a showing that his ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision. *Id.* at 756, 340 S.E.2d at 59. Even assuming *arguendo* that these questions were leading, we find no abuse of discretion by the trial court in allowing these questions to be asked and answered. This assignment of error is overruled.

[3] In his next assignment of error, defendant contends that the trial court erred in denying defendant's motion to suppress a note written by the deceased on the date of her death on the grounds that it is hearsay and that its probative value is substantially outweighed by the danger of unfair prejudice to defendant. Defendant's argument is without merit. Although defendant claims in his assignment of error that the note is hearsay, defendant does not argue in the text of his brief that the note is hearsay, and thus any contention that the note constitutes hearsay is deemed waived. Defendant's argument addresses only his contention that the note is extremely prejudicial to him, outweighing any probative value to the State. We disagree.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. N.C.G.S. § 8C-1, Rule 403 (1992). "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Stager*, 329 N.C. at 308, 406 S.E.2d at 897. The trial court will not be reversed for abuse of discretion unless the trial 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.*

> Rule 403 calls for a balancing of the proffered evidence's probative value against its prejudicial effect. Necessarily, evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question, then, is one of degree. The relevant evidence is properly admissible under Rule 402 *unless* the judge determines that it must be excluded, for instance, because of the risk of "*unfair* prejudice." *See* N.C.G.S. § 8C-1, Rule 403 (Commentary) (" 'Unfair prejudice' within its context [Rule 403] means an *undue* tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." (Emphasis added.))

State v. Mercer, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

The prejudicial effect of the note in this case does not outweigh its probative value. The note is evidence of the victim's state of mind. The note indicates that the victim was scared of defendant because he had threatened to kill her with a gun earlier that evening. Additionally, this evidence could be used by the jury to consider whether the victim provoked defendant in determining whether defendant's acts were premeditated and deliberated. *See State v. Faucette*, 326 N.C. 676, 392 S.E.2d 71 (1990) (evidence of victim's state of mind relevant where jury could infer from such evidence that it was unlikely the victim would do anything to provoke defendant and the probative value outweighed any prejudicial effect). We find no error in the trial judge's discretionary ruling allowing the introduction of the note into evidence.

[4] Next, defendant contends that the trial court erred in admitting the testimony of SBI Agent Jeff Sellers as to a conversation he had with Pamela Cox, defendant's ex-wife. Defendant argues that Agent Sellers' testimony did not corroborate the trial testimony previously offered by Pamela Cox and is therefore hearsay. We disagree.

Pamela Cox testified at defendant's trial on direct examination in part as follows:

> Q. Well, let me just ask you to look at State's Exhibit Number 21, ma'am, and if you would, look at that and tell us whether or not you recognize that gun?
>
> A. I believe I do.
>
> Q. And, what is, how do you recognize that gun, ma'am?

A. As being Larry's gun, Larry Shoemaker's gun.

Q. Do you know what sort of gun it is, what caliber it is?

A. It's a .22.

Q. And, did he have that the last time, as far as you know, the last time you saw him on January 3rd, of '91?

A. Yes, sir, as far as I know.

Q. All right. And, over, do you know how long he had owned that gun?

A. Not really. I think he had it before we were married. . . .

. . . .

Q. Go ahead, ma'am.

A. I was aware of the gun, I was most aware of the gun after we were married in 1970.

Q. All right. And, did you talk to an SBI agent in regard to this matter, Ms. Cox?

A. Yes, sir.

Q. Did you seek him out or did he seek you out?

A. I believe he sought me.

Q. Did he, this particular agent, was it . . . actually, you talked to two agents, did you not?

A. I believe so.

Q. And, one was over the phone, Agent Sellers, do you recall that?

A. I, I remember, over the phone. I probably wrote the name down, and I don't remember it now.

The State later offered the testimony of Agent Sellers, who spoke with Pamela Cox during the investigation to corroborate Ms. Cox's testimony. Agent Sellers testified as follows:

A. And, then she asked me, "Was it the .22 pistol?" And, I replied, "Yes, it was a .22 pistol."

. . . .

Q. All right, did you ask her to describe that .22 pistol to you?

A. Yes, I did. She stated. . . .

. . . .

Q. And, how did she describe it?

A. She described the weapon as a western type revolver, with a 4-inch barrel. She also stated that it appeared to have light wooden handles on it, which she described as pecan wood. She stated that she could not be sure, but she thought that the weapon had some gold on it somewhere.

"A prior statement by a witness is corroborative if it tends to add weight or credibility to his or her trial testimony. In addition, new information contained in a witness's prior statement but not referred to in his or her trial testimony may be admitted as corroborative evidence if it tends to add weight or credibility to that testimony." *State v. Coffey*, 326 N.C. 268, 293, 389 S.E.2d 48, 63 (1990) (citation omitted). In her testimony, Pamela Cox had already identified defendant's gun in court and stated that she had talked to a law enforcement agent about the gun on the telephone. Agent Sellers' testimony corroborates Pamela Cox's testimony by adding specific details to her description of defendant's gun. Therefore, Agent Sellers' testimony adds both weight and credibility to Pamela Cox's testimony.

Additionally, the trial court gave the following limiting instruction to the jury. "All right, members of the jury, you can consider what this officer said Ms. Cox told him to corroborate what she's testified about here on the stand. If it doesn't agree with it, or . . . [lend] support to it, disregard it." Agent Sellers' testimony was properly admitted for the purpose of corroborating defendant's ex-wife's earlier testimony. This assignment of error is overruled.

[5] In his next assignment of error, defendant contends that it was prejudicial error to admit the opinion of Dr. Lantz that it was highly unlikely that the victim's wounds were self-inflicted on the grounds that his opinion was incompetent and not based on medical data. This argument is without merit.

Rule 702 of the North Carolina Rules of Evidence sets forth the guidelines for testimony by experts, stating: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education[ ] may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702 (1992). This Court, in a pre-Rules case, has previously held:

> Admissibility of expert medical opinion is no longer strictly viewed through the narrow focus provided by the technical and vague concepts of invasion of the jury's province and the answer of an ultimate issue; rather, admissibility is evaluated primarily according to whether or not "the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978).

State v. Hunt, 305 N.C. 238, 245, 287 S.E.2d 818, 822-23 (1982).

In this case, Dr. Lantz was qualified without objection as an expert in forensic pathology. Dr. Lantz performed the autopsy on the victim and testified that his autopsy revealed a gunshot wound to the right chin of the victim. The autopsy also revealed some unburned gunshot residue and powder embedded in the skin around the wound. This information along with knowledge of the caliber of the gun that inflicted the wound allowed Dr. Lantz to formulate an opinion that the muzzle of the gun was two to six inches from the skin surface when it was discharged. Dr. Lantz further testified that, in his opinion, it would be highly unlikely that the victim's wound was self-inflicted. His opinion was based on the location of the wound, the distance from which the shot was fired, and the awkward angle that the victim would have had to hold the gun to inflict such a wound. Dr. Lantz further testified that self-inflicted wounds typically occur on a number of other locations on the head or body rather than the chin, such as "around the ear, the temple, behind the ear, sometimes in the mouth, under the chin, on the chest, or the abdomen."

This Court has previously held similar evidence to be admissible. In *State v. Hunt*, this Court approved the admission of a doctor's testimony regarding whether a victim's wound was self-inflicted. In *Hunt*, we said:

> Applying similar standards of admission, a majority of jurisdictions have held that "the subject of self-inflicted wounds is not one of such common experience that laymen may not be assisted by the opinion of a doctor, who has special knowledge regarding anatomy and injuries to the human body." *State*

> *v. Campbell*, 146 Mont. 251, 258, 405 P.2d 978, 983 (1965); *see* Annot., 56 A.L.R.2d 1447 (1957). We perceive no *current or defensible* obstacle in our case law to the adoption of that position in North Carolina.

Hunt, 305 N.C. at 245-46, 287 S.E.2d at 823.

Defendant argues that Dr. Lantz's testimony is mere conjecture and is unsupported by medical data. We disagree. Dr. Lantz's opinion is based on his findings from the autopsy of the victim. The trial court did not err in allowing Dr. Lantz to state his opinion that it was highly unlikely that the victim's wound was self-inflicted. This assignment of error is without merit.

[6] Next, defendant contends that the trial court erred in admitting into evidence a statement by the victim that she intended to end her relationship with defendant. Sherry Wood, a friend of the victim's, testified that about a week before the killing, the victim told her that defendant was on a trip but that when he returned she (the victim) intended to break up with him. Defendant argues that the statement should not have been admitted because it does not come within the hearsay exceptions allowed by N.C.G.S. § 8C-1, Rule 803(3) and is also irrelevant because the statement was made a week before the victim was killed. We disagree.

Rule 803(3) of the North Carolina Rules of Evidence provides that the following is not excluded by the hearsay rule, even though the declarant is not available as a witness:

> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

N.C.G.S. § 8C-1, Rule 803(3) (1992). "Rule 803(3) of the North Carolina Rules of Evidence permits admission of a witness's testimony as to statements of intent by another person to prove subsequent conduct by that other person." *State v. Coffey*, 326 N.C. 268, 285, 389 S.E.2d 48, 58 (1990) (trial court properly admitted testimony from two witnesses that the victim said she planned to go fishing with a nice gray-haired man). In the case *sub judice*, the victim

indicated an intent to end her relationship with defendant. Sherry Wood's testimony as to the victim's statement was admissible under Rule 803(3) as evidence of the victim's mental or emotional condition at the time she made the statements.

Defendant argues that the statement is not relevant and should have been excluded because it was "remote as to period of time." We disagree. Sherry Wood testified that she believed the statement was made approximately a week before the victim died but did not remember exactly. A period of approximately one week between the time of the statement and the victim's death is not so great as to render the statement irrelevant. *See State v. Cummings*, 326 N.C. 298, 312, 389 S.E.2d 66, 74 (1990) (trial court properly admitted a statement from the victim under Rule 803(3) that was made to a paralegal approximately three weeks before the victim's murder). This assignment of error is overruled.

[7] Defendant's next contention is that the trial court erroneously denied his motion to dismiss. Defendant contends that there was insufficient evidence of malice and premeditation and deliberation to submit this case to the jury. We disagree.

The law with regard to motions to dismiss in criminal trials is well settled. In *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991), this Court stated the law as follows:

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980).

Id. at 236, 400 S.E.2d at 61 (citation omitted). In reviewing challenges to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the State, and the State receives the benefit of all reasonable inferences. *State v. Williamson*, 333 N.C. 128, 423 S.E.2d 766 (1992). Contradictions and discrepancies are for the

jury to resolve. *Id.* The test for sufficiency of the evidence is the same whether the evidence is direct, or circumstantial, or both. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

Defendant was convicted of first-degree murder. First-degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Misenheimer*, 304 N.C. 108, 282 S.E.2d 791 (1981). The intentional use of a deadly weapon gives rise to a presumption that the killing was unlawful and that it was done with malice. *State v. Judge*, 308 N.C. 658, 303 S.E.2d 817 (1983). Premeditation is defined as a killing that 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, 400 S.E.2d 413 (1991). "Deliberation is defined as an intent to kill executed by defendant in a cool state of blood or in the absence of anger or emotion." *State v. Stone*, 323 N.C. 447, 451, 373 S.E.2d 430, 433 (1988). "Premeditation and deliberation must ordinarily be proved by circumstantial evidence." *Id.* 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.

State v. Olson, 330 N.C. 557, 565, 411 S.E.2d 592, 596 (1992).

In applying the foregoing principles of law to the facts of this case, we find no error in the trial court's refusal to grant defendant's motion to dismiss. A review of the evidence in this case supports a reasonable conclusion that the homicide was committed with malice, premeditation, and deliberation and that defendant was the perpetrator of the crime.

The evidence shows that there was a lack of provocation on the part of the deceased. There was no physical evidence of provocation. The furniture and household items were not in disarray. The victim had some bruises on her right hand, on her right shin,

and on her left calf. Additionally, the victim had small hemorrhages on the inner eyelid and around the eye and hemorrhages on the epiglottis. The pathologist testified that these hemorrhages are indicative of pressure being applied to the neck. There is nothing in the record to indicate that defendant had any injuries.

Additionally, premeditation and deliberation may be inferred in this case from the conduct and statements of defendant before and after the killing. The best evidence of defendant's conduct before the killing is contained in the note left by the victim. The note is evidence that defendant pulled a gun on the victim and threatened her life. After the killing, defendant appeared "carefree," "extremely calm," "nonchalant," "very unconcerned," and "uncaring" to the officers and medical personnel at the scene. Additionally, the record shows that defendant never inquired as to the health or status of the victim.

The third applicable circumstance from which premeditation and deliberation can be inferred is the threats and declarations of the defendant before the occurrence giving rise to the death of the deceased. Again, the note left by the victim outlining defendant's threats to kill her is the best evidence of this circumstance. Additionally, the victim's note provides substantial evidence of the fourth applicable circumstance, which is ill will or previous difficulties between the parties. The record also indicates that the victim was planning to end her relationship with defendant.

The last circumstance that allows an inference of premeditation and deliberation in the present case is that the killing was done in a brutal manner. The evidence shows that the victim was shot in the face from a distance of two to six inches.

As set forth above, the evidence in this case, when considered in light of the circumstances set forth in *Olson*, is sufficient to take the issue of premeditation and deliberation to the jury.

[8] There was ample circumstantial evidence that defendant shot the victim. Defendant was the only person in the house with the victim when the police arrived. The .22-caliber bullet that was removed from the victim had the same rifling characteristics and similar barrel markings as a bullet taken from the box of ammunition found in defendant's truck and fired from defendant's pistol. The nine-shot, .22-caliber pistol that was found on the floor of the master bedroom had eight live rounds and one fired cartridge

in the cylinder. Defendant's ex-wife identified the pistol, which was found in the bedroom, as belonging to defendant. The pathologist testified that it was highly unlikely that the victim's gunshot wound would have been self-inflicted. Furthermore, the victim left a handwritten note explaining that defendant had pulled a gun on her earlier in the evening and had threatened to kill them both. Finally, defendant's statements to the police provide further evidence that he shot the victim. Defendant first told officers on the scene that he did not know what happened. Later, defendant told a detective that he heard a gunshot while watching television. Defendant explained that he found the victim's body and then caught a glimpse of a figure running up the hill. Later in the same interview, defendant told the detective to "[c]ut the bullshit. I plead no contest." Additionally, defendant claimed that he had no knowledge regarding the gun that was found. Later, when asked how the gun could have gotten into the master bedroom without his noticing it, defendant admitted to moving it. The combination of these circumstances, together with the other evidence presented at trial, represents evidence sufficiently substantial for a jury to draw the reasonable inference that defendant was the perpetrator of the crime. This assignment of error is overruled.

[9] In his next assignment of error, defendant contends that the trial court erred in denying defendant's request for an instruction to the jury on the lesser included offense of voluntary manslaughter. We disagree.

This Court has previously held:

> Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. "One who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter." *State v. Wynn*, 278 N.C. 513, 518, 180 S.E.2d 135, 139 (1971). If any evidence of heat of passion on sudden provocation exists, either in the State's evidence or that offered by the defendant, the trial court must submit the possible verdict of voluntary manslaughter to the jury. The determinative factor is the presence of such evidence.

State v. Tidwell, 323 N.C. 668, 673, 374 S.E.2d 577, 580 (1989) (citations omitted). "It is well settled that the trial court is not required to charge the jury upon the question of a defendant's guilt of lesser degrees of the crime charged in the indictment

when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees." *State v. Gadsden*, 300 N.C. 345, 350, 266 S.E.2d 665, 669 (1980).

In the case *sub judice*, there is no evidence to support a charge to the jury on voluntary manslaughter. Defendant did not present evidence in this case. The only evidence of defendant's version of the victim's death came through defendant's statements to law enforcement officers. Defendant initially told the officers that he did not know what happened. Later he told a detective that he heard a gunshot and caught a glimpse of a figure running away. Under either the State's or defendant's version of the events, there is no evidence of defendant being under the influence of passion or in the heat of blood produced by adequate provocation. Because the record is devoid of evidence to support a voluntary manslaughter instruction, the trial court did not err in refusing to give this instruction to the jury.

Even assuming *arguendo* that there was some evidence to support an instruction on voluntary manslaughter, the trial court's failure to give it would have been harmless error. In this case, the trial court submitted three possible verdicts to the jury: first-degree murder, second-degree murder, and not guilty. In *State v. Freeman*, 275 N.C. 662, 170 S.E.2d 461 (1969), the trial court instructed the jury on first- and second-degree murder, and the jury returned a verdict of guilty of murder in the first degree. The defendant claimed that the trial court's instructions on voluntary manslaughter were erroneous and that it was error for the trial court to refuse to instruct on involuntary manslaughter. This Court held that the trial court had not erred and stated:

> A verdict of murder in the first degree shows clearly that the jurors were not coerced, for they had the right to convict in the second degree. That they did not indicates their certainty of his guilt of the greater offense. The failure to instruct them that they could convict of manslaughter therefore could not have harmed the defendant.

Id. at 668, 170 S.E.2d at 465; *see also State v. Fowler*, 285 N.C. 90, 203 S.E.2d 803 (1974), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1212 (1976). We find no prejudicial error.

[10] In his final assignment of error, defendant contends that the trial court erred in failing to instruct the jury on voluntary

intoxication. We disagree. A defendant is entitled to an instruction on voluntary intoxication if the trial judge concludes that there is evidence that would reasonably support a finding that the defendant was "utterly incapable" of forming a premeditated and deliberated intent to kill. *State v. McQueen*, 324 N.C. 118, 141, 377 S.E.2d 38, 51 (1989).

In the present case, the evidence would not support a reasonable finding that defendant was "utterly incapable" of forming a deliberated and premeditated purpose to kill. The only evidence of defendant's use of alcohol was one detective's testimony that he smelled alcohol on defendant and defendant's statement to that detective that he had consumed at least six beers since 2:30 p.m. that day and did not have supper that evening. However, when the detective was asked on cross-examination if defendant appeared to have had too much to drink, the detective replied, "Not really." Upon further questioning, the detective stated that although he did feel that defendant was "under the influence," he also stated that defendant "was not drunk, or sloppy drunk."

Other evidence which indicates that defendant was not "utterly incapable" of forming the necessary intent includes the fact that defendant engaged in a lengthy conversation with the above-mentioned detective and provided the detective with his full name, date of birth, driver's license number, address, telephone number, and information regarding his employer. In fact, there is nothing in the record to indicate that any of the other officers at the scene felt that defendant was under the influence of alcohol. Additionally, it was defendant who called the emergency dispatchers to report that the victim was shot. We conclude that defendant has not met his burden in this case of showing that he was "utterly incapable" of forming the necessary intent and was therefore not entitled to an instruction on voluntary intoxication. This assignment of error is overruled.

Based upon the foregoing, we conclude that defendant received a fair trial, free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. GORDON MICHAEL MARLOW

No. 497A91

(Filed 30 July 1993)

1. Criminal Law § 129 (NCI4th)— plea bargain—not approved by judge—withdrawal by State—no error

A first-degree murder defendant's federal and state due process rights were not violated when the state rejected his pleas of guilty to second-degree murder and other offenses where the trial judge indicated that he could not accept the codefendant's plea to first-degree murder based on felony murder absent a finding of no aggravating circumstances, the State indicated that the arrangement was a package, and the court rejected the pleas from defendant and the codefendant. The prosecutor may rescind his offer of a proposed plea arrangement at any time before it is consummated by actual entry of the guilty plea and the acceptance and approval of the proposed sentence by the trial judge. The proposed agreement here had no effect as a matter of law because it had not been approved by the trial judge. Furthermore, defendant did not rely to his detriment on the proposed agreement by taking a polygraph examination because the examination was inconclusive on questions concerning whether he was the person who shot the victim and the State contends that at no point did it intend to use the results of the polygraph examination against defendant or as a part of the proposed agreement.

Am Jur 2d, Criminal Law §§ 481 et seq.

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

2. Evidence and Witnesses § 1154 (NCI4th)— murder—testimony regarding statements of codefendant—hearsay—coconspirator exception—not applicable—admission not prejudicial

There was no prejudice in a murder prosecution from the admission of testimony regarding statements made by a codefendant where the conversations between the witness and the codefendant occurred after the termination of the conspiracy, the statements were neither made during the conspiracy nor in furtherance of it and did not fall within the coconspirator's exception to the hearsay rule, and any error

was harmless in light of the overwhelming evidence against defendant.

Am Jur 2d, Homicide § 345.

Admissibility of statements of coconspirators made after termination of conspiracy and outside accused's presence. 4 ALR3d 671.

3. **Criminal Law § 113 (NCI4th)— murder—discovery—statements not furnished—no prejudice**

There was no prejudice in a murder, robbery, and burglary prosecution in the State's failure to divulge defendant's statements to people other than law enforcement officers as directed by the court because the statements were never introduced into evidence, no attempt was made to offer the statements into evidence, and the only reference was by the prosecutor in his opening statement. Assuming error, there was no reasonable possibility of a different result had the error not been committed in light of the strong substantive evidence against defendant.

Am Jur 2d, Depositions and Discovery §§ 426, 427.

4. **Evidence and Witnesses § 2051 (NCI4th)— murder—testimony as reaction of another—instantaneous conclusion of the mind**

The trial court did not err in a prosecution for murder, robbery, and burglary by allowing a witness to testify regarding another person's state of mind when the trailer in which the killing occurred was pointed out. The testimony described an instantaneous conclusion of the mind, the equivalent of which was that the person was astonished or perplexed, and was admissible under N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Expert and Opinion Evidence §§ 10, 11.

5. **Evidence and Witnesses § 3161 (NCI4th)— murder—testimony regarding statement of third party—corroborative**

The trial court did not err in a prosecution for murder, robbery, and burglary by allowing a witness to testify that, when he and Horton had arrived at a codefendant's house, Horton had asked the codefendant if he murdered someone. This testimony was admissible to corroborate the prior testimony of John Horton as well as that of Tammy Horton.

Am Jur 2d, Witnesses §§ 1001-1005.

6. Evidence and Witnesses § 2807 (NCI4th)— murder—leading on direct examination—no abuse of discretion

There was no abuse of discretion in a prosecution for murder, robbery, and burglary where the prosecutor was allowed to lead a witness on direct examination because the testimony related to equivalent testimony that was introduced earlier in the trial. A ruling on the admissibility of a leading question is in the sound discretion of the trial court and, assuming that the prosecutor here asked a leading question, defendant has failed to establish abuse of discretion. N.C.G.S. § 8C-1, Rule 611(c).

Am Jur 2d, Witnesses §§ 752-756.

7. Criminal Law § 508 (NCI4th)— murder—mistrial denied—no abuse of discretion

There was no abuse of discretion in denying defendant's motion for a mistrial in a prosecution for murder, robbery, and burglary where defendant's motion was based upon allegations that verbal and nonverbal hearsay of a coconspirator was admitted against defendant after the conspiracy had ended. It could not be said that the trial court's ruling could not have been the result of a rational decision and defendant therefore failed to show abuse of discretion.

Am Jur 2d, Trial §§ 1706 et seq.

8. Evidence and Witnesses § 3191 (NCI4th)— murder—statement of State's witness—read by law enforcement officers

There was no plain error in a prosecution for murder, robbery, and burglary in not requiring someone other than the law enforcement officers to whom statements were given to read the statements to the jury for purposes of corroboration. Moreover, assuming error, the jury would not have reached a different result had the statements been read by someone else.

Am Jur 2d, Witnesses §§ 1001 et seq.

9. Criminal Law § 329 (NCI4th)— murder—severance of defendants on morning of trial—no abuse of discretion

There was no abuse of discretion in a prosecution for murder, robbery, and burglary in granting the State's motion to sever defendant's trial from that of his codefendant on the morning of the trial. The State would not have been able

to introduce certain evidence if the two defendants were tried together and, had the cases remained joined, further delays would have been inevitable.

Am Jur 2d, Trial §§ 157 et seq.

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 Bowen, J., at the 13 May 1991 Criminal Session of Superior Court, Johnston County. Defendant's motion to bypass the Court of Appeals as to his convictions of conspiracy to commit second-degree burglary, first-degree burglary, and robbery with a dangerous weapon was allowed by this Court on 30 June 1992. Heard in the Supreme Court 10 May 1993.

Michael F. Easley, Attorney General, by G. Patrick Murphy and John H. Watters, Special Deputy Attorneys General, for the State.

Thomas H. Eagen for defendant-appellant.

MEYER, Justice.

On 3 July 1989, defendant was indicted for first-degree murder, robbery with a dangerous weapon, first-degree burglary, and conspiracy to commit burglary. Defendant was tried capitally in the Superior Court, Johnston County, in May 1991 and was found guilty of all charges. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended a sentence of life imprisonment. In accordance with the jury's recommendation, the trial court sentenced defendant to life imprisonment for murder and imposed consecutive sentences of three years for conspiracy to commit second-degree burglary, fifteen years for first-degree burglary, and fourteen years for robbery with a dangerous weapon.

On appeal, defendant brings forward numerous assignments of error. After a thorough review of the transcript of the proceedings, the record on appeal, the briefs, and oral arguments, we conclude that defendant received a fair trial free of prejudicial error, and we therefore affirm his convictions and sentences.

Evidence presented at defendant's trial shows the following. On 1 May 1989, the victim, Leland Mac Grice, and his wife, Ruby Grice, were living in a mobile home off of rural paved road 1934 north of Selma, North Carolina. On the night of 1 May 1989, severe

storm warnings had been broadcast for the area. Because Mrs. Grice was afraid of stormy weather, she left the mobile home at approximately 8:20 p.m. and went to the residence of her daughter, Carol Daniels, less than a mile down rural paved road 1934.

At approximately 11:20 p.m., Mrs. Grice left her daughter's house and drove home. Upon arriving at her mobile home, Mrs. Grice entered through the back door and found papers and contents of drawers and cabinets scattered about the floor. The television was on, and the sound was turned up. In the living room, Mrs. Grice found her husband face down on the floor with a bullet hole in his head. A .22-caliber shell casing was on the floor at his right side, and his wallet was lying on his back. Mrs. Grice called her daughters, Mrs. Daniels and Sherry Hicks, who arrived within minutes.

Detective Tommy Beasley of the Johnston County Sheriff's Department was on duty on 1 May 1989 and responded to a call to the Grice residence. Upon arriving at the scene, Beasley was told by rescue squad personnel that the victim had no vital signs.

Dr. Thomas B. Clark, the medical examiner, testified that an autopsy of the victim revealed a one-inch abrasion on his forehead and a gunshot wound behind his left ear, five and one-half inches from the top of his head and three inches to the left of the posterior midline. The wound track proceeded left to right. The projectile entered the left occipital bone and lodged in the soft tissue behind the jaw bone on the right side. Dr. Clark opined that the cause of death was the hemorrhaging along the wound track caused by the bullet.

Detective Beasley received information that John Horton could help in the Grice homicide and met with Horton on 18 June 1989 at the home of Horton's sister, Tammy Horton. Beasley advised Horton that he was a detective with the sheriff's department and informed him that he needed to talk with him. At this point, Horton said that he was ready to talk. Horton then gave Beasley a statement of the events of 1 May 1989.

John Horton testified at trial, in keeping with his statement to Detective Beasley, that on 1 May 1989, he lived with his girlfriend, Annette Cooper; his sister, Tammy Horton; and her boyfriend, Tommy Ray. Horton stated that at approximately 6:30 p.m. on the night in question, Franklin Dwayne Howell and defendant,

Gordon Michael Marlow, came by Horton's mobile home in Howell's truck. Howell asked Horton if he would "drive for him later that night." Horton asked Howell why he wanted him to drive, but Howell gave no reason. Horton then told Howell that he would drive for him that night.

Around 9:00 p.m., Howell and defendant came back to Horton's mobile home, and Horton went outside and spoke with them. Howell again asked Horton to drive. Horton testified that he could tell that Howell and defendant were "doing lacquer thinner" because Horton could smell it. Horton agreed to drive and went back in the mobile home to dress. Horton testified that he assumed Howell and defendant wanted him to drive so that they could sniff lacquer thinner.

Horton testified that he, Howell, and defendant got into Howell's pickup truck with Howell driving and left the mobile home. Horton noted that Howell's .22-caliber bolt-action rifle was in the cab. Horton had seen and fired the gun previously. Horton stated that Howell wore camouflage clothing and that defendant was dressed in black pants and a black shirt. The three men rode around for approximately thirty to forty-five minutes. During this time, Howell and defendant talked about "where they could find easy money." Howell eventually asked Horton to drive. Horton testified that Howell went to the end of a dirt road near what he later learned was the Grice residence. Howell and defendant, who had the rifle with him, got into the back of the truck.

Horton stated that Howell spoke to him through the sliding rear window of the cab and told him to drive slowly down the dirt road because he and defendant were going to jump out. Howell also told Horton that after he and defendant jumped out, Horton was to circle the dirt road twice and then they would jump back into the rear of the truck. Howell further told Horton that if Horton did not see them the second time around, he was to go down rural paved road 1934 to a red barn where they would meet him.

Horton testified that he slowly proceeded down the dirt road adjacent to the Grice residence and that Howell and defendant jumped out. As they did so, Horton heard one of them say, "Let's get it over with." As the two men ran in the direction of the Grice residence, Horton stated that Howell had something tucked under his arm and defendant had the rifle.

Horton stated that he drove down the dirt road for approximately one and one-half miles until it intersected with a paved road. He then turned left on the paved road and looped back around to the start of the dirt road at the intersection next to the Grice residence. Horton testified that he did not see anyone, and therefore he looped around again. On his second time around, Horton saw defendant running across the field with the rifle. Defendant jumped into the back of the truck and instructed Horton to turn around and go back to the end of the dirt road and turn left on rural paved road 1934. Horton stated that he followed defendant's instructions. When he got to the barn between the Grice and Daniels residences, defendant screamed, "slow down." At that point, Howell jumped into the back of the truck. Horton proceeded down the road until it intersected Highway 39. Howell and defendant then got back into the cab.

Horton testified that once defendant and Howell were inside the cab, Howell asked, "who reloaded it." Defendant responded that he had. Horton stated that as he drove back to his mobile home, Howell and defendant were "joking, carrying on." Once back at Horton's home, defendant "pulled out a black bag" and threw it into the glove compartment. Horton testified that the bag sounded like it had change in it. As Horton walked around the truck, he saw a duffel bag with a tape player inside, which was later identified as belonging to the Grices. Horton stated that he then went into the mobile home and went to bed. He testified that he did not know anything about the Grice murder until he heard the news the following morning.

Additional facts will be set forth as necessary with respect to the various issues.

[1] By his first assignment of error, defendant contends that the trial court violated his federal and state due process rights in rejecting his pleas of guilty to second-degree murder and other offenses because his pleas had been entered and were binding upon the court. Defendant further alleges that, in reliance upon a plea agreement, he submitted to a polygraph examination to his detriment and was thus prejudiced by this violation. We do not agree.

On 13 March 1990, with Judge Wiley F. Bowen presiding, the State called the cases of defendant and his codefendant, Franklin Howell. Counsel for defendant Marlow stated that "defendant has

authorized me to tender in his behalf a plea of guilty to second degree murder," as well as a plea of guilty to first-degree burglary, robbery with a dangerous weapon, and felonious conspiracy to commit burglary. Howell's defense attorney then entered his pleas, among which was a plea of guilty to first-degree murder under the felony-murder theory. Judge Bowen stated that he could not accept a plea from Howell to first-degree murder absent a finding that the State had no evidence of any aggravating circumstance. The district attorney then stated that "this proposed plea arrangement is a package, as far as I am concerned, and is contingent the one upon the other." Judge Bowen then rejected the pleas from both defendant and Howell.

On 3 May 1991, Judge Robert H. Hobgood heard defendant's motion to enforce plea agreement. After hearing arguments from both sides, Judge Hobgood denied defendant's motion and entered a lengthy order containing extensive findings of fact and conclusions of law. The trial court concluded, as a matter of law, that "[t]he District Attorney did have discretionary authority to enter into negotiated pleas among multiple defendants in package deals."

In *Mabry v. Johnson*, 467 U.S. 504, 81 L. Ed. 2d 437 (1984), the United States Supreme Court held that the federal Constitution does not preclude the prosecution from withdrawing a plea agreement once it has been accepted by the defendant. The Court noted that "[a] plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest." *Id.* at 507, 81 L. Ed. 2d at 442.

N.C.G.S. § 15A-1023(b) provides that the trial court must first approve a recommended sentence under a plea agreement proposed by the State before it can become effective. In regard to N.C.G.S. § 15A-1023(b), this Court held in *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980), that "the prosecutor ha[s] no authority to bind the State to the dispensation of a particular sentence in defendant's case until the trial judge ha[s] approved of the proposed sentence." *Collins*, 300 N.C. at 150, 265 S.E.2d at 176-77. Therefore, the prosecutor may rescind his offer of a proposed plea arrangement at any time before it is consummated by *actual entry of the guilty plea* and the acceptance and approval of the proposed sentence by the trial judge.

In the case at bar, we conclude that defendant tendered a guilty plea which was not accepted and approved by the trial judge. The prosecutor withdrew the offers to both defendants prior to actual entry of the pleas and approval by the court. Furthermore, we conclude that defendant did not rely to his detriment on the proposed agreement. The polygraph examination transpired 1 December 1989. During the examination, defendant was inconclusive on the questions directed to him as to whether he was in fact the person who shot Mr. Grice. The State argues that at no point did it intend to use the results of the polygraph examination against defendant or as part of the proposed agreement. We conclude that there was no detrimental reliance by defendant in taking the polygraph examination.

Furthermore, because the trial court in the case *sub judice* did not approve the recommended sentence, we also reject defendant's state constitutional claim. As noted earlier, a plea agreement involving a sentence recommendation by the State must first have judicial approval pursuant to N.C.G.S. § 15A-1023(b) before it is enforceable. The alleged plea agreement in the present case involved a sentence recommendation that defendant enter pleas of guilty to the felonies of second-degree murder, first-degree burglary, robbery with a dangerous weapon, and conspiracy to commit second-degree burglary and that defendant receive two, concurrent life sentences. Thus, the proposed agreement between the defendant and the State had no effect as a matter of law because it had not been approved by the trial judge.

[2] By his next assignment of error, defendant contends that the trial court committed prejudicial error by admitting certain evidence during the testimony of State's witness John Horton. Specifically, at trial, the State called Horton, who testified, over objection, to two conversations that he had on 2 May 1989 with codefendant Franklin Howell in the presence of Tommy Ray. In response to the prosecutor's question, "[D]id you have a conversation with [Howell]?" Horton testified, "I asked him, did him and [defendant] have anything to do with the death of Mr. Grice." In response to the prosecutor's question, "Don't say anything he said. As a result of any answer he gave you, did you make any other further comments to him?" Horton responded, "I told him the best thing to do is not to come back around. To stay away." Horton then testified, "Well, right before we left, [Howell] come out with that

particular tape player and a black one and tried to give it to me and Tommy."

Horton then went on to testify that he saw Howell later that same afternoon, again with Tommy Ray present but in the absence of defendant, and Horton asked Howell, "did he kill [Mr. Grice]." In response to the prosecutor's next question, "Don't tell me what he said. As a result of him saying—making—. Did he make any response to you, but don't tell me what it was, yes or no, did he answer that question?" Horton answered, "Yes." Then the prosecutor asked, "And as a result of that, did you respond anything to him?" and Horton testified, "Again, I told him to leave and not to come back around." Horton then testified that Howell tried to give him a twenty-dollar bill, but he gave it back.

Under Rule 801 of the North Carolina Rules of Evidence, "hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). A statement may be a written or oral assertion or nonverbal conduct intended by the declarant as an assertion. N.C.G.S. § 8C-1, Rule 801(a) (1992).

Clearly, Horton's oral assertion that he told Howell "not to come back around. To stay away," constituted hearsay under Rule 801(a). Furthermore, Howell's actions of attempting to give Horton the tape player and later attempting to give him a twenty-dollar bill were nonverbal assertions also constituting hearsay. *See State v. Satterfield*, 316 N.C. 55, 340 S.E.2d 52 (1986).

An exception to the hearsay rule is that a statement by one conspirator made during the course and in furtherance of the conspiracy is admissible against his coconspirators. N.C.G.S. § 8C-1, Rule 801(d)(E) (1988). In order for the statements or acts of a conspirator to be admissible as evidence against the coconspirator, there must be a showing that " '(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) while it was active, that is, after it was formed and before it ended.' " *State v. Mahaley*, 332 N.C. 583, 593-94, 423 S.E.2d 58, 64 (1992) (quoting *State v. Tilley*, 292 N.C. 132, 138, 232 S.E.2d 433, 438 (1977)).

In this case, the conversations between Horton and Howell occurred after the termination of the conspiracy. The State's proffer

of conspiracy was limited to the time frame beginning on the afternoon of 1 May 1989, when Howell and defendant began coming by Horton's mobile home, and ending when Howell and defendant dropped Horton back at his mobile home around midnight of the same night. The testimony objected to was of conversations occurring in the morning and afternoon of 2 May 1989 between Horton and Howell, while defendant was not present. These statements were neither made during the conspiracy nor in furtherance of it, and therefore do not fall within the coconspirator's exception to the hearsay rule. Thus, the admission of these statements was error. However, we conclude that defendant was not prejudiced by their admission. Had this evidence not been admitted, there is no reasonable possibility that a different result would have been reached. N.C.G.S. § 15A-1443(a) (1988).

The evidence against defendant was overwhelming. During his testimony, Horton described the activities of himself, defendant, and Howell during the evening of 1 May 1989, which included dropping defendant, who carried a rifle, and Howell off near the Grice residence and then picking them back up. Horton then described seeing defendant throw a bag that sounded like it contained coins into the glove compartment of the truck, as well as seeing a duffel bag with a tape player in it in the back of the truck. Moreover, when officers searched Howell's truck two weeks after the murder, they discovered the gun that fired the shell casing found beside Mr. Grice and also found Mrs. Grice's tape player. We find that, in light of the overwhelming evidence against defendant, any error in admitting evidence of Howell's nonverbal conduct in Horton's presence was harmless beyond a reasonable doubt.

[3] In his next assignment of error, defendant contends that the trial court erred in denying his motion to suppress statements allegedly made by defendant because the State had failed to provide such statements in a timely manner pursuant to an order compelling discovery.

On 28 July 1989, defendant filed a motion for discovery, to which the State responded on 2 August 1989. During the course of pretrial litigation, Judge Wiley F. Bowen entered an order, in open court on 9 November 1989, compelling discovery. Section 2 of that order requires that "[i]f any statement by the defendant was made to a person other than a law enforcement officer and if this statement is then known to the State, the State must divulge

the substance of that statement no later than 12:00 noon, on Wednesday prior to the beginning of the week during which this case is calendared for trial." In addition to the discovery previously turned over by the State, supplemental discovery containing oral statements attributable to the defendant was supplied to the defense on 7 May 1991.

During the prosecutor's opening remarks, defendant objected to the mention of the statements attributable to defendant that had been supplied in the supplemental discovery on 7 May 1991. Defendant argued that the State had failed to comply with Judge Bowen's order of 9 November 1989 because the order required the State to divulge such statements no later than the first Wednesday after the State came into possession of such statements prior to any week in which the case had been calendared for trial. Defendant alleges that because the State had his statements since February of 1990 and the case had been calendared for trial numerous times, the State failed to comply with the order compelling discovery by not turning over the statements until 7 May 1991.

The statements in question were never introduced into evidence nor was any attempt ever made to offer them into evidence. The only reference to the statements during the actual trial was by the prosecutor in his opening argument. Assuming *arguendo* that the furnishing of the statements on 7 May 1991 was not in apt time and that the prosecutor's mention of them in his opening statement was error, we conclude that the error, if indeed it was error, was harmless. In light of the strong substantive evidence against defendant, we conclude that there is no reasonable possibility that had the error not been committed, a different result would have been reached. Therefore, this assignment of error is overruled.

[4] By his next assignment of error, defendant contends that the trial court committed prejudicial error by overruling his objections during the testimony of witness Tommy Ray.

Defendant first argues that the trial court erred by overruling his objection to Ray's answer in the following line of testimony:

> Q. What happened after you pointed out to [Horton] that was the trailer that Mr. Grice had been killed [in] the night before?
>
> A. He couldn't believe it.
>
> . . . .

Q. When he said that he couldn't believe it, he say [sic] anything to indicate that to you?

. . . .

A. He just started shaking. He didn't know what was going on or anything.

In overruling his objection, defendant contends that the trial court improperly allowed Ray to testify regarding Horton's state of mind.

Rule 701 of the North Carolina Rules of Evidence deals with opinion testimony of nonexpert witnesses. The rule provides:

> 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 (1992). The Official Commentary to the statute specifically states that "[n]othing in the rule would bar evidence that is commonly referred to as a 'short-hand statement of fact.' " *Id.* (quoting 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 125, at 474-76 (2d rev. ed. 1982)). We have held that a witness may testify to the instantaneous conclusions of the mind as to the condition, appearance, or physical or mental state of persons that are derived from the observance of a variety of facts presented to the senses at the same time. *State v. Williams*, 319 N.C. 73, 78, 352 S.E.2d 428, 432 (1987).

We conclude that when Ray testified that Horton "couldn't believe it," he was describing an instantaneous conclusion of the mind, the equivalent of which was that Horton was astonished or perplexed. This conclusion was clearly an inference or opinion rationally based on the perception of the witness and helpful to a clear understanding of his testimony. Thus, Ray's testimony was admissible under Rule 701 of the Rules of Evidence.

[5] Defendant next argues that the trial court erred in permitting Ray to testify that when he and Horton arrived at Howell's house on 2 May 1989, Horton "[a]sked [Howell] did he murder somebody." Defendant contends that Ray's testimony was impermissible hearsay evidence of Howell's admission on behalf of defendant. We disagree.

It is well settled that a prior consistent statement of a witness is competent for corroborative purposes. *See State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986); *State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). Prior consistent statements are admissible only when they are, in fact, consistent with the witness' trial testimony. *State v. Stills*, 310 N.C. 410, 415, 312 S.E.2d 443, 447 (1984). In fact, such a statement need not merely relate to specific facts in the witnesses' testimony as long as the prior statement tends to add weight or credibility to such testimony. *State v. McAvoy*, 331 N.C. 583, 592, 417 S.E.2d 489, 495 (1992).

We hold that Ray's testimony corroborated that of the prosecuting witness, John Horton. Horton had previously testified as to the events of 1 and 2 May 1989 as they involved Howell and defendant. Horton stated that after he saw the crime scene tape around the Grice residence, he went to confront Howell. Horton testified that he asked Howell, "did him and [defendant] have anything to do with the death of Mr. Grice."

In addition, Ray's testimony corroborated that of Tammy Horton. Tammy had also previously testified, without objection, that she had asked Howell "whether he was responsible or a part of the death of Mr. Grice." We conclude that Ray's testimony was admissible to corroborate John Horton's, as well as Tammy Horton's, prior testimony and thus overrule this assignment of error.

[6] As a final argument under this assignment of error, defendant contends that the trial court erred by allowing the State improperly to lead Ray during part of his testimony. Specifically, defendant assigns error to the following colloquy:

> Q. Did you hear [defendant] say anything about you needing to keep your mouth shut?
>
> [DEFENSE COUNSEL]: Objection, Your Honor. Leading the witness.
>
> A. I did hear that. I can't remember where I heard it at, though.
>
> THE COURT: Overruled.

N.C.G.S. § 8C-1, Rule 611(c) provides, in pertinent part, that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony." A ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only

for an abuse of discretion. *State v. Howard*, 320 N.C. 718, 360 S.E.2d 790 (1987). Assuming *arguendo* that the prosecutor did ask a leading question of Ray, we conclude that defendant has failed to establish abuse of discretion. Ray's testimony related to equivalent testimony by Tammy Horton and John Horton that was introduced earlier in the trial. Tammy Horton was allowed to testify, without objection, that defendant told Ray "[n]ot to say nothing, that [Ray] could be next." In addition, John Horton testified, without objection, that "[defendant] looked at me and Tommy and told me that if anybody said anything that we would be next." This assignment of error is overruled.

[7] By his next assignment of error, defendant contends that the trial court erred by denying his motion for a mistrial. Defendant's motion was based on his allegation that verbal and nonverbal hearsay of coconspirator Howell was admitted against the defendant after the conspiracy had ended. Defendant further contends that these statements were not revealed to him prior to trial.

The decision to grant or deny a mistrial rests within the sound discretion of the trial court. *State v. Warren*, 327 N.C. 364, 395 S.E.2d 116 (1990). A trial court should grant a mistrial "only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Laws*, 325 N.C. 81, 105, 381 S.E.2d 609, 623, *sentence vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 174, *reh'g denied*, --- U.S. ---, 116 L. Ed. 2d 648 (1991). Consequently, a trial court's decision regarding a motion for mistrial will not be disturbed on appeal absent a clear showing that the trial court abused its discretion. *Id.* We are unable to say that the trial judge's ruling could not have been the result of a rational decision and we therefore hold that the defendant has failed to show that the trial court abused its discretion by denying a mistrial.

[8] Defendant next contends that the trial court erred by failing to act *ex mero motu* and require someone, other than the law enforcement officers to whom John Horton gave statements, to relate the statements to the jury for purposes of corroboration. Defendant alleges this perceived error to be of constitutional

magnitude under both the state and federal constitutions but fails to cite a specific section of either constitution.

Because defendant failed to object to the officers' reading of the statements, the objection is deemed waived pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure. However, in *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983), we held that the "plain error" rule was applicable to evidentiary matters.

The reading of the prior statements of Horton by the officers was not error. Assuming, however, that it was error, our review of the record fails to convince us that the jury would have reached a different verdict had the statements been read by someone else. This assignment of error is overruled.

[9] In defendant's final assignment of error, he contends that the trial court erred in granting the State's motion to sever defendant's trial from that of his codefendant, Franklin Howell, on the morning of the trial. Defendant argues that he had been preparing for a joint trial in excess of one year and that the motion to sever granted by the trial judge on the day of trial was an abuse of discretion. We disagree.

On 13 February 1990, the district attorney made a motion to join the cases of the defendants, Marlow and Howell, for trial. Judge Bowen heard and granted that motion. On 3 May 1991 at a hearing of motions before Judge Hobgood, the State announced its intention to try the defendants separately, with defendant Marlow being tried first beginning 13 May 1991. At that time, the intention to try the defendants separately and to proceed with defendant Marlow on the 13th was acknowledged by the defense. On 13 May 1991, the State formally made a motion to sever the defendants' cases for trial. Judge Bowen granted the motion.

N.C.G.S. § 15A-927(c)(2) provides in pertinent part that:

> The court, on motion of the prosecutor, . . . must deny a joinder for trial or grant a severance of defendants whenever:
>
> a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants[.]

N.C.G.S. § 15A-927(c)(2) (1988). The disposition of a defendant's motion for a separate trial is a matter governed by the trial court's

discretion. *State v. Rasor*, 319 N.C. 577, 581, 356 S.E.2d 328, 331 (1987). We have long held that the ruling upon a motion for severance will not be disturbed on appeal unless the defendant demonstrates an abuse of judicial discretion that effectively deprived him of a fair trial. *See, e.g.*, N.C.G.S. § 15A-927(c)(2); *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982); *State v. Porter*, 303 N.C. 680, 281 S.E.2d 377 (1981). We do not find such abuse in the present case.

During the motions hearing on 3 May 1991, the State argued that a severance of the defendants' cases for trial was necessary to avoid potential error under *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968), and to avoid further delay in defendant's trial. In *Bruton*, the Supreme Court held that a nontestifying codefendant's extrajudicial confessions implicating the defendant cannot be admitted at their joint trial due to the devastating effect upon the confrontation rights of the other defendant, notwithstanding the trial judge's instructions to the jury that it consider the statements only as against the declarant. *Id.* at 126, 20 L. Ed. 2d at 479. Thus, in the case *sub judice*, the State would not have been able to introduce certain evidence if the two defendants were tried together.

In addition, the State argued that severance would avoid further delay in defendant Marlow's trial. On 26 March 1991, defendant filed a motion for a speedy trial, as well as a motion to dismiss for denial of a speedy trial. At the motions hearing on 3 May 1991, defendant Howell requested and received a continuance. On 13 May 1991, Judge Bowen denied defendant Marlow's motion for a speedy trial and concluded, as a matter of law, that "much of the delay was caused or acquiesced in by the defendant and [was] directly attributable to the number of motions filed by said defendant." Therefore, had the defendants' cases remained joined for trial, further delay would have been inevitable. We conclude that the trial court did not abuse its discretion and there was no error.

In summary, we conclude that defendant received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA, EX REL. LACY H. THORNBURG, ATTORNEY GENERAL, PLAINTIFF v. HOUSE AND LOT LOCATED AT 532 "B" STREET, BRIDGETON, N.C. 28519, BEING ALL OF LOT NO. 24, "B" STREET, SMALLWOOD SUBDIVISION, IN ACCORDANCE WITH THE PLAT RECORDED IN BOOK 150, PAGE 397 OF THE CRAVEN COUNTY REGISTRY, AND BEING DEEDED TO THERESA M. BESSEY IN BOOK 1160, PAGE 142, CRAVEN COUNTY REGISTRY, DEFENDANT, FIRST UNION MORTGAGE CORPORATION AND THE NEW BERN-CRAVEN COUNTY BOARD OF EDUCATION, INTERVENING DEFENDANTS

No. 150PA92

(Filed 30 July 1993)

Penalties § 7 (NCI4th)— RICO forfeited property—proceeds of sale—public school fund

The RICO Act requires that the proceeds of any sale of RICO forfeited property "shall be paid to the State Treasurer" and does not permit such proceeds to be distributed to entities other than the State. Therefore, N.C. Const. art. IX, § 7 requires that the clear proceeds from the sale of RICO forfeited property be paid to the public school fund. N.C.G.S. §§ 75D-5(j)(1-7).

Am Jur 2d, Forfeitures and Penalties §§ 67 et seq.

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(b) prior to review by the Court of Appeals of order entered by Butterfield, J., in the 4 November 1991 Civil Session of Superior Court, Craven County. Heard in the Supreme Court on 8 October 1992.

Lacy H. Thornburg, Attorney General, by W. Dale Talbert, Special Deputy Attorney General, for plaintiff-appellee.

Henderson, Baxter & Alford, P.A., by David S. Henderson and Benjamin G. Alford, for intervening defendant-appellant New Bern-Craven County Board of Education.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., and Allison Brown Schafer, for the North Carolina School Boards Association, amicus curiae.

Randle L. Jones, for The North Carolina Association of Police Attorneys; Charles P. Wilkins, for The North Carolina Association of Chiefs of Police; and Edmond W. Caldwell, Jr., for The North Carolina Law Enforcement Officers' Association and The North Carolina Sheriffs' Association, amici curiae.

EXUM, Chief Justice.

This is a forfeiture proceeding brought pursuant to Chapter 75D of our General Statutes—this State's Racketeer Influenced and Corrupt Organizations Act (RICO Act). There is no question regarding the State's right to a RICO forfeiture of the subject property. The issue which divides the State and the appealing intervening defendant, The New Bern-Craven County Board of Education (Board), concerns how the proceeds of a sale of the forfeited property shall be distributed in light of Section 7 of Article IX of the North Carolina Constitution, which provides:

> Sec. 7. **County School Fund.**
>
> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

The trial court concluded that this constitutional provision has no application to RICO forfeitures and that proceeds from the sale of RICO forfeited property may be distributed according to the terms of the RICO Act. It ordered that all proceeds from the sale of the forfeited property after payment to the lienholder, intervening defendant First Union Mortgage Corporation, be paid one-half to the State Treasurer and one-half to the State Bureau of Investigation.

The RICO Act provides in section 75D-5(a) that certain described property "is subject to forfeiture to the State. Forfeiture shall be had by a civil procedure known as a RICO forfeiture proceeding." N.C.G.S. § 75D-5(a) (1990). It provides in section 75D-5(d) that a RICO forfeiture proceeding shall be "prosecuted only by the Attorney General of North Carolina or his designated representative." N.C.G.S. § 75D-5(d).

The trial court's order concerning distribution of the proceeds of the sale of the RICO forfeited property was entered pursuant to section 75D-5(j) of the RICO Act, which provides:

> Subject to the requirement of protecting the interest of all innocent parties, the court may, after judgment of forfeiture, make any of the following orders for disposition of the property:
>
> (1) Destruction of the property or contraband, the possession of, or use of, which is illegal;
>
> (2) Retention for official use by a law enforcement agency, the State or any political subdivision thereof. When such agency or political subdivision no longer has use for such property, it shall be disposed of by judicial sale as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, *and the proceeds shall be paid to the State Treasurer*;
>
> (3) Transfer to the Department of Cultural Resources of property useful for historical or instructional purposes;
>
> (4) Retention of the property by any innocent party having an interest therein, including the right to restrict sale of an interest to outsiders, such as a right of first refusal, upon payment or approval of a plan for payment into court of the value of any forfeited interest in the property. The plan may include, in the case of an innocent party who holds an interest in the property through an estate by the entirety, or an undivided interest in the property, or a lien on or security interest in the property, the sale of the property by the innocent party under such terms and conditions as may be prescribed by the court and the payment into court of any proceeds from such sale over and above the amount necessary to satisfy the divided ownership value of the innocent party's interest or the lien or security interest. *Proceeds paid into the court must then be paid to the State Treasurer*;
>
> (5) Judicial sale of the property as provided in Article 29A of Chapter 1 of the General Statutes of North Carolina, *with the proceeds being paid to the State Treasurer*;

(6) Transfer of the property to any innocent party having an interest therein equal to or greater than the value of the property; or

(7) Any other disposition of the property which is in the interest of substantial justice and adequately protects innocent parties, *with any proceeds being paid to the State Treasurer.*

N.C.G.S. §§ 75D-5(j)(1-7) (emphasis added).

From the trial court's order the Board appealed, and, because of the importance of the question presented, we allowed the Board's petition for review prior to determination by the Court of Appeals. Concluding that the constitutional provision controls the disposition of the proceeds of sale and requires that these proceeds be paid to the Board for the support of the New Bern-Craven County public schools, we reverse.

The trial court heard the case and based its order on stipulated facts as follows:

Theresa M. Bessey (hereinafter "Bessey") was the sole owner of a house and lot located at 523 "B" Street, Smallwood Subdivision, Bridgeton, North Carolina, which are the subject of this forfeiture proceeding. Between 17 August 1988 and 1 December 1989, Bessey sold from these premises controlled substances on six separate occasions to an undercover agent of the North Carolina State Bureau of Investigation (SBI). On the basis of these six sales, criminal charges were brought against Bessey; and on 28 June 1990 Bessey pled guilty to six separate violations of N.C.G.S. § 90-95 for which she was sentenced to ten years' imprisonment. At the time Bessey entered her guilty pleas she consented to the RICO forfeiture of the premises from which the illegal sales were made.

This RICO forfeiture proceeding was begun by a civil complaint filed 11 June 1990. The RICO complaint alleged Bessey's underlying criminal offenses occurring on the subject premises as the basis for the RICO forfeiture. Bessey answered, consenting to the forfeiture. The Board, after being permitted to intervene, answered and alleged that under Article IX, Section 7, it was entitled to any "clear proceeds" which might result from the sale of the forfeited property. The Board moved for summary judgment in accordance with its answer. Plaintiff moved for summary judgment that the subject property be forfeited and sold and that the

net proceeds from the sale be distributed one-half to the State Treasurer and one-half to the State Bureau of Investigation (SBI). The trial court granted plaintiff's motion for summary judgment.

We first disagree with plaintiff's contention that the RICO Act directs that the proceeds from the sale of RICO forfeited property may be distributed to entities other than the State. While the RICO Act provides for a number of alternative dispositions of RICO forfeited property, it consistently, and in every instance, requires that the proceeds of any sale of such property "shall be paid to the State Treasurer." §§ 75D-5(j)(1-7).

Since the RICO Act provides for distribution to the State of the proceeds of any sale of RICO forfeited property, Article IX, Section 7, requires that those proceeds be paid directly to the public school fund. *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988). In *Mussallam*, we held that the disposition of proceeds from a civil appearance bond forfeiture were governed by Article IX, Section 7. *Id.* at 510, 364 S.E.2d at 367. The appearance bond's terms provided that the sureties were bound to pay the State of North Carolina if the principal failed to appear. We concluded that whenever the proceeds resulting from a forfeiture were required to be paid to the State, Article IX, Section 7, required that they be paid to the public school fund. We stated:

> We interpret the provisions of Section 7 relating to the clear proceeds from penalties, forfeitures and fines as identifying two distinct funds for the public schools. These are *(1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state*; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. . . . *Thus, in the first category, the monetary payments are penal in nature and accrue to the state regardless of whether the legislation labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal.*
>
> Applying this reasoning to the bond at issue here, it is clear that the superior court judge set the bond to ensure the husband's appearance. The punishment for his failure to so appear would be immediate forfeiture of the bond. *The terms of the bond specifically made its proceeds payable to the State of North Carolina should it be forfeited. The bond therefore falls within the parameters of the first category.*

Id. at 508-09, 364 S.E.2d at 366-67 (emphasis added).

Mussallam's analysis relied on *Hodge v. R.R.*, 108 N.C. 17, 12 S.E. 1041 (1891), and *Katzenstein v. R.R. Co.*, 84 N.C. 688 (1881). *Katzenstein* was an action by a shipper of goods against the Raleigh and Gaston Railroad brought pursuant to a statute which made it unlawful for a railroad company to allow freight to "remain unshipped for more than five days." 84 N.C. at 689. The statute also provided that "any company violating this section, shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same." *Id.* Defendant railroad appealed from a verdict for plaintiff, contending among other things that plaintiff could not sue under the statute because the Constitution (then Article IX, Section 5) gave, as it does now, the "clear proceeds of all penalties and forfeitures" to the county school fund. This Court, finding no error below, concluded that the constitutional provision applied only to penalties and forfeitures which accrued to the State, saying "there is a distinction between those [penalties and forfeitures] that accrue to the state, and those that are given to the person aggrieved, or such as may sue for the same, and no doubt this distinction was in the contemplation of the framers of the constitution . . . ." 84 N.C. at 693.

Conversely, *Hodge* was an action brought by the State on the relation of W.T. Hodge against the Marietta and North Georgia Railroad pursuant to a statute which assessed a $500 penalty against corporations for failing to make certain reports, "to be sued for in the name of the State of North Carolina in the Superior Court of Wake County." 108 N.C. at 18, 12 S.E. at 1041. This Court affirmed the trial court's sustaining of defendant's demurrer to the complaint on the ground that only the State could bring the suit, not the State on the relation of some individual. The Court, distinguishing *Katzenstein*, said: "But here the statute imposing the penalty provides for its recovery by the State, and the Constitution devotes such penalties and forfeitures to the school fund." *Id.* at 19, 12 S.E. at 1041.

Under our analysis in *Mussallam*, *Katzenstein*, and *Hodge*, Article IX, Section 7, requires that clear proceeds accruing to the State from any forfeiture must be paid to the public school fund. The RICO Act provides that the proceeds from the sale of RICO forfeited property accrue to the State. Such proceeds must therefore be paid to the public school fund.

The trial court erred in granting plaintiff's motion for summary judgment as to the distribution of the proceeds of sale of the

RICO forfeited property. It should have granted summary judgment for the Board on this issue. The decision of the superior court is therefore

REVERSED.

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

Justice MEYER dissenting.

The forfeiture of the property is not in issue on this appeal. We are here presented solely with the validity of the trial judge's disposition of the proceeds of the forfeiture.

I believe that the majority has erred in holding that Article IX, Section 7 of our state Constitution controls the disposition of forfeitures ordered under the state RICO Act. It is my position that the trial judge correctly disposed of the forfeited property pursuant to our RICO Act in his order of final judgment of forfeiture and order of disposition entered on 5 February 1992 by awarding 50% of the net foreclosure proceeds to the State Bureau of Investigation and 50% to the State Treasurer.

Forfeitures ordered and distributed pursuant to the RICO Act are remedial in nature in that they are intended to compensate the state, local governmental agencies, and other persons for losses incurred due to racketeering activity. Therefore, RICO forfeitures are not penal in nature, and their distribution is not controlled by Article IX, Section 7.

It is my position that all forfeitures ordered pursuant to the RICO Act, regardless of to whom the proceeds ultimately accrue, are remedial and not penal in nature and are intended to compensate particular parties, including the state, who suffer loss from organized racketeering activity. In *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988), this Court interpreted the provisions of Article IX, Section 7 relating to the clear proceeds from penalties, forfeitures, and fines as identifying two distinct funds for the public schools. "These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws." *Id.* at 508-09, 364 S.E.2d at 366-67.

With regard to the second category, we held that "it is quite apparent from the words of section 7 that the clear proceeds of all fines collected for the violation of the criminal laws are to be used for school purposes." *Id.* at 509, 364 S.E.2d at 367. The Court indicated that "[o]ne could not legitimately argue that the violation of a criminal law is not a 'breach of the penal laws,' " *id.*; however, the Court defined the term "penal law" as used in the context of Article IX, Section 7 as meaning "laws that impose a monetary payment for their violation," *id.* In the instant case, the state RICO Act simply does not impose a monetary payment or fine for its violation. The Court in *Mussallam*, stated that such payments are punitive rather than remedial in nature only when they are intended to penalize the wrongdoer rather than to compensate a particular party. *Id.* The intent of the forfeiture action before the Court is not to punish the criminal defendant, but to remove the illegally obtained tools of the criminal trade from private use and distribute them back into the state's economy. The forfeiture serves only to compensate or restore aggrieved parties for losses resulting from the illegal diversion of assets from the public economy. This is evidenced by the fact that forfeitures pursuant to the RICO Act are in no way tied to the criminal proceedings nor their dispositions.

Mussallam should only be read so as to clearly establish the rule of law that Article IX, Section 7 of the North Carolina Constitution controls the disposition of penalties and forfeitures only where "monetary payment is penal in nature and accrue[s] to the state." *Id.* Implicit in the Court's decision are the further conclusions that the disposition of monetary payments, whether labeled by the legislature as penalties or forfeitures and whether imposed in civil or criminal actions, is not controlled by Article IX, Section 7 if the proceeds are remedial in nature and intended to compensate a particular party for a loss or if the proceeds of the penalty or forfeiture accrue to someone other than the state. Thus, if it accrues to the state, a penalty or forfeiture intended to penalize a wrongdoer falls within the first category identified by the Court in *Mussallam*, and its disposition is controlled by the Constitution. However, a remedial penalty or forfeiture intended to compensate a particular party *or* one that does not accrue to the state does not fall within either the first or second category identified by the Court in *Mussallam*, and its disposition is not controlled by the Constitution.

By specifically authorizing property forfeited under the RICO Act to be distributed in whole or in part to agencies and persons other than the state, the legislature has indicated its clear intent that some proceeds from RICO forfeitures are not to "accrue" to the state. Under *Mussallam*, only forfeitures that accrue to the state are controlled by Article IX, Section 7. Therefore, the constitutional provision does not control the disposition of the RICO Act forfeiture ordered in this case.

In approaching the question presented by this appeal, the Court should be guided by the following well-established principles. All statutes are presumed to be constitutional, and every presumption is to be indulged in favor of validity. *Martin v. N.C. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970). The burden of showing a statute's unconstitutionality is on the person who attacks it. 12 N.C. Index 3d, *Statutes* § 4.1 (1978). If a statute is susceptible to two interpretations, one constitutional and the other unconstitutional, the constitutional interpretation must be adopted. *In re Arthur*, 291 N.C. 640, 231 S.E.2d 614 (1977). The intent of the legislature controls the interpretation of a statute. *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978); *State v. Hart*, 287 N.C. 76, 213 S.E.2d 291 (1975). In ascertaining the intent of the legislature, the courts should consider the language of the statute, the spirit of the act and what it sought to accomplish, and the effect of proposed interpretations. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972); *Electric Service v. City of Rocky Mount*, 20 N.C. App. 347, 201 S.E.2d 508, *aff'd*, 285 N.C. 135, 203 S.E.2d 838 (1974). It is presumed that the legislature enacted a statute with care and deliberation and with full knowledge of prior and existing law. *State v. Benton*, 276 N.C. 641, 174 S.E.2d 793 (1970). If these well-established principles are adhered to in this case, the order of the trial judge must be upheld.

Article IX, Section 7 provides in pertinent part:

> [T]he clear *proceeds of all* penalties and *forfeitures* and of all fines *collected* in the several counties *for any breach of the penal laws of the State*, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

N.C. Const. art. IX, § 7 (emphasis added).

The emphasized language makes it unmistakably clear that all "forfeitures," whether they arise in criminal or civil actions, are not covered by this provision. Only those forfeitures that are penal in nature are covered by this provision. Forfeitures that are not penal in nature are not covered and may be disposed of by our legislature as it sees fit. It has seen fit to dispose of the proceeds of the property in question in this case according to the state RICO Act. N.C.G.S. ch. 75D (1990).

The trial judge was correct in holding that RICO forfeitures are primarily remedial in nature and are therefore outside the mandate of Article IX, Section 7 of the state Constitution.

Key to the issue is the term "remedial," which is defined as "[a]ffording a remedy; giving means of obtaining redress; of the nature of a remedy." *Black's Law Dictionary* 1293 (6th ed. 1990).

> The underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.

Id. at 1294. The RICO Act comports with this definition.

The Act itself makes clear that the "[c]ivil remedies under [Chapter 75D] are cumulative, supplemental and not exclusive, and *are in addition to the fines, penalties and forfeitures set forth in a final judgment of conviction of a violation of the criminal laws of this State as punishment for violations of the penal laws of this State.*" N.C.G.S. § 75D-10 (emphasis added).

The statement of legislative purpose and intent in enacting the law that precedes the substantive provisions of the RICO Act is as follows:

> (a) The General Assembly finds that a severe problem is posed in this State by the increasing organization among certain unlawful elements and the increasing extent to which organized unlawful activities and funds acquired as a result

> of organized unlawful activity are being directed to and against the legitimate economy of the State.
>
> (b) The General Assembly declares that the purpose and intent of this Chapter is: to deter organized unlawful activity by imposing *civil equitable sanctions* against this subversion of the [State's] economy by organized unlawful elements; to prevent the unjust enrichment of those engaged in organized unlawful activity; to restore the general economy of the State all of the proceeds, money, profits, and property, both real and personal of every kind and description which is owned, used or acquired through organized unlawful activity by any person or association of persons whether natural, incorporated or unincorporated in this State; and to provide compensation to private persons injured by organized unlawful activity. It is not the intent of the General Assembly to in any way interfere with the attorney-client relationship.

N.C.G.S. § 75D-2 (emphasis added).

The North Carolina General Assembly's intent in enacting the RICO Act is clear. The legislature, in recognizing the increasing organization among certain criminal elements and the resulting effect upon the state's economy, sought to deter such unlawful activity and to restore proceeds to the state's general economy. The statute's purpose is to prevent unjust enrichment and to restore unlawfully diverted property and capital back to the state's economy. The statute evidences the intent to compensate individual citizens and the state's economy, and therefore the measures are clearly and exclusively remedial in nature. The statute, on its face, expressly provides that a violation of the RICO Act is "inequitable and constitutes a civil offense only and is not a crime." N.C.G.S. § 75D-4(b).

The nature of the proceedings themselves fail to meet the criteria traditionally associated with penal or punitive actions. A RICO forfeiture proceeding is an *in rem* action against property, initiated by civil complaint and prosecuted only by the Attorney General of North Carolina or his designated representative. N.C.G.S. § 75D-5(c), (d). As such, it is an action against the property itself, and property itself is not an entity capable of being punished. The fact that individuals who are engaged in ongoing criminal enterprises may subjectively perceive a forfeiture as punitive is not dispositive.

The forfeiture remedy as established by the RICO Act is obtained through a civil, *in rem* proceeding, and if not otherwise prescribed by the statute, the procedures to be used are governed by the Rules of Civil Procedure. N.C.G.S. § 75D-5(b). Such forfeitures are not imposed against an individual wrongdoer as an *in personam* action. The property owner's culpability, *mens rea*, intent, or criminal conviction are irrelevant to a successful forfeiture action. To the contrary, forfeitures *in rem* are based upon proof that the property was itself "guilty" of being used or acquired through illegal activity. The property is the defendant. Therefore, real property is subject to civil forfeiture "even if its owner is acquitted of—or never called to defend against—criminal charges." *United States v. 3120 Banneker Dr. N.E.*, 691 F. Supp. 497, 499 (D.C. Cir. 1988). In this regard, the United States Supreme Court stated in *Waterloo Distilling Corp. v. United States in re Personal Property*, 282 U.S. 577, 75 L. Ed. 558 (1931), that "[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate . . . . The forfeiture is no part of the punishment for the criminal offense." *Id.* at 581, 75 L. Ed. at 561.

Some discussion of the possible practical results of today's majority opinion is warranted. The outcome of the majority's decision, while appearing to be favorable to our school boards, may, in the long run, prove to be very unfavorable. Investigations that result in substantial forfeitures are complicated, time consuming, and expensive. Absent the compensation received from the various forfeiture statutes, law enforcement will not have the means, equipment, personnel, or money to devote to such investigations. Law enforcement, in light of current budget cuts, can ill afford to devote resources outside the clear realm of enforcement of the law. Officers will no doubt still diligently pursue their duties as to criminal enforcement, and arrests will be made. However, the additional hours needed to succeed in a successful forfeiture proceeding will be a luxury that law enforcement agencies will be unable to afford. Successful forfeiture proceedings naturally require extensive documentation, research, and additional personnel hours. If law enforcement agencies are unable to recoup these costs through distribution of forfeiture proceeds, such investigations might cease, in which event the school boards will receive nothing.

With law enforcement's resources already taxed to their limits, forfeiture proceedings would be a luxury that departments could

ill afford to pursue. I believe that the school boards would suffer in the long run from today's decision. Furthermore, it is no secret that proceeds from forfeitures are used to support various programs of state, county, and city law enforcement agencies, a number of them directly related to our schools. For instance, the Drug Awareness Resistance Education (D.A.R.E.) programs are overwhelmingly funded not by the school system, but by law enforcement. These programs could be a casualty of budget cuts necessitated by the allocation of forfeiture proceeds solely to the school boards. Likewise, school crossing guards are paid for not by the schools, but by law enforcement. These programs might also fall victim to today's decision, to say nothing of nonschool-related programs now supplemented with forfeiture proceeds.

The majority says that the RICO Act itself requires that the entire proceeds of any sale of forfeited property "shall be paid to the State Treasurer." This appears to be the key to the problem and a matter that can be easily remedied by the legislature by an amendment to the RICO Act providing a different disposition of the proceeds of the sale. I would point out that a number of similar forfeiture statutes do not contain this restriction.

N.C.G.S. § 14-269.1 provides for the forfeiture of firearms seized in violation of the state's concealed weapons law. Among the dispositions provided for at the court's discretion is turning the weapons over to law enforcement for official use. N.C.G.S. § 14-269.1(2) (1992). Likewise, a provision of the state's Controlled Substance Act provides for the forfeiture of property to law enforcement for official use. N.C.G.S. § 90-112(d)(1) (1990). Similarly, the provisions of the state's ABC laws provide for the use of seized property by law enforcement, N.C.G.S. § 18B-504(f)(3) (1989), and the provisions of the state's wildlife statute permit the legitimate utilization of property by a public agency when the property is not suitable for sale, N.C.G.S. § 113-137(i) (1990).

Existing case law, statutory interpretation, and legislative intent support the disposition of forfeiture assets to law enforcement as an appropriate remedial measure. The benefits of the state RICO Act to law enforcement, the citizenry, and the taxpayers of this state are substantial.

The following conclusions of the trial judge in this case are supported by his findings of fact and should be conclusive on this appeal: The defendant real property was subject to forfeiture pur-

suant to N.C.G.S. § 75D-5(a) and to distribution pursuant to N.C.G.S. § 75D-5(j); Article IX, Section 7 of the state Constitution governs the disposition of forfeitures that are penal in nature and accrue to the state but not those that are remedial or do not accrue to the State; the primary purpose and intent of the RICO Act and its forfeiture provisions is to provide the state and other persons a means of compensation for injury or loss caused by racketeering activity; the General Assembly has the authority to direct the disposition of proceeds generated by remedial *in rem* forfeitures to persons or entities other than the state; when the proceeds of remedial *in rem* forfeitures ordered under the authority of the RICO Act are distributed to persons or entities other than the state in accordance with the statute, they do not accrue to the state; the alleged racketeering activity damaged the general economy of the state and caused injury or loss to the State Bureau of Investigation; and the forfeiture of the defendant real property and distribution of the proceeds from its sale primarily has the remedial effect of partially compensating the state for the loss to its general economy and the State Bureau of Investigation for loss of special funds, both of which were incurred as a result of the alleged racketeering activity.

I vote to affirm the order of the trial judge.

D. WAYNE BROOKS AND WIFE, KATHLEEN C. BROOKS v. ELLA M. GIESEY, SARA MEADOWS, JOHN ALEXANDER MEADOWS, SUE L. MEADOWS AND HOPIE E. BEAMAN

No. 302A92

(Filed 30 July 1993)

1. Costs § 36 (NCI4th)— attorney's fees—nonjusticiable case—reliance on legal advice—persistence in litigating case

Sanctions under N.C.G.S. § 6-21.5 may be appropriate despite a layperson's reliance on legal advice if the layperson persists in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue.

Am Jur 2d, Costs §§ 72-86.

2. Costs § 36 (NCI4th)— awareness of nonjusticiable issues—continuance of litigation—attorney's fees—sufficiency of findings and conclusions

Even though the trial court did not make a specific finding that plaintiffs should reasonably have been aware of the deficiencies in their claims, the trial court's order contains sufficient findings and conclusions to support its award of attorney's fees to defendants under N.C.G.S. § 6-21.5 where the findings and conclusions establish that defendants' answer denied the specific allegations of plaintiffs' complaint and raised various defenses; after engaging in substantial discovery, defendants moved for summary judgment with respect to all claims eight months after their answer was filed; the motion was heard two months later on briefs by stipulation and was granted some fourteen and a half months after defendants' answer denying liability was filed; and from the initiation of this suit by plaintiffs, there never was any factual or legal basis for finding defendants liable for any alleged injury suffered by plaintiffs.

Am Jur 2d, Costs §§ 72-86.

3. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—complaint filed before amendment—other papers filed after amendment

Although a complaint filed prior to the amendment of Rule 11 on 1 January 1987 may not be the basis for sanctions under the legal sufficiency prong of Rule 11, "other papers" filed subsequent to the amendment may be the basis for sanctions if they are interposed for an improper purpose.

Am Jur 2d, Pleading §§ 211-213, 339-349.

Comment Note—Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed 556.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed 107.

4. Rules of Civil Procedure § 11 (NCI3d)— discovery responses—Rule 11 sanctions improper

Discovery responses are not properly the subject of sanctions under Rule 11; rather, a motion under Rule 26(g), the

more specific rule governing sanctions in the context of discovery responses, is the proper avenue for sanctioning such improper conduct.

Am Jur 2d, Pleading §§ 211-213, 339-349.

Comment Note—Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed 556.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed 107.

5. **Rules of Civil Procedure § 11 (NCI3d)— affidavits opposing summary judgment—other papers—Rule 11 sanctions—insufficient findings**

Assuming that affidavits filed by plaintiffs in opposition to defendants' motion for summary judgment are "other papers" within the meaning of Rule 11, the trial court's finding that the affidavits "contain conclusory and nonfactual statements" did not support the court's general conclusion that "other papers" were interposed for an improper purpose. Furthermore, a separate order was entered against plaintiffs for deposition costs incurred by defendants in response to plaintiffs' affidavits and defendants have thus recovered these costs.

Am Jur 2d, Pleading §§ 211-213, 339-349.

Comment Note—Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed 556.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed 107.

6. **Rules of Civil Procedure § 11 (NCI3d)— brief opposing summary judgment—other papers—Rule 11 sanctions—insufficient findings**

While a brief filed by plaintiffs in opposition to defendants' motion for summary judgment constituted a "paper" within the meaning of Rule 11, the trial court's finding that plaintiffs make no argument in the brief "with respect to the claims asserted by them in their complaint seeking to recover on

the theories of fraud or unfair and deceptive trade practices" was insufficient to support a conclusion that the brief constituted a paper interposed for an improper purpose.

Am Jur 2d, Pleading §§ 211-213, 339-349.

Comment Note—Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed 556.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed 107.

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

On appeal and discretionary review of a decision of the Court of Appeals, 106 N.C. App. 586, 418 S.E.2d 236 (1992), reversing an order imposing sanctions under N.C.G.S. § 1A-1, Rule 11(a) and affirming orders imposing sanctions under N.C.G.S. § 6-21.5 and § 1A-1, Rule 37(c) entered by Llewellyn, J., in the Superior Court, Craven County, on 27 July 1990. Heard in the Supreme Court 12 April 1993.

Glover & Petersen, P.A., by James R. Glover, for plaintiff-appellants D. Wayne Brooks and wife, Kathleen C. Brooks.

Ward & Smith, P.A., by Donalt J. Eglinton, for defendant-appellant/appellees Ella M. Giesey, Sara Meadows, John Alexander Meadows and Sue L. Meadows.

David P. Voerman, P.A., by David P. Voerman, for appellee David P. Voerman.

FRYE, Justice.

This case arose when plaintiffs brought an action in Superior Court, Craven County, against defendants for damages arising out of the purchase of certain real property. During 1981 and 1982, defendants Ella M. Giesey, Sara Meadows, John Alexander Meadows, and Sue L. Meadows (referred to collectively as defendants or the Meadows) subdivided land which they had inherited in Craven County into a residential subdivision known as Bellefern Subdivision. Sara Meadows hired an independent engineer and surveyor

to lay out and map the development, and an independent general contractor to grade and pave the roads and dig the ditches.

After 1 April 1982, when the surveyor and general contractor completed their work and the subdivision maps and restrictive covenants were recorded, the Meadows began selling lots. They sold Lot 10 on 6 June 1983 to Hopie E. Beaman (Beaman), an independent building contractor and originally a co-defendant in this lawsuit.[1] Lot 10 is lower than the lots on each side of it, and contains a small depression at the back of the lot. On 24 June 1983, plaintiffs, after walking over the lot, contracted with Beaman in writing to purchase the lot and a house which Beaman was to build on the lot. During the period from July to September 1983, plaintiffs became aware of a drainage problem on the lot. They expressed their dissatisfaction and asked Beaman and Sara Meadows to correct the problem. Sara Meadows contacted the independent contractor she had hired earlier to examine the property. The contractor, at no cost to plaintiffs, did some grading and filling across the back of the lot. However, the problem was not alleviated and water continued to stand at the back of the lot following heavy rains. On 12 April 1984, the house was completed and Beaman conveyed the lot to plaintiffs by warranty deed.

Plaintiffs filed a complaint against defendants and Beaman on 4 December 1986, alleging that they had suffered economic loss in connection with their property based on the following theories: (1) breach of warranty; (2) fraud; (3) negligent design and construction of the drainage facilities; (4) creation of an easement; (5) trespass; (6) nuisance; and (7) unfair and deceptive trade practices. On 25 April 1988, the trial court, Judge James D. Llewellyn presiding, granted summary judgment in favor of and awarded costs to defendants. The trial court's order was affirmed by the Court of Appeals in a unanimous, unpublished opinion. *Brooks v. Giesey*, 94 N.C. App. 223, 381 S.E.2d 202 (1989) (*Brooks I*).

Following *Brooks I*, defendants pursued motions for sanctions against plaintiffs pursuant to, *inter alia*, Rule 11, Rule 37 and N.C.G.S. § 6-21.5. The trial court heard arguments on these motions on

1. Summary judgment was entered in favor of Beaman on 4 May 1988. Plaintiffs appealed but the appeal was dismissed, with prejudice, by Stipulation and Consent Order entered 26 August 1988. Accordingly, Beaman was not a party to the first appeal nor is he a party to the present proceeding.

23 April 1990. On 27 July 1990, Judge Llewellyn entered judgments awarding defendants costs (including reasonable attorney's fees) in the amounts of $15,532.99 (under N.C.G.S. § 6-21.5), $12,622.90 (under Rule 11), and $3,200 (under Rule 37).[2] The sanctions imposed pursuant to N.C.G.S. § 6-21.5 and Rule 37 were imposed against the plaintiffs, jointly and severally. The Rule 11 sanctions were imposed against plaintiffs and their attorney, David Voerman, jointly and severally. Plaintiffs and attorney Voerman appealed separately to the Court of Appeals.

The Court of Appeals unanimously reversed the Rule 11 sanctions and affirmed the Rule 37 sanctions. *Brooks v. Giesey*, 106 N.C. App. 586, 418 S.E.2d 236 (1992) (*Brooks II*). A majority of the panel affirmed the award under N.C.G.S. § 6-21.5 with Judge Greene dissenting from that portion of the opinion. Plaintiffs appealed to this Court as of right based on Judge Greene's dissent. Additionally, on 18 November 1992, this Court allowed defendants' petition for discretionary review of two issues relating to the imposition of sanctions under Rule 11. *Brooks v. Giesey*, 332 N.C. 664, 424 S.E.2d 904 (1992).

I. Sanctions Under N.C.G.S. § 6-21.5

The Court of Appeals affirmed the trial court's award of attorney's fees pursuant to N.C.G.S. § 6-21.5, with Judge Greene dissenting. *Brooks II*, 106 N.C. App. 586, 418 S.E.2d 236. After concluding that the order entered under N.C.G.S. § 6-21.5 was proper, the majority of the panel

> noted that under Rule 11, "a represented party may rely on his attorney's advice as to the legal sufficiency of his claims" and only "will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." *Bryson [v. Sullivan]*, 330 N.C. [644,] 663, 412 S.E.2d [326,] 337 [1992]. In our opinion, it is unfortunate that under section 6-21.5, which does not contain the same limitations, clients who presumably know nothing about the law can be sanctioned for factual and legal deficiencies.

Id. at 592, 418 S.E.2d at 239.

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2. In each of the corresponding orders there is language to the effect that each award is an alternative means for recovering the same costs. Thus, the most defendants will recover is the total cost of defense awarded under N.C.G.S. § 6-21.5.

The dissent disagreed with this observation and noted that there is in fact a limitation on the trial court's ability to impose sanctions under N.C.G.S. § 6-21.5. *Id.* at 595, 418 S.E.2d at 241 (Greene, J., dissenting). The dissent concluded that after determining that a pleading contains no "justiciable issue of law or fact" the trial court

> must then determine that the plaintiff should reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue of law or fact or that the plaintiff persisted in litigating the case "after the point where [he] should reasonably have become aware that the pleading [he] filed no longer contained a justiciable issue.' " *Bryson*, 330 N.C. at 665, 412 S.E.2d at 338 [(quoting *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991))].

Id.

We agree with the dissent's observation that the trial court's ability to impose sanctions under N.C.G.S. § 6-21.5 is in fact limited by our holding in *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438.

Neither the Court of Appeals' majority nor dissent assert that the imposition of sanctions under N.C.G.S. § 6-21.5 is subject to the Rule 11 limitation we announced in *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992). However, plaintiffs argue that such a limitation should now be recognized. We decline to do so.

In *Bryson*, we considered whether "litigants who rely in good faith upon advice of counsel concerning the legal basis for their claim may have sanctions imposed against them under the legal sufficiency prong of Rule 11 if it is determined that the pleading violates the Rule." *Id.* at 660, 412 S.E.2d at 335-36. We concluded that good faith reliance on an attorney's advice precluded sanctions against the party under the legal sufficiency prong. *Id.* at 662, 412 S.E.2d at 336. However, we made it clear in *Bryson* that this limitation applied only to the legal sufficiency prong and not the improper purpose prong of Rule 11. *Id.* at 663, 412 S.E.2d at 337. That distinction was based on the belief that a represented party should "be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." *Id.* (citing *In re Kunstler*, 914 F.2d 505 (4th Cir. 1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 669 (1991)).

[1] Sanctions under N.C.G.S. § 6-21.5 may be imposed where there is "a complete absence of a justiciable issue of either law or fact." N.C.G.S. § 6-21.5 (1986). Thus, sanctions under N.C.G.S. § 6-21.5 may be appropriate despite the layperson's reliance on legal advice if the layperson persists "in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Sunamerica*, 328 N.C. at 258, 400 S.E.2d at 438.

Judge Greene concluded that the trial court's order could not be upheld "because the trial court *made no findings or conclusions* on whether these plaintiffs should reasonably have been aware of these deficiencies at the time the complaint was filed or persisted in litigating the case after a point where they should have been aware of its deficiencies." *Id.* at 595, 418 S.E.2d at 241 (Greene, J., dissenting) (emphasis added). However, upon review, we find that the trial court's findings and conclusions were sufficient to uphold the order under N.C.G.S. § 6-21.5 and we now affirm the result reached by the majority of the panel of the Court of Appeals.

[2] In *Sunamerica*, we observed that "[u]nder N.C.G.S. § 6-21.5, the trial court 'shall make findings of fact and conclusions of law to support its award of attorney's fees.' " *Sunamerica*, 328 N.C. at 260, 400 S.E.2d at 439 (quoting N.C.G.S. § 6-21.5). We held that "[i]n deciding a motion brought under N.C.G.S. § 6-21.5, the trial court is required to *evaluate* whether the losing party persisted in litigating the case after a point where he should reasonably have become aware that the pleading he filed no longer contained a justiciable issue." *Id.* at 258, 400 S.E.2d at 438 (emphasis added). In *Sunamerica*, after the defendant asserted the affirmative defense of the statute of limitations, the plaintiff elected to oppose defendant's motion for summary judgment, rather than seek a dismissal. *Id.* We reviewed the trial court's findings of fact and conclusions of law contained in the order granting summary judgment and attorney's fees, *see id.* at 260-61, 400 S.E.2d at 439-40, and found they were sufficient to support the trial court's order of attorney's fees. This was true although the trial court did not make a specific finding that the plaintiffs "should reasonably have been aware of the deficiencies." Likewise, although there was no specific finding on that issue in this case, we find the trial court's findings and conclusions to be sufficient to uphold the award.

The granting of defendants' motion for summary judgment is not "in itself a sufficient reason for the court's decision to award attorney's fees" under N.C.G.S. § 6-21.5. However, it "may be evidence to support the court's decision to make such an award." N.C.G.S. § 6-21.5. Thus, we consider the following facts as evidence to support the trial court's award. Plaintiffs filed their Complaint in this case on 4 December 1986. Defendants answered on 4 February 1987, denying specific allegations and raising various defenses. On 12 October 1987, after engaging in substantial discovery, defendants moved for summary judgment with respect to all claims. The motion was heard on 15 February 1988 on briefs by stipulation. The motion was granted on 25 April 1988, some fourteen and a half months after defendants' answer denying liability was filed.

In addition to granting summary judgment, the trial court made extensive findings of fact and conclusions of law in its order granting attorney's fees under N.C.G.S. § 6-21.5. The trial court's findings include the following. (1) In their answer of 4 February 1987, the Meadows specifically denied:

> (a) the existence of any agency between them and Hopie E. Beaman, (b) the making by them of any representation (fraudulent or otherwise) to the Plaintiffs, (c) the creation of any easement as alleged, and (d) the making by them of any unauthorized entry upon the Plaintiffs' real property which is the subject of the allegations contained in their Complaint.

(2) Defendants raised the following defenses in their answer:

> (a) the absence of privity of contract (and absence of contract or warranty) between them and the Plaintiffs, (b) the absence of the making by or for them to the Plaintiffs of any false or untrue representations concerning the real property which is the subject of the allegations contained in the Plaintiffs' Complaint, (c) independent contract, (d) the absence of any easement as alleged in the Plaintiffs' Complaint, (e) the absence of any unauthorized entry by or for them upon the property which is the subject of Plaintiffs' Complaint and (f) waiver.

(3) The record established the following uncontroverted facts:

> a. On June 6, 1983, the Defendants entered a contract to sell Lot 10 of the Bellefern Subdivision . . . to Hopie E. Beaman.

b. On June 24, 1983, after having been contacted by the Plaintiffs, Hopie E. Beaman (acting for and on behalf of himself and Colonial Building Contractors of New Bern, Inc.) showed Lot 10 of the Bellefern Subdivision to the Plaintiffs.

c. On June 24, 1983, the Plaintiffs physically inspected Lot 10 of the Bellefern Subdivision, including the low area which has given rise to the claims . . . and were satisfied with Lot 10 at that time.

d. On June 28, 1983, the Plaintiffs and Hopie E. Beaman . . . in a written contract by which the Plaintiffs agreed to purchase Lot 10 from Hopie E. Beaman . . . and by which Hopie E. Beaman . . . agreed to convey Lot 10 to Plaintiffs and to construct a single family residence on Lot 10 for the Plaintiffs.

e. The contract entered between the Plaintiffs and Hopie E. Beaman on June 28, 1983, contains, among other provisions:

> 8. PREMISES. THE BUYER acknowledges that they have inspected the . . . property and . . . plans and specifications and that no representations or inducements have been made other than those expressed herein and that this contract, with any amendments hereto, contain (f/c) the entire agreement between the parties hereto.

f. The Defendants were not parties to the written contract between the Plaintiffs and Hopie E. Beaman which was entered on June 28, 1983.

g. Hopie E. Beaman did not at any time on or before June 28, 1983 have any authority to act for or on behalf of any of the Defendants.

h. The Plaintiffs had no contact or communication with any of the Defendants or any person acting for or on behalf of the Defendants with respect to Lot 10 . . . at any time on or before June 28, 1983.

i. Some time after June 28, 1983, the Plaintiffs became dissatisfied with the drainage characteristics of Lot 10 . . . and they first asked the Defendants to assist them regarding this matter in September, 1983.

j. At the Plaintiffs request and in or after September, 1983, the Defendants secured for the Plaintiffs in an attempt to alleviate the Plaintiffs' dissatisfaction with the drainage characteristics of Lot 10 . . . the services of a licensed land surveyor and professional engineer and licensed contractor.

k. The Plaintiffs did not pay the Defendants any sum or provide the Defendants with any other consideration for securing for them pursuant to their request the services of a licensed land surveyor and professional engineer and a licensed contractor.

l. The Plaintiff D. Wayne Brooks acknowledged in his deposition . . . that the actions taken by the licensed land surveyor and professional engineer and the licensed contractor . . . actually "improved" the drainage characteristics with which the Plaintiffs were dissatisfied.

In its conclusions of law, after specifically setting out why each claim failed to present a justiciable issue of law or fact, the trial court concluded that "[n]one of the claims asserted by the Plaintiffs in their Complaint seeking to recover from Defendants on any theory presents any justiciable issue of fact or law."

The trial court's findings of fact and conclusions of law establish that from the initiation of this suit, there was never any factual or legal basis for finding defendants liable for any alleged injury suffered by plaintiffs. Thus, we conclude that the trial court's order, which was much more detailed than the order approved in *Sunamerica*, 328 N.C. at 261, 400 S.E.2d at 440, contains sufficient findings and conclusions to support the award of attorney's fees under N.C.G.S. § 6-21.5. We therefore affirm the Court of Appeals on this issue.

II. Rule 11 Sanctions

[3] We turn next to the trial court's order awarding defendants attorney's fees under Rule 11. We granted defendants' petition for discretionary review of two issues relating to this award. The first issue raised by defendants is whether plaintiffs and their attorney may be liable for sanctions under Rule 11 for signing and filing certain "other papers" for an improper purpose after 1 January 1987. Although we answer this question in the affirmative, we conclude that Rule 11 sanctions under that prong are improper in this case. Therefore, we affirm the Court of Appeals'

decision to reverse the trial court's order under Rule 11 without reaching defendants' second issue.[3]

Rule 11 provides, in relevant part, that the

> signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

N.C.G.S. § 1A-1, Rule 11 (1990). The Court of Appeals held that the trial court "erred in ordering Rule 11 sanctions against [plaintiffs] and their attorney based on [plaintiffs'] complaint because the complaint was filed before the enactment of the current Rule 11." *Brooks II*, 106 N.C. App. at 590, 418 S.E.2d at 238.

A Rule 11 violation occurs, if at all, when one signs and files a "pleading, motion or other paper" in violation of the rule. N.C.G.S. § 1A-1, Rule 11. Until its amendment, effective 1 January 1987, Rule 11 provided that a pleading which was not signed or which was signed in violation of the rule could be stricken as "sham and false." *Turner v. Duke University*, 325 N.C. 152, 163, 381 S.E.2d 706, 712 (1989). Rule 11 did not authorize monetary sanctions before its amendment. *See id.* The Court of Appeals was correct that monetary sanctions based solely on the legal sufficiency prong of Rule 11 could not be imposed against a party for the signing of a complaint filed before the amended version of Rule 11 was in effect.

The earlier version of Rule 11 was in effect at the time the complaint in this case was signed. Thus, the complaint in this case, filed in December of 1986, could not be a basis for the imposition of Rule 11 sanctions. *See In re Williamson*, 91 N.C. App. 668, 681-82, 373 S.E.2d 317, 324 (1988).

Defendants argue, however, that the trial court's order sanctioned the filing of "other papers" for an "improper purpose" rather

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3. The second issue raised by defendants is whether plaintiffs and their attorney can avoid the imposition of sanctions under Rule 11 on the basis of due process.

than the filing of the complaint. While we agree that Rule 11 sanctions may be properly imposed against a party who signed and filed motions or other papers after 1 January 1987 in violation of the rule, we cannot uphold the trial court's order in this case.

We have held that "[t]he improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements." *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337. Thus, even if a paper is well grounded in fact and law, it may still violate Rule 11 if it is served or filed for an improper purpose. *Id.* at 664, 412 S.E.2d at 337. Likewise, although a complaint filed prior to the amendment of Rule 11 may not be the basis for sanctions under the legal sufficiency prong of Rule 11, "other papers" filed subsequent to the amendment may still be the basis for sanctions if they are interposed for an improper purpose. This is true even though the "other papers" necessarily relate to claims asserted in a complaint which was not filed in violation of Rule 11 as it existed on the date of filing.

We have observed that in reviewing a trial court's order under Rule 11

> the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the findings of fact are supported by a sufficiency of the evidence. If the appellate court makes these three determinations in the affirmative, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under N.C.G.S. § 1A-1, Rule 11(a).

Turner, 325 N.C. at 165, 381 S.E.2d at 714. In applying these principles to the present case, we conclude that the trial court erred in entering this award under Rule 11. In this case, the trial court concluded, *inter alia*, that

> 5. The papers signed, served and filed by the Plaintiffs and the attorney of record for the Plaintiffs . . . were interposed for the improper purpose of attempting to circumvent a summary adjudication adverse to the Plaintiffs with respect to the unwarranted claims asserted in the Plaintiffs' Complaint by suggesting (through conclusory and nonfactual statements) that there existed some controverted issue of material fact

regarding these claims, thereby causing unnecessary delay and needless increase in the cost to the Defendants of defending against these claims.

. . . .

9. The time committed by [defendants' attorney] after April 14, [1987][4] involved activities which were reasonably necessary to the defense against claims asserted in the Plaintiffs' Complaint and pursued thereafter without regard to the law or facts for improper purpose by the Plaintiffs and their attorney of record.

The Court of Appeals was presumably troubled by the language above which states that the costs incurred after 14 April 1987 were in connection with the defense of the "claims asserted in the Plaintiffs' Complaint . . . ." However, we observe that the trial court's conclusions reflect consideration of other "papers signed, served and filed by Plaintiffs and the attorney of record." Thus, we must determine whether the trial court's findings support its conclusion that "other papers" were properly the subject of the Rule 11 award.

In support of its conclusions, the trial court found as facts, *inter alia*, that plaintiffs served the following papers on defendants. First, plaintiffs verified and their attorney signed and served on defendants three responses to defendants' first discovery request,[5] all of which included denials to requests for admissions and conclusory and nonfactual responses to interrogatories. Also, in response to defendants' motion for summary judgment, plaintiffs filed the affidavits of both plaintiffs and five potential witnesses. Lastly, plaintiffs filed a "Brief in Opposition to Defendants' Motion for Summary Judgment" signed by attorney Voerman. As a violation of Rule 11 occurs, by its terms, only in relation to a signed "pleading, motion or other paper," we must determine which, if any, of these papers are "other papers" that could be the basis for sanctions under the rule.

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4. A discovery response served by plaintiffs on 13 April 1987 constitutes the first of the "other papers" which appear to be the subject of the trial court's order under Rule 11.

5. After plaintiffs' initial response to defendants' first set of discovery requests, defendants filed a motion to compel and for sanctions pursuant to N.C.G.S. § 1A-1, Rules 26, 33, 36 and 37. Plaintiffs agreed to supplement their answers and served two supplemental responses.

> We have observed that
>
> [t]he North Carolina Rules of Civil Procedure are, for the most part, verbatim recitations of the federal rules. *Sutton v. Duke*, 277 N.C. 94, [99,] 176 S.E.2d 161[, 164] (1970). Decisions under the federal rules are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules. *Id.*

Turner, 325 N.C. at 164, 381 S.E.2d at 713. This holds true for N.C.G.S. § 1A-1, Rule 11(a). *See id.* at 163, 381 S.E.2d at 713.

[4] First, we consider the discovery responses. The following comments of the Advisory Committee on the federal version of Rule 11 are instructive in determining whether discovery responses are "other papers" within the meaning of Rule 11. "Although the encompassing reference to 'other papers' in new Rule 11 literally includes discovery papers, the certification requirement in that context is governed by proposed new Rule 26(g). Discovery motions, however, fall within the ambit of Rule 11." Fed. R. Civ. P. 11 advisory committee's note. Many other authorities also conclude that discovery papers are not "other papers" within the meaning of Rule 11. *See* Georgene M. Vairo, *Rule 11 Sanctions* § 4.01[d][7][A], at 4-109 ("Rule 11 applies to motions in connection with discovery, but Rule 26(g) applies to discovery requests, responses and objections. Occasionally, a court will incorrectly permit the imposition of Rule 11 sanctions in connection with discovery responses. The majority, and correct, view, however, is that Rule 26(g) or other rules governing discovery generally are the applicable rules." (footnotes omitted)); Gregory P. Joseph, *Sanctions The Federal Law of Litigation Abuse* § 5(D)(2)(b) at 69-70 [hereinafter *Sanctions*] ("Discovery requests and responses . . . are surely court 'papers' within Rule 11, but they are expressly governed by Rule 26(g) and are generally not intended to be subject to Rule 11. . . . [O]nly discovery papers subject to Rule 26(g) were specifically carved out of the operation of Rule 11 by the Advisory Committee.").

N.C.G.S. § 1A-1, Rule 26(g) requires an attorney or unrepresented party to sign each discovery request, response, or objection. Such signature constitutes a certification parallel to that required by Rule 11. Again, the advisory committee's notes relating to the federal rule are instructive in interpreting the similar North Carolina Rule. *See Turner*, 325 N.C. at 164, 381 S.E.2d at 713.

> The term 'response' includes answers to interrogatories and to requests to admit as well as responses to production requests. . . . Motions relating to discovery are governed by Rule 11. However, since a discovery request, response, or objection usually deals with more specific subject matter than motions or papers, the elements that must be certified in connection with the former are spelled out more completely. The signature is a certification of the elements set forth in Rule 26(g).

Fed. R. Civ. P. 26 advisory committee's note.

We recognize that this Court's decision in *Turner*, 325 N.C. 152, 381 S.E.2d 706, has been interpreted by the Court of Appeals as equating motions under Rules 11 and 26(g). *See Taylor v. Taylor Products*, 105 N.C. App. 620, 628 n.2, 414 S.E.2d 568, 574 n.2 (1992). However, plaintiffs in *Turner* made motions under both rules, even though the Court addressed the issue in terms of Rule 11. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714. While it is true that sanctions under Rule 26(g) may be applied following Rule 11 case law, we disavow *Taylor* to the extent that it holds that the "failure to proceed under Rule 26(g) is not material." *Taylor*, 105 N.C. App. at 628 n.2, 414 S.E.2d at 574 n.2.

The imposition of sanctions for discovery abuses under Rule 26(g) informs offending counsel of exactly what action is being sanctioned. This process alleviates any due process concerns an attorney might raise by claiming not to know which of his or her actions merit sanctions. *See Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830 (9th Cir. 1986) (stating that "[t]o apply Rule 11 literally to all papers filed in the case, including those which are the subject of special rules, would risk the denial of the protection afforded by those special rules"), *abrogated on other grounds, Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 L. Ed. 2d 359 (1990). We conclude that a motion under the more specific rule governing sanctions in the context of discovery responses is the proper avenue for sanctioning such improper conduct.[6] *See Zaldivar*, 780 F.2d

6. We note that defendants in the present case made a motion for sanctions pursuant to Rule 26(g). The motion for sanctions under Rule 26 was incorporated with defendants' motion for sanctions under Rules 33, 36 and 37. It appears that these motions were merged and treated together as a motion under Rule 37. As noted earlier, the trial court did enter an award of $3,200 under Rule 37. This award was for costs incurred by defendants in proving matters denied by plaintiffs in these discovery responses. Thus, defendants recovered the costs incurred as a result of the improper discovery responses.

at 829-30 ("Rule 11 is not a panacea intended to remedy all manner of attorney misconduct occurring before or during the trial of civil cases. . . . [It is not] properly used to sanction the inappropriate filing of papers where other rules more directly apply."); *Ortho Pharmaceutical Corp. v. Sona Distributors, Inc.*, 117 F.R.D. 170, 172 (S.D. Fla. 1986) ("rules that directly apply to the procedural situation always supersede the use of Rule 11"), *aff'd*, 847 F.2d 1512 (11th Cir. 1988). Therefore these discovery responses were not properly the subject of sanctions under Rule 11.

[5] Next, we consider whether the affidavits and the brief filed in opposition to defendants' motion for summary judgment are "papers" within the meaning of Rule 11. There is little question that plaintiffs' brief constituted a "paper" within the meaning of the rule and, for purposes of this discussion, we will assume that the affidavits signed by plaintiffs are papers within the meaning of the rule as well.[7] *See Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 112 L. Ed. 2d 1140 (1991) (holding that a party may be sanctioned under Rule 11 for signing an affidavit which violates the federal rule); *see also* Joseph, *Sanctions* § 5(D)(2)(a) at 64 (observing that "[p]apers attendant to pleadings and motions (briefs, affidavits, papers filed pursuant to local court rule, and the like) are generally governed by" the federal version of Rule 11). *But cf. Zaldivar*, 780 F.2d at 830 (holding that "the filing of inappropriate affidavits in support of, or in opposition to, motions for summary judgment should be considered under Rule 56(g), rather than Rule 11"). However, even assuming the brief and affidavits are papers under Rule 11, the trial court's order in regard to these papers must nonetheless be reversed.

The trial court's only finding in regard to the plaintiffs' affidavits was that they "contain conclusory and nonfactual statements." While this finding may support a conclusion that the affidavits were interposed for an improper purpose, we cannot say that the finding in regard to the affidavits alone supports the trial court's general conclusion that "other papers" were interposed for an improper purpose. We also note that there was a separate order entered against plaintiffs for deposition costs in-

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7. The advisory committee's notes do not exclude these papers, unlike discovery responses, from the reach of the federal version of Rule 11. Fed. R. Civ. P. 11 advisory committee's note.

curred by defendants in response to plaintiffs' affidavits. Defendants therefore have also recovered these costs.

[6] The trial court's only finding in relation to the brief was that in it "[p]laintiffs make no argument with respect to the claims asserted by them in their Complaint seeking to recover on the theories of fraud or unfair and deceptive trade practices." We cannot say that this finding supports a conclusion that the brief constituted a paper interposed for an improper purpose. Thus, we cannot affirm the trial court's order of Rule 11 sanctions based on the brief.

There are no other "papers" which could be the subject of the trial court's Rule 11 order. As we cannot affirm sanctions based on any of the papers we examined, we affirm the Court of Appeals' reversal of the trial court's Rule 11 order.

For the reasons stated above we affirm the decision of the Court of Appeals.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. CHARLES ALONZO TUNSTALL

No. 323A92

(Filed 30 July 1993)

1. Appeal and Error § 471 (NCI4th) — continuance — constitutional rights — review on appeal

While the decision to grant or deny a continuance traditionally rests within the discretion of the trial court, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. When a motion for a continuance is based on a constitutional right, the issue is one of law and the trial court's conclusions are fully reviewable on appeal.

Am Jur 2d, Appeal and Error §§ 772 et seq.

2. Constitutional Law §§ 288, 347 (NCI4th)— denial of continuance—effective assistance of counsel—right to confront witnesses

Implicit in the constitutional provisions guaranteeing the assistance of counsel and the right to confront witnesses is the requirement that an accused have a reasonable time to investigate, prepare and present a defense. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation only when surrounding circumstances justify a presumption of ineffectiveness. If the surrounding circumstances do not establish that it is unlikely that the defendant could have received effective assistance of counsel, the defendant can make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel. If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State can show that the error was harmless beyond a reasonable doubt.

Am Jur 2d, Criminal Law §§ 752, 921-923, 985-987.

3. Criminal Law § 261 (NCI4th)— denial of continuance—unavailability of defendant—lateness of discovery—no constitutional violation

A defendant in a first-degree murder prosecution failed to offer evidence tending to establish a violation of his constitutional right to investigate, prepare and present his defense through the denial of his motion for a continuance where defendant requested a continuance based on the unavailability of defendant until the day before trial and based on the lateness of discovery provided by the State; there is no evidence that defendant and his counsel were unable to consult fully during the seven months between the appointment of counsel and defendant's transfer to Central Prison; defendant testified that he had conferred with his counsel for thirty minutes since he had returned to Warrenton on the day preceding the hearing but did not testify concerning the amount of time he had consulted with his counsel in the period since counsel was appointed; defendant made no showing that his incarceration in Central Prison rendered him inaccessible to counsel; and, in fact, an associate from his counsel's office consulted with defendant for approximately an hour in Central Prison the

week preceding the trial. The record does not reveal the information provided to defendant pursuant to a court order and it is therefore impossible to determine whether additional time to review the materials would have benefited defendant. Defendant's counsel received tardy notice of two oral statements made by defendant, but, far from being unprepared, defendant's attorney skillfully revealed to the jury the weaknesses in the testimony of the witnesses presenting the statements.

Am Jur 2d, Continuance § 28.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment entered by Small, J., in the Superior Court, Warren County, on 12 March 1992, sentencing the defendant to life imprisonment. Heard in the Supreme Court on 18 March 1993.

Michael F. Easley, Attorney General, by Jane R. Garvey, Assistant Attorney General, for the State.

Malcolm R. Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for the defendant-appellant.

MITCHELL, Justice.

The defendant, Charles Alonzo Tunstall, was indicted on 28 May 1991 on a charge of first-degree murder and was tried non-capitally at the 9 March 1992 Criminal Session of Superior Court, Warren County. On 12 March 1992, the jury returned a verdict finding the defendant guilty of first-degree murder, and the trial court sentenced the defendant to life imprisonment.

On 9 March 1992, prior to the commencement of the defendant's trial, the trial court held a hearing on motions for a bill of particulars and to compel discovery which the defendant had filed on 24 September 1991. The trial court allowed the motion for a bill of particulars in part, ordering the State to provide the defendant with

(1) Exact date, time and location of the alleged murder;

(2) Whether or not the State contends there was an altercation between the deceased and defendant prior to the alleged shooting which constitutes a factual basis for the state's theory on the manner in which the alleged murder was committed;

(3) Whether or not the deceased had a weapon in his possession during such altercation, if any, or at the time of the alleged murder;

(4) Whether or not the State intends to offer evidence of other crimes committed by the defendant for the purpose of showing *scienter quo animo* relating to the alleged murder;

(5) A statement of the facts upon which the State intends to rely which would prove that the killing was done by premeditation or deliberation or was done in the perpetration or attempt to perpetrate a felony.

The trial court further ordered the State to supply "any statements made by the deceased threatening the defendant which would tend to shed light on the defendant's self defense to the alleged murder for which he is being tried." The trial court concluded that the State had provided all other discovery required by N.C.G.S. § 15A-903.

During the motions hearing on 9 March 1992, the defendant's counsel requested a continuance, stating, "I received discovery on Thursday and Friday of last week, and it's my position that we're going to have to request a continuance based on that lateness of discovery and based on the rulings that we are entitled to additional information." The defendant's counsel further noted that the defendant had been incarcerated for safekeeping in Central Prison in Raleigh until 9 March 1992, the day of the motions hearing, and that the items of which counsel had received notice in his office the previous week were oral statements made by the defendant to two deputy sheriffs.

The prosecutor opposed the motion to continue, stating:

I would just like to state for the record that much of this information has already been provided. . . . Discovery was provided at a much earlier date than he stated. In fact, I have a letter dated in February which goes over some of the things that have already been provided to him, including some of the things that the court ordered as a part of what the State needs to provide in the written bill of particulars.

The trial court reserved judgment on the defendant's motion to continue and stated to the prosecutor:

> [W]hen you file the written documents in the morning I will consider the timeliness within which [the defendant] received the information and what effect it might have on his ability to prepare a defense and whether or not it will affect his preparation.
>
> I cannot . . . evaluate that, until I have the benefit of what information is going to be supplied to him, whether or not he will need to try to locate additional witnesses.
>
> Maybe it would be that you will supply him no new additional information and consequently he can be ready for trial. I just have no way of knowing.

On the next day, 10 March 1992, the trial court held a hearing on the defendant's motion to continue. The defendant testified that he was originally arrested on 21 April 1991 and incarcerated in Warren County until he made bond on 29 July 1991. Thereafter, he was arrested again on 12 August 1991 and incarcerated in Warren County. He was sent to Central Prison on 25 November 1991, where he remained until he was brought back to Warrenton on 9 March 1992. The week before the 9 March 1992 hearing, a lawyer associated with the defendant's counsel interviewed the defendant at Central Prison for about an hour. The defendant testified that he had conferred with his counsel for only thirty minutes since returning to Warrenton.

In support of the motion to continue, the defendant's counsel argued the following:

> It would be our position that while the State provided some discovery material at an early date, that the State did not comply with the bill of particulars until ordered to do so by the Court, and provided that information to the defense counsel at about nine twenty-five this morning. . . . And in addition . . . this case was designated for trial by the State of North Carolina last week. The defendant was brought in at three-fifteen yesterday.
>
> It's my position that under all of the circumstances that have been presented regarding the discovery and the unavailability of this defendant, that . . . we have presented good cause as to why this matter should be carried over to insure that this defendant is given full opportunity to be

prepared to meet the State's evidence and present any evidence he has regarding that evidence at his trial.

After finding that the defendant was charged with murder on 21 April 1991 and that the defendant's trial counsel was appointed on 1 May 1991 to represent him in this case, the trial court denied the defendant's motion to continue. The trial court then proceeded with jury selection and with the trial of the defendant's case.

At the defendant's trial, the State presented evidence which tended to show the following. Deputy J.A. McCowan of the Warren County Sheriff's Department testified that in the early morning hours of 21 April 1991 he responded to a call at the residence of Annie Mae Bullock in Soul City, North Carolina. When he arrived at the Bullock home, he saw the defendant, Charles Tunstall, standing at the back door. The defendant was carrying a double-barreled twenty-gauge shotgun. The defendant said, "You're at the right place, come on in." McCowan then went to the back door and knocked, and the defendant again told him to come in. When McCowan entered the kitchen, the defendant was standing between the kitchen and the living room. As McCowan approached him, the defendant stated, "I shot the mother f---er, he's over there dead." McCowan did not write this statement down and first told the prosecutor about this statement one week before the defendant's trial. The defendant was still holding the shotgun as McCowan approached him. McCowan asked the defendant to put the gun down, and the defendant handed it to him. The defendant told McCowan that he had another gun. The defendant then took a .25-caliber automatic pistol from his pocket and handed it to McCowan.

From the kitchen, McCowan saw the victim, later identified as Larry Leroy Jones, leaning in a kneeling position against one sofa with his head on another sofa. The victim had been shot in the lower back, just above the belt line, and appeared to be dead. McCowan testified that Annie Bullock, the defendant's girlfriend, and Joanne Wyche, the victim's girlfriend, were at the Bullock residence with the defendant when McCowan arrived.

Auxiliary Sheriff's Deputy Ronnie Baskett of the Warren County Sheriff's Department testified that when he arrived at the Bullock residence at about 4:40 a.m., Deputy McCowan and the defendant, who had been handcuffed, were coming out of the house. Baskett placed the defendant in his patrol car and then went inside the

house to speak with Annie Bullock and Joanne Wyche. After staying at the residence for approximately three hours, Baskett took the defendant to the Sheriff's Department. During the trip, the defendant asked if the victim were dead and stated, "I hope I killed the mother f---er." Although he informed Detective H.B. Askew of the Warren County Sheriff's Department of the defendant's statement, Baskett did not reduce this statement to writing. Baskett first told the prosecutor about this statement by the defendant a week before the defendant's trial.

Joanne Wyche, the girlfriend of the victim, testified that the victim was a friend of Annie Mae Bullock. Wyche, Bullock, the victim and the defendant were drinking at Bullock's house during the early morning hours of 21 April 1991. While they were sitting in the living room, the defendant left the room. When the defendant returned, the victim stood up to get a cigarette lighter from a table. The defendant then reached under the sofa, pulled out a shotgun and shot the victim in the back. Wyche testified that there had been no altercation between the defendant and the victim before the defendant shot the victim.

Wyche testified that the victim had been carrying a small gun with him. When they arrived at Bullock's home, the victim gave Wyche the gun. Wyche testified that she had the gun in her pocket when the victim was shot. After the defendant shot the victim, the defendant began to wrestle with Bullock and told Wyche to call the police. He then asked Wyche for the gun she had, and she gave it to him. Wyche also heard the defendant call someone and ask that person to get a lawyer for him because he had "shot this boy." The defendant told Wyche that he had nothing against her and that she was an innocent bystander. He also told her that he knew Bullock wanted him dead.

Detective H.B. Askew of the Warren County Sheriff's Department testified that he interviewed Joanne Wyche at the Bullock residence. Wyche told him that there had been a conversation at Bullock's in which the victim told the defendant that Bullock and the defendant should work out their problem without any violence. Wyche stated that while the group was in the living room, the defendant left the room for about ten minutes. When the defendant returned, he told the victim that he knew the victim had a gun. According to Wyche's statement, the defendant and

the victim then started arguing, and the defendant reached under the couch, pulled out a gun, and shot the victim in the back.

Askew also interviewed the defendant on the morning of the shooting. Askew testified that the defendant told him that he and Bullock had been having problems since they started dating in May 1990. The defendant stated that on the day of the shooting, the victim had come to the Bullock house with a girl and another person. The defendant and the victim began talking, and the victim stated, "I was the one that you talked to on the phone and I was going to kill you but now that we have talked I like you and I am not going to kill you." The defendant stated that the victim had a gun but had handed the gun to Wyche before the defendant shot him. Askew also testified that Deputy Baskett had told him of the defendant's statement that he "meant to kill the mother f---er."

The defendant testified at trial that he had received a telephone call at Bullock's house on the day before the killing. A person whose voice the defendant did not recognize stated that he was coming to correct a problem that had arisen between the defendant and Bullock during the Christmas holidays. The defendant and Bullock were in bed at about 3 or 4 a.m. when the doorbell rang. Bullock answered the door, and the defendant later came out of the bedroom and saw the victim and his girlfriend. The victim told the defendant that he had come to kill him, but it seemed like the defendant was "an all-right guy." The defendant, the victim, and the two women sat down and were drinking and talking. During the course of the conversation, the victim stated again that he had come to kill the defendant, but the defendant seemed like an all-right guy.

The defendant walked outside for a few minutes, and he heard Annie Bullock telling the victim that she wanted the defendant to get out of her house. The defendant came back inside and sat down on a love seat between the victim and Bullock. The victim then got up and walked over to his girlfriend, Wyche. The victim reached in his pocket and pulled a pistol out, then said, "I came to kill you and since her sons are not going to do anything I am." The victim ejected two shells from the gun and handed the gun to his girlfriend. The defendant then pulled his shotgun from beneath the sofa and told the victim not to move. The victim, however, asked his girlfriend for his gun and started to reach for it. The defendant then raised his shotgun and shot the victim. The defendant testified that he feared for his life when he saw the victim's pistol.

As his sole assignment of error on appeal, the defendant argues that the trial court erred by denying his motion to continue the trial of his case. The defendant contends that his trial counsel was not allowed adequate time to prepare a defense. The defendant argues that the trial court's denial of his motion to continue therefore deprived him of his rights, guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina, to the effective assistance of counsel and to adequate time to prepare a defense.

[1] Traditionally, the decision to grant or deny a continuance rests within the discretion of the trial court. *Ungar v. Sarafite*, 376 U.S. 575, 589, 11 L. Ed. 2d 921, 931 (1964); *State v. Roper*, 328 N.C. 337, 348, 402 S.E.2d 600, 606, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 232 (1991). However, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. *See Roper*, 328 N.C. at 349, 402 S.E.2d at 606. This Court has long held that when a motion for a continuance is based on a constitutional right, the issue presented is an issue of law and the trial court's conclusions of law are fully reviewable on appeal. *See State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977); *State v. Smathers*, 287 N.C. 226, 230, 214 S.E.2d 112, 114-15 (1975); *State v. Hackney*, 240 N.C. 230, 235, 81 S.E.2d 778, 781 (1954); *State v. Farrell*, 223 N.C. 321, 326, 26 S.E.2d 322, 325 (1943).

[2] The defendant's rights to the assistance of counsel and to confront witnesses are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and by sections 19 and 23 of Article I of the Constitution of North Carolina. *State v. Harris*, 290 N.C. 681, 686-87, 228 S.E.2d 437, 440 (1976). Implicit in these constitutional provisions is the requirement that "an accused have a reasonable time to investigate, prepare and present his defense." *Id.* at 687, 228 S.E.2d at 440. Every defendant must " 'be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime with which he stands charged and to confront his accusers with other testimony.' " *State v. Thomas*, 294 N.C. 105, 113, 240 S.E.2d 426, 433 (1978) (quoting *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970)).

In addressing the propriety of a trial court's refusal to allow a defendant's attorney additional time for preparation, the Supreme Court of the United States has noted that the right to effective assistance of counsel "is recognized . . . because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658, 80 L. Ed. 2d 657, 667 (1984). While a defendant ordinarily bears the burden of showing ineffective assistance of counsel, prejudice is presumed "without inquiry into the actual conduct of the trial" when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance" is remote. *Id.* at 659-660, 80 L. Ed. 2d at 668. A trial court's refusal to postpone a criminal trial rises to the level of a Sixth Amendment violation "only when surrounding circumstances justify" this presumption of ineffectiveness. *Id.* at 661-62, 80 L. Ed. 2d at 669-670. If, as here, the circumstances surrounding the trial court's refusal to postpone the defendant's trial do not establish that it is unlikely that the defendant could have received effective assistance of counsel, the defendant can "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." *Id.* at 666, 80 L. Ed. 2d at 672-73.

This Court has held that the constitutional requirement of a "reasonable time" to prepare mandates "no set length of time for investigation, preparation and presentation . . . , and whether [the] defendant is denied due process must be determined upon the basis of the circumstances of each case." *State v. Harris*, 290 N.C. at 687, 228 S.E.2d at 440; *see also State v. Horner*, 310 N.C. 274, 277-78, 311 S.E.2d 281, 284 (1984). To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense. *Harris*, 290 N.C. at 687, 228 S.E.2d at 440. To demonstrate that the time allowed was inadequate, the defendant must show "how his case would have been better prepared had the continuance been granted or that he was materially prejudiced by the denial of his motion." *State v. Covington*, 317 N.C. 127, 130, 343 S.E.2d 524, 526 (1986). If the defendant shows that the time allowed his counsel to prepare for trial was constitutionally inadequate, he is entitled to a new trial unless the State shows that the error was harmless beyond a reasonable doubt. *State v. Gardner*, 322 N.C. 591, 594, 369 S.E.2d 593, 594 (1988); *see also State v. Maher*, 305 N.C. 544, 550, 290 S.E.2d 694, 697 (1982) (plurality opinion).

In *State v. McFadden*, this Court held that the denial of a defendant's motion for a continuance violated his constitutional right to the effective assistance of counsel because the defendant and his counsel were permitted inadequate time to prepare for trial. 292 N.C. at 616, 234 S.E.2d at 747. In *McFadden*, the defendant's retained counsel was not present when the defendant's felony case was called for trial. A junior associate of the defendant's counsel appeared in court and requested a continuance on the basis that the defendant's retained counsel was engaged in a trial in federal court and was the only person prepared to try the case. The trial court denied the motion to continue and ordered the junior associate to represent the defendant. The associate, who had tried only one jury case previously, knew nothing about the defendant's case until the day of trial and had discussed the case with the defendant for only ninety minutes. Faced with such circumstances, this Court concluded that the defendant was denied effective assistance of counsel because he and his attorney did not have "a reasonable time in which to prepare and present a defense." *Id.*

In *State v. Maher*, this Court also ordered a new trial for a defendant whose motion to continue was denied. 305 N.C. at 552, 290 S.E.2d at 698. In that case, the defendant's privately retained counsel had prepared the case for trial but withdrew as counsel four days before the trial. The defendant retained new counsel on that same day. An associate of the defendant's new counsel appeared before the trial court and informed the court that the defendant's new counsel was trying a case in federal court and would not be available until the next week. The associate moved for a continuance, and the motion was denied. Five days later, when the case was called for trial, the new counsel moved for a continuance on grounds of inadequate preparation time and informed the trial court that he was not prepared and that he had not yet talked to the defendant. The trial court denied the motion to continue and gave counsel fifteen minutes in which to consult with the defendant. Based on these circumstances, a plurality of this Court concluded that "the trial court's denial of defendant's motion for a continuance infringed upon defendant's constitutional right to effective assistance of counsel." *Id.*

[3] In the present case, the defendant's counsel requested a continuance based on the unavailability of the defendant until the day before trial and based on the lateness of discovery provided by

the State. The facts of the present case, however, do not establish any constitutional violations. The defendant's trial counsel was appointed on 1 May 1991. The defendant was incarcerated in Warren County and available to counsel between that date and 29 July 1991, when the defendant was released on bond. He was at liberty for approximately two weeks. The defendant again was arrested on 12 August 1991 and remained incarcerated in Warren County until 25 November 1991, when he was sent to Central Prison in Raleigh for safekeeping. There is no evidence in the record tending to show that the defendant and his counsel were unable to consult fully with each other during the seven months between the appointment of counsel and the removal of the defendant to Central Prison. The defendant testified at the hearing on the motion to continue only that he had conferred with his appointed counsel for thirty minutes *since he had been returned to Warrenton on the day preceding the hearing*; the defendant did not testify concerning the amount of time he had consulted with his counsel in the more than ten-month period since his counsel had been appointed on 1 May 1991. Additionally, the defendant made no showing that his incarceration in Central Prison in Raleigh rendered him inaccessible to his counsel. In fact, while the defendant was still incarcerated in Central Prison in the week preceding his trial, an associate from his counsel's office consulted with the defendant for approximately an hour. The defendant totally failed to establish that he was deprived of any constitutional right by a lack of a reasonable opportunity to consult with his attorney in preparation for trial.

The defendant further contends that the lateness of discovery provided by the State entitled him to a continuance. The defendant's counsel argued in support of the motion to continue that the State did not comply with the defendant's motion for a bill of particulars until ordered to do so by the trial court on 9 March 1992 and that the State had not provided him with two statements made by the defendant to law enforcement officers until the week before the trial. The record does not reveal what information actually was provided to the defendant pursuant to the trial court's order of 9 March 1992. Therefore, it is impossible for this Court to determine whether additional time to review any materials provided to the defendant on the morning of 10 March 1992 would have benefitted the defendant. *See State v. Horner*, 310 N.C. 274, 278, 311 S.E.2d 281, 284 (1984).

The record does show that the defendant's counsel received tardy notice—less than a week before the defendant's trial began—of two oral statements made by the defendant. These statements consisted of (1) the defendant's statement to Deputy J.A. McCowan, "I shot the mother f---er, he's over there dead" and (2) the defendant's statement to Auxiliary Deputy Ronnie Baskett, "I hope I killed the mother f---er." The defendant's counsel had at least three days between notification of these statements and the beginning of jury selection in the defendant's trial in which to investigate the circumstances under which the statements were made. The defendant has not shown that additional time would have enabled his counsel to better confront the witnesses who testified that the defendant made these statements. On cross-examination, both McCowan and Baskett admitted that they had not told the prosecutor about the defendant's statements until the week before his trial. Both witnesses also admitted that they had not reduced the defendant's statements, made nearly eleven months earlier, to writing. Far from being unprepared to confront these witnesses, the defendant's attorney skillfully revealed to the jury the weaknesses in their testimony.

We conclude that in the present case, the circumstances surrounding the trial court's denial of the defendant's motion to continue do not demonstrate that it is unlikely that the defendant could have received effective assistance of counsel. The defendant failed to offer evidence tending to establish a violation of his constitutional right to a reasonable time to investigate, prepare and present his defense. The defendant's evidence did not tend to show that he had inadequate time to confer with counsel or that counsel had inadequate time to prepare for trial. Furthermore, the defendant has not attempted to point to any specific error made by trial counsel which would constitute ineffective assistance at trial. *See United States v. Cronic*, 466 U.S. at 666, 80 L. Ed. 2d at 672-73. The record before us on appeal indicates that the defendant's trial counsel provided him with a thorough and skillful defense throughout the trial.

For the foregoing reasons, we hold that the defendant received a fair trial free of prejudicial error.

No error.

STATE OF NORTH CAROLINA v. KENNETH MICHAEL BRYANT

No. 166A91

(Filed 30 July 1993)

1. Homicide § 230 (NCI4th)— first-degree murder—sufficiency of evidence

There was sufficient evidence of first-degree murder to withstand defendant's motion to dismiss and take the case to the jury where defendant contended that there was scant physical evidence and cites an inconsistency between an admission by defendant and the physical evidence, but that was for the jury's consideration; defendant cites an inherently unreliable identification of defendant by a State's witness but the credibility of a witness's identification and the weight given his testimony are for the jury to decide; while there is an exception when the witness's testimony is inherently incredible, the witness here had seen defendant before and was standing in a lighted parking lot when defendant came running past him some eight to ten feet away, and the witness gave a description the same night to a deputy sheriff, picked defendant out of a photographic lineup, and identified defendant at trial as the man he saw running past him through the parking lot; contrary to defendant's contentions, the State produced evidence placing him at the crime scene at the time of the shooting; although defendant argued that defendant's threats against the victim were vague and made while he was intoxicated, this would simply be another factor to be considered by the jury; and there is no requirement that the State produce evidence of flight in a first-degree murder case, nor is there any requirement that the State probe into a possible defense theory such as the murder being in conjunction with a larceny.

Am Jur 2d, Homicide §§ 425 et seq.

2. Criminal Law § 762 (NCI4th)— murder—instructions—definition of reasonable doubt

The trial court erred in a noncapital first-degree murder prosecution by instructing the jury that a reasonable doubt is an honest substantial misgiving generated by the insufficiency of the proof and by telling the jury that they could find defendant guilty if they were satisfied to a moral certainty

of the truth of the charge and that they did not have a reasonable doubt if they had an abiding faith to a moral certainty in the defendant's guilt. The instruction will not pass muster under *Cage v. Louisiana*, 498 U.S. 39, when reasonable doubt is defined in terms of "grave uncertainty," "actual substantial doubt," or in terms which suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard, and the jury is then told that what is required for conviction is moral certainty of the truth of the charge. The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty.

Am Jur 2d, Trial § 832.

Justice MEYER dissenting.

Appeal as 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 2 October 1990 Criminal Session of Superior Court, Edgecombe County, upon a jury verdict of guilty of first-degree murder. Heard in the Supreme Court 16 February 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for defendant-appellant.

FRYE, Justice.

On 30 April 1990, an Edgecombe County grand jury indicted defendant for the murder of Roy Gene Ackery (the victim). Defendant was tried non-capitally and found guilty of first-degree murder. On 5 October 1990, a judgment was entered sentencing defendant to life imprisonment. From this judgment defendant appeals to this Court.

Defendant brings forward seven issues on appeal. However, we find it necessary to address only two of those issues since defendant is entitled to a new trial.

In defendant's first argument, he contends that the trial court erred by refusing to grant his motion to dismiss at the close of all the evidence. He contends that his conviction must be vacated

because the State's evidence was insufficient to convict him of first-degree murder.

When 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. Sweatt*, 333 N.C. 407, 414, 427 S.E.2d 112, 116 (1993). "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.* (quoting *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989)). The term "substantial evidence" means "the evidence must be existing and real, not just seeming or imaginary." *Clark*, 325 N.C. at 682, 386 S.E.2d at 194. When there is substantial evidence of each element of the crime charged and that the defendant was the perpetrator, then a motion to dismiss should be denied. *Id.*

The evidence taken in the light most favorable to the State tends to show the following facts and circumstances. Defendant was living and working in Jackson, Mississippi, in December 1989. His estranged wife, Doris Jones Bryant, was living with the victim in a mobile home on Highway 43 across from the Hitching Post, a bar in Edgecombe County, North Carolina.

Cheryl Marlowe, who had dated defendant sporadically for over three years, testified at trial, under a grant of immunity, that on 30 December 1989 she and defendant went to the Good Tymes bar in Rocky Mount where they drank beer and shot pool. They left the bar at approximately 9:30 p.m. and drove around Nash and Edgecombe Counties. At approximately 10:30 p.m., defendant told Ms. Marlowe to let him out of the car. Marlowe stopped at a stop sign located at the intersection of a rural paved road and Highway 43 near the victim's mobile home and the Hitching Post. Defendant instructed Ms. Marlowe to continue driving down the road for a while then return to pick him up after approximately five minutes. Marlowe testified that prior to getting out of the car, defendant reached under the seat. She did not see him get anything from under the seat, but she knew that he had placed a gun there earlier. Once defendant was out of the car, Marlowe drove further down the road and relieved herself in a patch of trees. She then made a U-turn and returned to the stop sign to pick up defendant. When defendant entered the car, he told Marlowe

that neither his estranged wife nor the victim was at home. Marlowe drove defendant to his sister's house, but she was not at home. During the drive back to Wilson from defendant's sister's house, defendant removed a gun from under the seat, unloaded it and threw a shell out of the window. Defendant then told Marlowe that when he arrived at the victim's mobile home, he knocked on the window, the victim looked through the blinds, and both men grabbed for the door knob. Defendant then fired his gun through the door.

Marlowe had been interviewed three times prior to the trial. Her version of what happened on the night of the murder varied in each of her statements, however she explained that the variations were due to the fact that her husband was present in her home during the second interview, she was afraid of defendant, and she was afraid of losing her children if she became involved. Marlowe testified that she had said some things which were true and she had said some things which were not true, but her testimony before the court was the truth.

Charles Myers also testified for the State. Myers testified that at approximately 10:00 p.m. or 10:30 p.m. on the night of the murder he was standing outside of the Hitching Post. He heard the sound of a gun shot come from the victim's mobile home and within forty or forty-five seconds defendant ran past him. Myers stated that prior to the murder he did not know defendant's name, but he had seen defendant "around town."

Richard Hopkins testified that on the night of the murder defendant asked him how long it had been since he had seen the victim. Hopkins responded that it had been about two days. Defendant then pulled out a barber's razor and said, "[w]ell, I got something for him when I see him."

Doris Bryant, defendant's estranged wife, testified that in April, 1989, defendant kicked open the door of her apartment at midnight and told her that he would "kill [the victim]" and "he'd kill [her], too." Doris Bryant also testified that when she returned to the victim's mobile home between 10:30 p.m. and 10:40 p.m. on the night of his murder, she discovered the victim's body lying against the mobile home door.

James Adcock, a paramedic, testified that when he arrived at the victim's mobile home, the victim did not have a pulse, nor

was he breathing. Adcock observed a gun shot wound to the right temple of the victim's head, and was of the opinion that the victim was dead upon Adcock's arrival at the scene.

Defendant did not testify at trial, but he presented witnesses to establish an alibi defense. Defendant called as witnesses, his brother-in-law, his brother's girlfriend, his sister's boyfriend and his three sisters. All of defendant's witnesses testified that defendant was in their presence on 30 December 1989 at approximately 10:30 p.m. playing cards.

[1] Notwithstanding the evidence stated above, defendant specifically argues that the evidence was insufficient to convict him of murder in the first degree for the following reasons: 1) the State presented scant physical evidence; 2) the inconsistency between an admission by defendant and the physical evidence; 3) an inherently unreliable identification of defendant by a State's witness; 4) the State produced no evidence which placed defendant at the crime scene at the time of the shooting; 5) the alleged threats which defendant made against the victim were vague, and most were made while defendant was under the influence of alcohol; 6) the State produced no evidence that defendant fled the area; and 7) the lack of further evidence regarding observations by a witness of a possible larceny following the murder.

Murder in the first degree is the 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). Defendant does not contend that the evidence is insufficient to prove a specific element of the offense of first-degree murder. Rather, he attacks what he perceives as a general weakness in the State's case for the seven reasons submitted. We conclude that the evidence presented by the State was sufficient to withstand the motion to dismiss and to take the case to the jury.

Where there is substantial evidence of each element of the offense charged—as here—the fact that there was "scant" physical evidence, or inconsistencies in the evidence, is for the jury's consideration. *See State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). In addition, "the credibility of the witness' identification and the weight given his testimony is a matter for the jury to decide." *State v. Turner*, 305 N.C. 356, 362, 289 S.E.2d 368, 372 (citing *State v. Green*, 296 N.C. 183, 250 S.E.2d 197 (1978)); *State v. Orr*, 260 N.C. 177, 132 S.E.2d 334 (1963); *State v. Bowerman*,

232 N.C. 374, 61 S.E.2d 107 (1950). This Court recognizes an exception to this rule when the witness' testimony is "inherently incredible." *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967) (witness, who had never seen defendant before, identified him at scene of crime, at night, and at a distance of 286 feet). However, in the instant case, the witness, Charles Myers, had seen defendant before and was standing in a lighted parking lot when defendant came running past him some eight to ten feet away. Myers gave a description of defendant on the same night to a deputy sheriff, picked defendant out of a photographic lineup, and identified defendant at trial as the man he saw running past him through the parking lot.

Contrary to defendant's contentions, the State did produce evidence placing him at the crime scene at the time of the shooting. Charles Myers' testimony that he heard the sound of a shot coming from the victim's trailer around 10:00 p.m. or 10:30 p.m. and saw defendant running past him some forty or forty-five seconds later is sufficient to raise an inference that defendant was at the mobile home at the time of the shooting. As for defendant's argument that his threats were vague and made while he was under the influence of alcohol, we do not find this to be fatal to the State's case. Assuming arguendo, defendant's threats were vague and made while he was intoxicated, this would simply be another factor to be considered by the jury in determining whether defendant was guilty of premeditated and deliberate murder. Finally, there is no requirement that the State produce evidence of flight in a first-degree murder case, nor is there any requirement that the State probe into a possible defense theory such as the murder being in conjunction with a larceny.

The evidence in the present case, taken in the light most favorable to the State, was clearly sufficient to support a finding that defendant intentionally shot and killed the victim with malice, premeditation and deliberation. Thus, the trial court did not err in refusing to grant defendant's motion to dismiss. This argument is rejected.

[2] The only other issue which we must address is defendant's contention that the trial court erred by giving a reasonable doubt instruction that reduced the State's burden of proof below the standard mandated by the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution. The trial court instructed the jury in pertinent part as follows:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a *moral certainty* in the defendant's guilt, then they have a reasonable doubt; otherwise not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is *an honest substantial misgiving* generated by the insufficiency of the proof.

(Emphasis added.) Defendant argues that he is entitled to a new trial because the trial court committed constitutional error by giving the above instruction on reasonable doubt which was identical in pertinent respects to an instruction found unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1991). *See also Sullivan v. Louisiana*, --- U.S. ---, 124 L. Ed. 2d 182 (1993) (*Cage* error is reversible error per se and not subject to harmless error analysis).

The State argues that since defendant did not object at trial to the reasonable doubt instruction, the alleged infirmity in the instruction must be addressed in terms of "plain error." The "plain error" rule was set forth by this Court in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983) as follows:

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

> *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original).

Id. at 660, 300 S.E.2d at 378.

Cage error is fundamental error. A jury verdict rendered in violation of *Cage* is not a jury verdict within the meaning of the Sixth Amendment. *Sullivan v. Louisiana*, --- U.S. at ---, 124 L. Ed. 2d at 188. Clearly, convicting a person of first-degree murder in violation of *Cage* meets the test of plain error.

In *Cage*, the United States Supreme Court held that the reasonable doubt instruction used in the defendant's trial was constitutionally defective. The instruction was as follows:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

State v. Cage, 498 U.S. at 40, 112 L. Ed. 2d at 341-42.

This Court addressed reasonable doubt instructions in light of *Cage* in two recent cases, *State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992), and *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). In *Hudson*, the Court upheld the reasonable doubt jury instruction. However, the reasonable doubt instruction in *Hudson* did not contain any of the three terms, "grave uncertainty," "actual substantial doubt," or "moral certainty," which were condemned in *Cage*. *Id.* at 142-43, 415 S.E.2d at 742-43. We concluded that the jury could not have been misled by the reasonable doubt instruction. *Id.*

In *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992), five Justices concurred in awarding the defendant a new trial. However, only two Justices in the majority reached the issue of the constitutionality of the reasonable doubt instruction. Thus, we do not consider the opinion in *Montgomery* as binding precedent from this Court on the constitutionality of the reasonable doubt instruction. The instruction reviewed in *Montgomery* was in pertinent part:

> Members of the jury, a reasonable doubt, or at least a definition of that [sic] is acceptable by our Supreme Court, is that it is not a vain, imaginary or fanciful doubt, but rather is one based upon sanity or saneness and rationality. And when it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it means that you must be fully satisfied or entirely convinced or satisfied to a *moral certainty* of the truth of the charge, and after considering and comparing and weighing all the evidence, or the lack of the evidence, as the case may be, if your minds are left in such condition that you cannot say that you have abiding faith to a *moral certainty* of the defendant's guilt of one or more or all of those charges, then under those circumstances, you have a reasonable doubt. Otherwise, you do not.
>
> A reasonable doubt, as that term is employed in the administration of criminal law, is an *honest, substantial misgiving*, one generated by the insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

Two members of the Court held that "the use of the terms 'substantial misgiving' and 'moral certainty' in combination in the trial court's reasonable doubt instruction violated the requirements of the Due Process Clause as interpreted by the Supreme Court in *Cage*." *Id.* at 572, 417 S.E.2d at 749-50. The trial court in *Montgomery* joined its definition of a reasonable doubt, an "honest, substantial misgiving," with a requirement that, to convict the defendant, the jury must be convinced to a "moral certainty" rather than to an evidentiary certainty. *Id.* at 573, 415 S.E.2d at 742. Two members of this Court concluded that while the instruction in *Montgomery* was "not identical to the instruction held unconstitutional in *Cage*, the trial court used a combination of terms so similar to the combination disapproved in *Cage* that there is a 'reasonable likelihood'

that the jury applied the challenged instruction in a way that violated the Due Process Clause." *Id.* The instruction in the instant case is essentially identical to the one in *Montgomery*. We now hold that the reasonable doubt instruction used by the trial court in the instant case also violates *Cage*.

The United States Supreme Court in *Cage* took note of the fact that the Louisiana Supreme Court had upheld the reasonable doubt instruction in *Cage* notwithstanding the use of the phrases "grave uncertainty" and "moral certainty" on the grounds that, taking the charge as a whole, reasonable persons of ordinary intelligence would understand the definition of reasonable doubt. However, the United States Supreme Court rejected this view noting:

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

Cage, 498 U.S. at 41, 112 L. Ed. 2d at 342.

We believe the crucial term in the reasonable doubt instruction condemned by the United States Supreme Court in *Cage* is "moral certainty." The correct standard for conviction beyond a reasonable doubt is evidentiary certainty rather than moral certainty.

A moral certainty may exist when a thing is "probable though not proved." Webster's Ninth Collegiate Dictionary 771 (9th ed. 1991). A moral certainty may exist when something is "based upon strong likelihood or firm conviction, rather than upon the actual evidence or demonstration." The American Heritage Dictionary 852 (1979). The role of the jury is to determine the truth as to whether the defendant is guilty of the crime charged or some lesser included offense thereof. Truth is "conformity to knowledge, fact, actuality, or logic," while the word moral is "concerned with

the judgment of the goodness or badness of human action and character." *Id.* at 1378.

A jury instruction which emphasizes what is good or bad—a moral judgment, rather than truth—an evidentiary judgment, is inconsistent with the role of the jury in deciding the guilt or innocence of the defendant. When a jury is instructed that it may convict if it finds the defendant guilty to a moral certainty it increases the possibility that a jury may convict a person because the jury believes he is morally guilty without regard to the sufficiency of the evidence presented at trial to prove his guilt. Thus, when reasonable doubt is defined in terms of "grave uncertainty," "actual substantial doubt," or in terms which suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard, and the jury is then told that what is required for conviction is moral certainty of the truth of the charge, the instruction will not pass muster under *Cage*.

In the instant case, the jury was instructed that a "reasonable doubt . . . is an honest substantial misgiving generated by the insufficiency of the proof." The term "honest substantial misgiving" is modified by the additional phrase,"generated by the insufficiency of the proof," thus referring the jurors back to an evidentiary standard. However, the jurors were also told that they could find defendant guilty if they were "satisfied to a moral certainty of the truth of the charge," and that they did not have a reasonable doubt if they had "an abiding faith to a moral certainty in the defendant's guilt." Thus, we find *Cage* error, entitling defendant to a new trial. *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339; *Sullivan v. Louisiana*, --- U.S. ---, 124 L. Ed. 2d 182.

NEW TRIAL.

Justice MEYER dissenting.

I dissent from the majority's decision to grant a new trial for *Cage* error essentially for the same reasons I expressed concerning that issue in my dissent in *State v. Montgomery*, 331 N.C. 559, 417 S.E.2d 742 (1992). Defendant here did not object to the reasonable doubt instruction given by the trial judge.

Cage does not dictate that we find reversible error in the instant case. In *Cage*, the Supreme Court found error in the Louisiana trial court's reasonable doubt instruction, stating:

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

Cage v. Louisiana, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342 (1990) (emphasis added).

In reading *Cage* broadly, the majority opinion deviates from the clear dictate of our own prior case law as well as from that of virtually every other appellate court in the land that has considered the matter. *See Gaskins v. McKellar*, --- U.S. ---, 114 L. Ed. 2d 728 (Stevens, J., concurring in denial of writ of certiorari and acknowledging that *Cage* is to be read narrowly and emphasizing the critical import of the "grave uncertainty" language), *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1098 (1991); *see also Ex parte White*, 587 So. 2d 1236 (Ala. 1991) (finding permissible an instruction that failed to equate reasonable doubt with "grave uncertainty" and "actual substantial doubt" and that did not require jury to find guilt to a "moral certainty"), *cert. denied*, --- U.S. ---, 117 L. Ed. 2d 142, *reh'g denied*, --- U.S. ---, 117 L. Ed. 2d 655 (1992); *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); *Adams v. State*, 587 So. 2d 1265 (Ala. Crim. App. 1991) (finding permissible use of terms "actual and substantial doubt" and "moral certainty"); *Fells v. State*, 587 So. 2d 1061 (Ala. Crim. App. 1991) (finding use of term "moral certainty" to be proper); *People v. Jennings*, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (same), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 462 (1991); *Bradford v. State*, 261 Ga. 833, 412 S.E.2d 534 (1992) (instruction permissible when court used only "moral and reasonable certainty"); *Potts v. State*, 261 Ga. 716, 410 S.E.2d 89 (1991) (instruction permissible when court did not equate reasonable doubt with "grave uncertainty" or "actual substantial doubt"), *cert. denied*, --- U.S. ---, 120

L. Ed. 2d 908, *reh'g denied*, --- U.S. ---, 121 L. Ed. 2d 233 (1992); *State v. Rhoades*, 121 Idaho 63, 80, 822 P.2d 960, 977 (1991) (Johnson, J., concurring) (instruction permissible with "actual doubt"), *cert. denied*, --- U.S. ---, 122 L. Ed. 2d 119 (1993); *Commonwealth v. Beldotti*, 409 Mass. 553, 567 N.E.2d 1219 (1991) (instruction permissible with "moral certainty" language); *State v. Bernard*, 820 S.W.2d 674 (Mo. Ct. App. 1991) (instruction permissible where no *Cage* language used), *rev'd on other grounds*, 849 S.W.2d 10 (Mo. 1993) (en banc); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (instruction permissible when "moral uncertainty" and "actual and substantial doubt" used); *Lee v. State*, 107 Nev. 507, 813 P.2d 1010 (1991) (instruction permissible with "actual and substantial doubt" language); *Lord v. State*, 107 Nev. 28, 806 P.2d 548 (1991) (same); *State v. Gonzalez*, 822 P.2d 1214 (Utah 1991) (instruction proper when contains none of the language condemned in *Cage*).

In sum, I believe that the main opinion errs in its conclusion that the reasonable doubt instruction tendered by the trial court was error requiring a new trial.

CAROLYN B. FOWLER v. J. M. VALENCOURT AND CITY OF SALISBURY, NORTH CAROLINA

No. 428PA92

(Filed 30 July 1993)

Limitations, Repose, and Laches § 44 (NCI4th)— action against police officer—assault and false imprisonment—statute of limitations

Plaintiff's claims against a police officer for assault and false imprisonment are governed by the three-year statute of limitations of N.C.G.S. § 1-52(13) for actions "against a public officer, for a trespass, under color of his office," rather than the one-year limitation on actions for "libel, slander, assault, battery, or false imprisonment" set forth in N.C.G.S. § 1-54(3), since the term "trespass" includes assault, battery, false imprisonment and false arrest; N.C.G.S. § 1-52(13) thus deals expressly with claims arising out of assault, battery, and false imprisonment by a public officer acting under the color of

his office; and N.C.G.S. § 1-52(13) deals more particularly with the precise situation presented by plaintiff's claims. This decision will not be applied prospectively only because it is not a change in the law. The decisions of *Mobley v. Broome*, 248 N.C. 54, *Evans v. Chipps*, 56 N.C. App. 232, and *Jones v. City of Greensboro*, 51 N.C. App. 571, are overruled to the extent that they conflict with this decision.

Am Jur 2d, False Imprisonment § 105.

Justice MEYER dissenting.

Justice MITCHELL dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 108 N.C. App. 106, 423 S.E.2d 785 (1992), affirming in part and reversing in part a summary judgment entered by DeRamus, J., on 26 August 1991 in Superior Court, Rowan County. Heard in the Supreme Court 10 May 1993.

Smith, Follin & James, by Seth R. Cohen and Norman B. Smith, for plaintiff-appellant.

Michael B. Brough & Associates, by Michael B. Brough and William C. Morgan, Jr., for defendant-appellees.

PARKER, Justice.

Plaintiff instituted this civil action for actual and punitive damages against J.M. Valencourt, a police officer for the City of Salisbury, and the City of Salisbury alleging state common-law tort claims for assault, false arrest and imprisonment, and malicious prosecution and a claim for relief pursuant to the federal Civil Rights Act, 42 U.S.C. § 1983. Defendants' answer denied these allegations and asserted the affirmative defense of governmental immunity on the part of the City of Salisbury, the one-year statute of limitations contained in N.C.G.S. § 1-54(3) as to plaintiff's claims for assault and false arrest and imprisonment, and qualified immunity on the part of Officer Valencourt. The trial court granted defendants' motion for summary judgment on all issues and plaintiff appealed to the Court of Appeals.

In its opinion, the Court of Appeals affirmed in part and reversed in part the ruling of the trial court. Summary judgment on plaintiff's claim for malicious prosecution against both defend-

ants and for the section 1983 claim based on false arrest and imprisonment against defendant Valencourt was reversed. Summary judgment on plaintiff's common-law claims for assault and false arrest and imprisonment and for the section 1983 claim based on assault and malicious prosecution against both defendants and for the section 1983 claim against the City of Salisbury was affirmed. The Court of Appeals further affirmed summary judgment on plaintiff's claim for punitive damages against both defendants.

This Court allowed plaintiff's petition for discretionary review of the Court of Appeals' decision that the one-year statute of limitations in N.C.G.S. § 1-54(3), rather than the three-year statute in N.C.G.S. § 1-52(13), was applicable and barred plaintiff's common-law claims for assault and false arrest.

The underlying facts pertinent to plaintiff's claims for assault and false arrest are these. Plaintiff was employed by Rowan County as a data entry operator for the Department of Social Services. On the afternoon of 18 October 1989, plaintiff's sister, Ann Blackwell Dixon, telephoned her at work to pick up their younger brother, Norman Blackwell, at Ms. Dixon's home later that day. When plaintiff arrived at her sister's residence, she found Officer Valencourt investigating the theft of a television set. Officer Valencourt learned through a telephone conversation with a Rowan County Sheriff's Deputy that there were outstanding warrants against Norman Blackwell. When Officer Valencourt informed Ms. Dixon of the warrants for her brother's arrest, she began screaming that he "was not going to arrest her baby brother." Officer Valencourt then instructed Norman Blackwell that the orders for his arrest were en route and that he was not to leave the premises. Notwithstanding this instruction, plaintiff and Norman Blackwell got into plaintiff's automobile and drove away. Officer Valencourt followed in his patrol car and pulled plaintiff's vehicle over approximately two blocks away from Ms. Dixon's residence. Plaintiff was placed under arrest for resisting, delaying, and obstructing a police officer pursuant to N.C.G.S. § 14-223. Another police officer who had arrived at the scene handcuffed plaintiff and seated her in his patrol car. Plaintiff was unruly and uncooperative while being restrained and thereafter complained on several occasions that the handcuffs were too tight. When the handcuffs were later removed, her hands were blistered and numb. At her trial in Rowan County District Court on 8 December 1989 on the charge of resisting, delaying, and obstructing a police officer, plaintiff was found not

guilty. Plaintiff filed her complaint in this action on 22 October 1990, more than one year from the date of the incident giving rise to her claims.

The sole question before this Court for review is whether N.C.G.S. § 1-54(3) or N.C.G.S. § 1-52(13) is the applicable statute of limitation. Section 1-54(3) places a one-year limitation on actions for "libel, slander, assault, battery, or false imprisonment." N.C.G.S. § 1-54(3) (Supp. 1992). Section 1-52(13) imposes a three-year limitation on actions "[a]gainst a public officer, for a trespass, under color of his office." N.C.G.S. § 1-52(13) (Supp. 1992).

In construing a statute, the Court must first ascertain the legislative intent to assure that the purpose and intent of the legislation are carried out. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). To make this determination, we look first to the language of the statute itself. *Id.* If the language used is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language. *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977). Applying these principles of statutory construction, we examine the language of the statutes at issue.

"False imprisonment," used in N.C.G.S. § 1-54(3), has been defined as "the illegal restraint of the person of any one against his will." *State v. Lunsford*, 81 N.C. 528, 530 (1879). If not lawful or consented to, any restraint is unlawful. *Hales v. McCrory-McLellan Corp.*, 260 N.C. 568, 133 S.E.2d 225 (1963). A technical assault is always committed with false imprisonment. False arrest is a form of false imprisonment. *Mobley v. Broome*, 248 N.C. 54, 56, 102 S.E.2d 407, 409 (1958).

Addressing the meaning of "trespass" in applying former C.S., sec. 443, subsec. 1, the predecessor of both N.C.G.S. § 1-54(1) and N.C.G.S. § 1-52(13), this Court in *Brown v. R.R.*, 188 N.C. 52, 123 S.E. 633 (1924), stated:

> True, in its more general sense, a trespass is sometimes said to include any wrongful invasion of the rights of another, but in its more natural and usual meaning it is properly restricted to unlawful acts done to the person or property of another by violence or force, direct or imputed. It is to acts of trespass in this sense that the one-year statute of limitations applies—

> that is, a trespass committed by a public officer under color of his office and constituting a wrongful invasion of the rights of third persons by force shown or imputed, and the statute does not and was never intended to apply to a breach of official duty in reference to the principal and employer—in this case the municipality.

Id. at 58, 123 S.E. at 636 (citation omitted). "In all cases where an injury to the person is done with force and immediately by the act of the defendant, trespass may be maintained (at common law, the form of action denominated 'trespass vi et armis.')." 7 Stuart M. Speiser et al., *The American Law of Torts* § 23:4, at 604 (1990). Assault and false imprisonment including false arrest exist under the umbrella of the ancient action of trespass. *Id.* §§ 26:1, at 877; 27:1, at 927.

In addition to the rules mandating that the Court discern the legislative intent from the plain language of the statutes themselves, another applicable rule of statutory construction must be considered. This rule, argued by both plaintiff and defendants, is that where two statutes deal with the same subject matter, the more specific statute will prevail over the more general one. As stated by this Court in *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 328 S.E.2d 274 (1985):

> 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. *National Food Stores v. North Carolina Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966); *State ex rel. Utilities Comm. v. Union Electric Membership Corp.*, 3 N.C. App. 309, 164 S.E.2d 889 (1968). "When two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control." *Seders v. Powell*, 298 N.C. 453, 459, 259 S.E.2d 544, 549 (1979); *Colonial Pipeline Co. v. Neill*, 296 N.C. 503, 251 S.E.2d 457 (1979).

Id. at 238, 328 S.E.2d at 279.

As might be expected, plaintiff argues that N.C.G.S. § 1-52(13) is the more specific statute because it deals with actions by a

public officer under color of office. Defendants contend that N.C.G.S. § 1-54(3), which specifically mentions assault, battery, and false imprisonment, is the more specific statute. As noted above, the authorities are consistent that the term "trespass" includes assault, battery, false imprisonment, and false arrest. Given this definition, N.C.G.S. § 1-52(13) deals expressly with claims arising out of assault, battery, and false imprisonment by a public officer acting under the color of his office, and thus is a statute "special and particular" rather than a general limitation statute like N.C.G.S. § 1-54(3). In this sense, N.C.G.S. § 1-52(13) deals more particularly with the precise situation presented by plaintiff's claims. *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. at 239, 328 S.E.2d at 280. Accordingly, we hold that N.C.G.S. § 1-52(13), not N.C.G.S. § 1-54(3), governs plaintiff's claims for false arrest and assault. While plaintiff has couched her complaint in terms of assault, false imprisonment, and false arrest, "[t]he nature of the action is not determined by what either party calls it," *Hayes v. Ricard*, 244 N.C. 313, 320, 93 S.E.2d 540, 545-46 (1956), but rather "by the issues arising on the pleadings and by the relief sought." *Id.* Moreover, where there is doubt as to which of two possible statutes of limitation applies, the rule is that the longer statute is to be selected. *Dickens v. Puryear*, 302 N.C. 437, 444 n.8, 276 S.E.2d 325, 330 n.8 (1981).

Defendants argue that the issue before the Court was previously decided by this Court in *Mobley v. Broome*, 248 N.C. 54, 102 S.E.2d 407 (1958). The opinion in *Mobley*, however, is silent as to whether the Court considered the statute covering trespass by a public officer under color of his office, which at that time was codified as N.C.G.S. § 1-54(1) and provided a one-year period of limitation. Similarly, the Court of Appeals did not address the applicability of N.C.G.S. § 1-52(13) in *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982), and *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981), also relied upon by defendants. In those cases, the Court of Appeals merely held that the assault and false imprisonment claims were barred by the one-year statute, N.C.G.S. § 1-54(3). The court's opinion in neither case indicates whether the applicability of N.C.G.S. § 1-52(13) to claims for assault and false imprisonment by a public officer was argued. Nevertheless, in view of our holding today, to the extent that *Mobley*, *Evans*, and *Jones* hold that the one-year statute of limitation for false imprisonment and assault and battery is the applicable

statute when a plaintiff alleges claims for false arrest, false imprisonment, and assault and battery by a police officer in the exercise of official duties, those cases are expressly overruled.

The position adopted by the Court today also finds support in the legislative history which repealed former N.C.G.S. § 1-54(1) and made trespass by a public officer under color of his office subject to a three-year period of limitation under N.C.G.S. § 1-52(13). As plaintiff discusses in her brief, Senate Bill 276 which added subsection (13) to section 1-52 is entitled:

> AN ACT TO AMEND G.S. 1-17 SO AS TO ELIMINATE IMPRISONMENT AS A DISABILITY UNDER THE STATUTE OF LIMITATIONS AND TO SUBJECT THE CIVIL RIGHTS ACT OF 1871, 42 U.S.C. § 1983, TO THE NORTH CAROLINA STATUTE OF LIMITATIONS.

1975 N.C. Sess. Laws ch. 252. Section 2 of Senate Bill 276 provides:

> **Sec. 2.** G.S. 1-52(2) is hereby rewritten to read as follows: "Upon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it."

1975 N.C. Sess. Laws ch. 252, § 2. The clear import of this amendment was to bring actions under the federal Civil Rights Act, 42 U.S.C. § 1983, within the purview of the three-year statute of limitations. Section 4 of Senate Bill 276 provided as follows:

> **Sec. 4.** G.S. 1-52 is hereby amended to add a new subsection as follows:
>
> "(13) against a public officer, for a trespass, under color of his office."

1975 N.C. Sess. Laws ch. 252, § 4. The legislature's simultaneous passage of these two provisions suggests an intention by the legislature to make the limitation period for those causes of action that frequently arise out of transactions forming the basis for a section 1983 claim the same as the period for a section 1983 claim. We note parenthetically that the United States Supreme Court has subsequently ruled that claims under 42 U.S.C. § 1983 will be governed by the statute of limitations applicable to general negligence claims in the state where the claim arose. *Owens v. Okure*, 488 U.S. 235, 102 L. Ed. 2d 594 (1989).

Further, we reject defendants' contention that we should make our ruling regarding the applicability of N.C.G.S. § 1-52(13) prospective only. As to claims involving state statutes and common law, the rule has long been established that

> a decision of a court of supreme jurisdiction overruling a former decision is, as a general rule, retrospective in its operation. *Mason v. A.E. Nelson Cotton Co.*, 148 N.C. 492, 62 S.E. 625 (1908); *MacDonald v. University of North Carolina*, 299 N.C. 457, 263 S.E.2d 578 (1980). . . . This Court has implicitly recognized that the decision on retroactivity involves a balancing of countervailing interests. . . .
>
> . . . Unless compelling reasons, . . . exist for limiting the application of the new rule to future cases, we think that the overruling decision should be given retrospective effect.

Cox v. Haworth, 304 N.C. 571, 573-74, 284 S.E.2d 322, 324 (1981). In the present case we find no compelling reason to depart from the traditional North Carolina rule and apply our holding prospectively. In our view, our decision today is not a change in the law. The applicable statute of limitations, N.C.G.S. § 1-52(13), has been effective since 1 January 1976 and has not been considered and ruled on by either appellate court in the context of a police officer's execution of official duties. Further, application of our holding today to the parties and litigants before the Court will not be unduly burdensome in that the section 1983 claim based on unlawful arrest against Officer Valencourt was upheld by the Court of Appeals and proof of the section 1983 claim will entail presentation of much of the same evidence necessary to prove the underlying torts.

Finally, the parties in their briefs have raised the issue of excessive force with respect to plaintiff's claim for assault. This issue is beyond the scope of plaintiff's petition for discretionary review and is not properly before the Court for review.

For the foregoing reasons, the decision of the Court of Appeals that plaintiff's claims for false imprisonment and assault are barred by the statute of limitations is reversed, and this case is remanded to the Court of Appeals for further remand to the superior court for trial of the remaining viable claims.

REVERSED IN PART AND REMANDED.

Justice MEYER dissenting.

Contrary to the majority, I conclude that N.C.G.S. § 1-54(3) (the one-year statute of limitations) and not N.C.G.S. § 1-52(13) (the three-year statute of limitations) is the more specific statute and should govern the outcome of this case. I therefore dissent.

The appellate courts of this state have clearly and unequivocally stated on several occasions that the one-year statute of limitations applies to false arrest and assault actions brought against police officers. In *Mobley v. Broome*, 248 N.C. 54, 102 S.E.2d 407 (1958), this Court held that the one-year statute of limitations is applicable to actions for assault and false imprisonment applied to actions against police officers as well as others. This principle has been reaffirmed by the Court of Appeals on several occasions. *See, e.g., Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

This Court should follow its own past decisions and those of the Court of Appeals in accord with ours that have held, without exception, that the one-year statute of limitations applies.

The interpretative problems that N.C.G.S. § 1-52(13) creates stem from the ambiguity inherent in the use of the term "trespass." This statute is well over one hundred years old, and the term "trespass" historically has embraced a wide variety of actions. In *Brown v. Walker*, 188 N.C. 52, 58, 123 S.E. 633, 636 (1924), this Court concluded that the term, as used in this statute, was restricted to "unlawful acts done to the person or property of another by violence or force, direct or imputed," rather than any wrongful invasion of the rights of another.

When *Brown* was decided, the section of the statute relating to trespass by a public officer under color of his office was in N.C.G.S. § 1-54, and the Court, in commenting on the applicability of the statute to acts *not* involving acts done to another by violence or force (such as in the present case, a false imprisonment), said this:

> True, in its more general sense, a trespass is sometimes said to include any wrongful invasion of the rights of another, but in its more natural and usual meaning it is properly restricted to unlawful acts done to the person or property of another by violence or force, direct or imputed. It is to acts of trespass in this sense that the one-year statute of limitations applies—that is, a trespass committed by a public officer under color

> of his office and constituting a wrongful invasion of the rights of third persons by force shown or imputed, and the statute does not and was never intended to apply to a breach of official duty in reference to the principal and employer—in this case the municipality.

Id. (citation omitted). It is as clear as can be that the sort of trespass contemplated by the use of the term "trespass" in the present N.C.G.S. § 1-52(13) is a violent physical assault and that false arrest or imprisonment continues to be covered by the one-year statute, N.C.G.S. § 1-54(3).

To the extent the term "trespass" is used in N.C.G.S. § 1-52(13) in an aggregate sense to refer to a range of actions based upon injury to persons or property, the majority's holding that the three-year statute applies in this case runs afoul of the principle that where a statute of general application conflicts with a statute applicable only to a restricted class of cases, the latter controls. The majority relies on this very rule but draws the wrong conclusion in seeking to apply the principle to the instant case. The reason the majority draws the wrong conclusion is that it focuses on who the alleged tort-feasor is rather than the nature of the action. As a result, the majority mistakenly concludes that, because the class "public officers" is more narrow than the class of all persons who could be tort-feasors in actions based on assault or false imprisonment, the three-year statute, N.C.G.S. § 1-52(13), is the more narrow statute and is therefore controlling. The majority's reasoning ignores the principle that "in determining the applicable statute of limitations, the focus should be upon the nature of the right which has been injured." *Holly v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 241, 259 S.E.2d 1, 9, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 919 (1979). Plaintiff's reasoning converts N.C.G.S. § 1-54(3)'s one-year statute of limitation for assault and false imprisonment into a three-year period in any case where the defendant is a "police officer," thus ignoring the nature of the right allegedly injured, that is, to be free of assault and false arrest. N.C.G.S. § 1-54(3) is not a statute of general application applicable to an entire range of trespass actions. It is specifically directed to claims "for libel, slander, assault, battery, or false imprisonment," N.C.G.S. § 1-54(3) (Supp. 1992), rather than the entire range of "trespass" actions committed by public officers covered under N.C.G.S. § 1-52(13). Properly understood, then, it is N.C.G.S. § 1-54(3) that is the more restricted and the more specific statute.

Our North Carolina cases have repeatedly and consistently recognized that the one-year statute of limitation for actions based on assault and false imprisonment applies to police officers. *Mobley v. Broome*, 248 N.C. 54, 102 S.E.2d 407; *Fowler v. Valencourt*, 108 N.C. App. 106, 423 S.E.2d 785 (1992); *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426; *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562. The majority's decision runs afoul of years of faithful adherence by our courts to this well-settled rule.

The decision in *Jones v. City of Greensboro* was handed down in 1981, some six years after the enactment of the 1975 amendment. Again in 1982, the Court of Appeals once more recognized N.C.G.S. § 1-54(3) as the applicable statute of limitations for false imprisonment by a police officer. *Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426. The General Assembly has obviously had numerous opportunities to clarify the law had these decisions been inconsistent with its intent. The legislature's failure to do so suggests that the Court of Appeals' 1981 and 1982 decisions that followed our 1958 decision in *Mobley v. Broome* were correct.

Had the legislature intended to extend the statute of limitations for false imprisonment by police officers, as the majority says it intended, surely it would have done so explicitly rather than by means of the obscure, outdated reference to "trespass" actions. If that was the legislature's intention, it has been ignored by the courts of this state for several decades, and the legislature would have certainly clarified the statute by this late date.

Justice MITCHELL dissenting.

Giving the words used by the General Assembly in N.C.G.S. § 1-54(3), their plain, ordinary and universally accepted meanings, the one-year limitation period provided by that statute narrowly and specifically applies to actions for assault and false imprisonment, including those in which the defendant is a police officer. We have expressly so construed the statute for thirty-five years. *Mobley v. Broome*, 248 N.C. 54, 102 S.E.2d 407 (1958). *Accord Evans v. Chipps*, 56 N.C. App. 232, 287 S.E.2d 426 (1982); *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981). The parties in this case were entitled to rely upon the statute as authoritatively construed by this Court. Believing as I do in the doctrine of *stare decisis*, I must respectfully dissent from the decision and holding of the majority that the one-year statute of limitation, N.C.G.S. § 1-54(3), is not available to the defendants in this case.

STATE OF NORTH CAROLINA v. BARRY MICHAEL HARVELL AND CHRISTOPHER EUGENE INGOLD

No. 318A92

(Filed 30 July 1993)

1. **Evidence and Witnesses § 758 (NCI4th)— opinion testimony—inference from defendant's remark—admission not prejudicial—other testimony**

There was no prejudice in a murder prosecution from the testimony of a guard that defendant Harvell had said something which indicated that he was planning to shoot a woman where the guard could not remember what defendant had said but there was other strong and unequivocal evidence of direct threats against a woman by defendant while he was in her presence and armed with a firearm. N.C.G.S. § 8C-1, Rule 701.

Am Jur 2d, Criminal Law §§ 985-987.

2. **Constitutional Law § 309 (NCI4th)— murder—closing argument that evidence closest to proving voluntary manslaughter—not ineffective assistance of counsel**

A murder defendant was not deprived of the effective assistance of counsel where his counsel argued without his consent that, if the evidence tended to establish the commission of any crime, that crime was voluntary manslaughter. This was not the equivalent of admitting that the defendant was guilty of any crime.

Am Jur 2d, Appeal and Error §§ 772 et seq.

Adequacy of defense counsel's representation of criminal client regarding argument. 6 ALR4th 16.

3. **Criminal Law § 442 (NCI4th)— murder—prosecutor's opening and closing argument—role of jury—not grossly improper**

A prosecutor's remarks in the opening and closing arguments of a murder prosecution were not grossly improper where the trial was held in Stanly County but defendants were from Montgomery County and one defendant contended that the prosecutor impermissibly chose to frame the case as Stanly County against Montgomery County and appealed to the passions, prejudices, and fears of the jury. It is well

settled that a prosecutor's remarks reminding the jury that it is acting as the voice and conscience of the community are proper, the prosecutor did not emphasize the fact that the defendants were from Montgomery County, and the prosecutor's argument was a hyperbolic expression of the State's position that a not guilty verdict would be an injustice in light of the evidence of guilt. Defendant failed to object at trial and there was no gross impropriety.

Am Jur 2d, Trial §§ 225 et seq.

4. **Criminal Law § 794 (NCI4th)— murder—acting in concert—requested instructions not given—not supported by evidence**

The trial court did not err by refusing to give defendant Ingold's requested instructions on acting in concert in a murder prosecution where the evidence, if believed, would only support a determination that the killing was done pursuant to a common purpose and would not support a reasonable finding that the killing was an independent act by defendant Harvell not done pursuant to a common purpose shared with defendant Ingold.

Am Jur 2d, Trial § 723.

5. **Criminal Law § 794 (NCI4th)— murder—acting in concert—requested instructions on presence not given—not supported by evidence**

The trial court correctly refused defendant Ingold's requested instruction on mere presence in a murder prosecution where the evidence did not support the instruction. Evidence that Ingold said "we're going to finish it" and followed close behind defendant Harvell armed with a steel pipe as Harvell walked into the group with a shotgun tended to show that Ingold made it known to Harvell that he was standing by willing to lend any assistance necessary.

Am Jur 2d, Trial § 723.

6. **Criminal Law § 775 (NCI4th)— murder—acting in concert—requested instruction on voluntary intoxication refused—no error**

The trial court did not err in a first-degree murder prosecution by not giving defendant Ingold's requested instruction on voluntary intoxication where defendant was charged with

first-degree murder, the court instructed on voluntary intoxication, and defendant was convicted of second-degree murder. Voluntary intoxication does not relieve a defendant altogether from criminal responsibility, but it may negate the element of specific intent. The conviction of second-degree murder is precisely the verdict to which the defendant Ingold was entitled if the jury determined that he did not form a specific intent to kill after premeditation and deliberation due to his intoxication. A defendant's voluntary intoxication, even if established, will not prevent a determination that he acted in concert with another.

Am Jur 2d, Trial § 743.

Appeal by the defendants from judgments entered by Helms, J., on 4 March 1992, in Superior Court, Stanly County. Heard in the Supreme Court on 12 May 1993.

Michael F. Easley, Attorney General, by Mary Jill Ledford, for the State.

J. Kirk Osborn for the defendant-appellant Barry Michael Harvell.

Ernest H. Morton for the defendant-appellant Christopher Eugene Ingold.

MITCHELL, Justice.

The two defendants, Barry Michael Harvell and Christopher Eugene Ingold, were indicted for first-degree murder. Their cases were joined for trial at the 10 February 1992 Criminal Session of Superior Court, Stanly County. The jury found the defendant Ingold guilty of second-degree murder, and the trial court entered judgment sentencing him to imprisonment for twenty years. The jury found the defendant Harvell guilty of first-degree murder. At the conclusion of a separate capital sentencing proceeding, pursuant to N.C.G.S. § 15A-2000, the jury recommended that Harvell receive a sentence of imprisonment for life, and the trial court entered judgment accordingly. The defendant Harvell appealed to this Court as a matter of right pursuant to N.C.G.S. § 7A-27(a). The defendant Ingold appealed the judgment against him to the Court of Appeals; his motion to bypass the Court of Appeals with regard to his appeal was allowed by this Court on 16 November 1992.

The evidence introduced at trial tended to show, *inter alia*, the following. On 9 June 1991, the defendants Christopher Ingold and Barry Harvell drove with Gary Hamilton to Badin Lake in Stanly County. Upon arriving at Badin Lake, the three men sat at a picnic table where they drank beer and engaged in conversation with a group at the next picnic table. An argument broke out between the defendant Harvell and members of the group at the next picnic table. At some point in the argument, someone at the other picnic table indicated that he had a gun. The defendant Ingold and Gary Hamilton then drove to Tony Laton's home to get a gun. Laton gave the two men his twelve-gauge shotgun, and they returned to Badin Lake.

Shortly after Ingold and Hamilton returned to Badin Lake, a fight started between the defendant Harvell and one of the men in the group at the other picnic table. Harvell was cut on the leg with a knife during the fight. Another man from the other group approached Hamilton and hit him in the face. These events lasted approximately one minute and ended when the men in the other group drove away in their vehicles.

Hamilton saw the defendants Harvell and Ingold walking in the direction that the other men had gone. Harvell was carrying a shotgun, and Ingold was carrying a wooden post. Hamilton got into his truck and picked up Harvell and Ingold. Hamilton had driven around the "pier area" several times when Harvell ordered him to stop. Harvell and Ingold got out of the truck and walked toward a group of people in the "pier area." Harvell was still carrying the shotgun. Ingold no longer had the wooden post but was carrying a steel pipe. Harvell passed a security guard, Mary Smith, who tried to stop him from going to the lake, telling him that she had called the sheriff. In response, the defendant Harvell stated, "I don't give a damn who's coming. The bitch started it and I'm going to finish it." Approaching the group in the "pier area," Harvell aimed the shotgun at Dena Durham, but her boyfriend, Dean Russell, pushed her aside. Harvell then fired the shotgun, literally blowing off the top of Dean Russell's head and killing him. Harvell fired two more shots, but no one else was hit. When Harvell shot Dean Russell, the defendant Ingold was standing close behind Harvell and holding the steel pipe in a raised position. Following the killing, Harvell and Ingold jumped back into Hamilton's truck and went to Tony Laton's home where they were subsequently arrested.

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

APPEAL OF THE DEFENDANT BARRY MICHAEL HARVELL

[1] By an assignment of error, the defendant Harvell contends that the trial court erred by admitting the improper opinion testimony of the security guard, Mary Smith. Smith testified that Harvell "said something else to me that indicated to me that he was planning to shoot a woman." However, when Smith was asked what the defendant had said to her in this regard, she answered, "I don't remember what he said." The defendant contends that the admission of Smith's opinion testimony violated Rule 701 of the North Carolina Rules of Evidence which provides, in pertinent part, that opinion testimony of a lay witness or testimony as to an inference by a lay witness is allowed where the witness's opinion or inference is "rationally based on the perception of the witness and helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701 (1988). Assuming *arguendo* that the admission of this part of Smith's testimony violated Rule 701, we conclude that 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 possibility that, had the error in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). Smith had already testified that the defendant Harvell, while armed with a shotgun, had expressly stated to her that "the bitch started it and I'm going to finish it." Additionally, the testimony of eyewitness Patricia Long tended to show that as the defendant Harvell approached the victim and the victim's girlfriend with the shotgun in his hand, Harvell said, "bitch, you started it and I'm going to finish it." In light of such strong and unequivocal evidence of direct threats against a woman, made by the defendant while she was in his presence and he was armed with a firearm, we conclude that there is no reasonable possibility that the testimony complained of in this assignment affected the result reached by the jury at trial. Therefore, any error in the admission of this testimony was harmless. *Id.; see State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1991) (evidence that a defendant was carrying a gun supported an inference that he anticipated a confrontation and gave some forethought to how he would deal with the situation). This assignment of error is without merit.

[2] By another assignment of error, the defendant Harvell contends that his trial counsel, without his consent or authorization, argued that the jury should find him guilty of voluntary manslaughter, thus depriving him of his constitutional right to the effective assistance of counsel. During closing arguments, his counsel argued that the defendant Harvell was not guilty of first or second-degree murder. His counsel then stated, "I submit to you that based upon the evidence presented in terms of a criminal offense, that the one that most closely—or the one that is most closely kind [sic] to this is the offense of voluntary manslaughter, that being there was provocation." At issue in this case is whether the defendant's trial counsel admitted to the jury that the defendant Harvell was guilty of voluntary manslaughter.

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507-08 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986), we held that a defendant has been denied effective assistance of counsel if his counsel admits his guilt to the jury without his consent. We have also held that an argument that the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything, and the rule of *Harbison* does not apply. *State v. Greene*, 332 N.C. 565, 572, 422 S.E.2d 730, 733-34 (1992). In the present case, the defendant's counsel never conceded that the defendant was guilty of any crime. He merely noted that if the evidence tended to establish the commission of any crime, that crime was voluntary manslaughter. This was not the equivalent of admitting that the defendant was guilty of any crime. Accordingly, this assignment of error is without merit.

[3] By another assignment of error, the defendant Harvell contends that the trial court erred in permitting the prosecutor to make improper and prejudicial remarks during his opening statement and his closing argument to the jury. The defendant argues that the prosecutor's opening and closing remarks contained statements tending to inflame the jury.

As a general proposition, counsel is allowed wide latitude in jury arguments. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992). Counsel is permitted to argue facts supported by evidence which has been presented, as well as reasonable inferences which can

be drawn therefrom. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). Where, as here, a party fails to object to an opening statement or closing argument, our review is limited to determining whether the remarks were so grossly improper as to require the trial court's intervention *ex mero motu*. *State v. Craig*, 308 N.C. 446, 457, 302 S.E.2d 740, 747, *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). The standard of review is one of "gross impropriety." *Id.* In the present case, the defendant argues that two portions of the prosecutor's opening statement and closing argument were grossly improper. We will address each of the defendant's contentions individually.

During his opening statement to the jury, the prosecutor made the following remarks:

> A warm Sunday afternoon here in Stanly County, Dean Russell and some of his friends decided to go to Badin Lake. . . . Unbeknownst to Dean Russell and the group in which he was a part, three men from Montgomery County, Gary Hamilton and the two defendants, Mr. Ingold and Mr. Harvell, were also going to Badin Lake that same day.

During his closing argument, the prosecutor made the following remarks:

> I ask, ladies and gentlemen, that by your verdict you do justice. I ask that by your verdict you do justice not only to yourselves, but to Stanly County as well, because as jurors in this case with your verdict you act and speak as the representative of your community. That is your function. I ask, ladies and gentlemen, that by your verdict you draw a line, and ask that you draw that line between Stanly County and these men here and find them guilty of first-degree murder.

The defendant contends that the prosecutor impermissibly chose to frame this case as one of Stanly County against Montgomery County and, thereby, improperly appealed to the passions and prejudices of the jury. It is well settled that a prosecutor's remarks reminding the jury that, for purposes of the defendant's trial, it is acting as the voice and conscience of the community are proper. *State v. Soyars*, 332 N.C. 47, 418 S.E.2d 480 (1992); *State v. Scott*, 314 N.C. 309, 333 S.E.2d 296 (1985). In addition, the prosecutor did not emphasize the fact that the defendants in this case were from Montgomery County; he mentioned this fact on only one isolated

occasion. We conclude that there was no gross impropriety involved in such remarks.

The defendant next contends in support of this assignment that the following argument of the prosecutor was grossly improper because it appealed to the passions, prejudices and fears of the jury:

> Let's end this with a correct verdict. Let's do what we can to heal what I regard as a wound, not just to Dean Russell, but a wound that's been inflicted upon Stanly, and its a wound, ladies and gentlemen, that without your verdict speaking the truth, its a wound that's going to fester. Its going to fester.

In *State v. Pittman*, 332 N.C. 244, 262, 420 S.E.2d 437, 447 (1992), the prosecutor stated that if the defendant was found not guilty, "justice in Halifax County will be dead." We held that this argument was not improper because it was a hyperbolic expression of the State's position that a not guilty verdict, in light of the evidence of guilt, would be an injustice. *Id.* Similarly, the prosecutor's statement here was a hyperbolic expression of the State's position that a not guilty verdict would be an injustice in light of the evidence of guilt. There was no gross impropriety.

For the foregoing reasons, we conclude that the remarks of the prosecutor which are the subject of this assignment of error were not grossly improper. Accordingly, this assignment of error is overruled.

APPEAL OF THE DEFENDANT CHRISTOPHER INGOLD

[4] By an assignment of error, the defendant Ingold contends that the trial court erred in refusing to give the jury his requested instructions on the law of acting in concert. The defendant requested the following instructions:

> For example, if defendants A and B formed a common plan to kill a particular person X, and defendant A shoots and kills that person, then Defendant B, if he is present, is also guilty of the killing. Similarly, if pursuant to the common plan to kill X, defendant A attempts to shoot and kill X but accidentally kills another person Y, then defendant B is also guilty of the killing since it was a natural or probable consequence of the common plan to kill X. If, however, defendants A and B form a common plan to kill X, but defendant A, acting independently and not in pursuance of the common plan to

> kill X, shoots and kills person Y, then defendant B, even if he is present, is not guilty of the killing, since the killing of Y was not in pursuance of the common plan to kill X, nor was it a natural or probable consequence of the common plan to kill X.
>
> Accordingly, even if you find that Chris Ingold and Barry Harvell joined in a common plan to assault or kill any of the particular persons they had argued with at the picnic area, yet you cannot convict him for the killing of the victim since that killing was an independent act and was not in pursuance of the common plan or a natural or probable consequence thereof. You may only convict Chris Ingold if you find that he and Barry Harvell joined in a common plan to kill the victim or his girlfriend.

The trial court denied the defendant's request and, instead, gave the pattern jury instruction on acting in concert. N.C.P.I.—Crim. 202.10 (1971).

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). It has long been established that

> if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.

State v. Erlewine, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991) (quoting *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)). *Accord State v. Joyner*, 297 N.C. 349, 255 S.E.2d 390 (1979). *But see State v. Reese*, 319 N.C. 110, 141-42, 353 S.E.2d 352, 370 (1987). However, even if it is assumed *arguendo* that the requested instruction here contained no misstatements of law, we conclude that it was not supported by the evidence.

The evidence in this case tended to show that after arriving at Badin Lake, Gary Hamilton and the defendants Harvell and Ingold drank beer and began socializing with a group at a nearby

picnic table. Shortly thereafter, an argument started between Harvell and members of the group at the other picnic table. Someone at the other picnic table indicated that he had a gun, so Hamilton and the defendant Ingold left the lake and went to Tony Laton's home for a gun. Laton gave the two men his twelve-gauge shotgun and they returned to the lake. Shortly after their return, a fight started between the defendant Harvell and one of the men in the group at the other picnic table. During the fight, Harvell was cut on the leg with a knife. Another man from the other group approached Hamilton and punched him in the face. After this altercation ended, the men in the other group drove away in their vehicles.

Hamilton got into his truck and picked up Harvell and Ingold who had started walking in the direction that the other men had gone. Harvell was carrying a shotgun and Ingold was carrying a wooden post. Hamilton had driven around the "pier area" at the lake several times when Harvell ordered him to stop. Harvell and Ingold got out of the truck and walked toward a group of people engaged in recreational activities in the "pier area" near the lake. Harvell was still carrying the shotgun, but Ingold was now carrying a steel pipe. When asked what was going on, the defendant Ingold told Jimmy Love that "they started it and we're going to finish it." The defendant Harvell made similar statements. After the two armed defendants walked together into the crowd, Harvell aimed the shotgun at Dena Durham, but her boyfriend, Dean Russell, pushed her aside. Harvell fired the shotgun blowing off the top of Dean Russell's head. Harvell fired two more shots which struck no one. Throughout the time during which Harvell shot Dean Russell and fired the two additional shots, the defendant Ingold was standing close to Harvell and holding the steel pipe in a raised position.

The defendant Ingold contends that the evidence in this case would support a reasonable finding that the killing of Dean Russell was the independent act of Harvell and unrelated to any common purpose shared by Ingold. We do not agree. Instead, the evidence, if believed, would only support a determination that the killing of Dean Russell was done pursuant to a common purpose. All of the evidence, if believed, tended to show that after the initial confrontation at the picnic tables, Harvell and the defendant Ingold armed themselves with deadly weapons and went together to the "pier area." In Ingold's presence, Harvell told the security guard who tried to stop him from going armed with the shotgun into

the group of people in the "pier area" that he did not care that she had called the sheriff. As he held the shotgun, he stated that the "bitch started it and I'm going to finish it." When Jimmy Love asked the defendant Ingold what was going on, he stated that "they started it and we're going to finish it." Harvell, closely followed by Ingold who was armed with the steel pipe, then entered the crowd and told Dena Durham, the victim's girlfriend, that he was going to "finish it." The victim, Dean Russell, pushed Durham aside, and Harvell shot and killed him. The strikingly similar statements of the two defendants that they were "going to finish it" and the concerted actions that they undertook while together immediately prior to and after the killing tended to show unequivocally that the defendants Ingold and Harvell had formed a joint purpose to commit the very crime committed. The evidence was to the effect that as the defendant Harvell exited Hamilton's truck and walked into the crowd with the shotgun and killed the victim, the defendant Ingold stayed close behind him armed with a steel pipe and ready to assist Harvell if necessary. If the defendant Ingold did not intend to participate in the shooting Harvell was about to engage in, Ingold could have stayed in the truck or left the scene as Harvell entered the crowd. In light of the foregoing, we conclude that the evidence introduced in the trial court would not support a reasonable finding that the killing of Dean Russell was an independent act by Harvell not done pursuant to a common purpose shared with the defendant Ingold. The trial court did not err in refusing to give the requested jury instructions. Accordingly, this assignment of error is without merit.

[5] By another assignment of error, the defendant Ingold contends that the trial court erred in refusing to give the jury his requested instruction pertaining to "mere presence." The defendant requested the following instruction:

> Under the theory known as acting in concert, if two persons join in a common purpose to commit a particular crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common plan, that is, the common plan to commit a particular crime, or as a natural or probable consequence thereof. *However, the mere presence of a person at the scene of a crime at the time of its commission does not make him guilty of the offense*; nor does the mere knowledge

> that an offense is about to be committed or is being committed or has been committed; nor does the failure to give an alarm.

(Emphasis added). Instead, the trial court gave the jury the appropriate pattern jury instruction concerning the principle of acting in concert. N.C.P.I.—Crim. 202.10 (1971). The defendant Ingold contends that the trial court erred by failing to include an instruction on mere presence because the evidence fully supported such an instruction.

We conclude, for reasons more fully discussed under the preceding assignment of error, that the trial court did not err because the evidence did not support an instruction on "mere presence." The evidence in the present case was that when Jimmy Love asked the defendant Ingold what was going on, Ingold stated that "we're going to finish it." As the defendant Harvell walked into the group near the lake with a shotgun in his hand, the defendant Ingold followed close behind him armed with a steel pipe. Such evidence tended to show that as Harvell approached and shot the victim, Ingold made it known to Harvell that Ingold was standing by willing to lend any assistance necessary. No evidence tended to show that the defendant Ingold was merely present at the scene of the killing. Therefore, the trial court correctly declined to instruct the jury on mere presence. Accordingly, this assignment of error is overruled.

[6] By another assignment of error, the defendant Ingold contends that the trial court erred in refusing to give the jury a requested instruction pertaining to the "defense" of voluntary intoxication. Here, the defendant was charged with first-degree murder. The evidence before the trial court was sufficient to require an instruction on voluntary intoxication, and the trial court gave such an instruction. *See generally State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988) (clarifying rule to be applied in determining whether trial court must instruct on voluntary intoxication).

While voluntary intoxication does not relieve a defendant altogether from criminal responsibility, it may negate the element of specific intent in those crimes in which such an element must be proved. *State v. Silvers*, 323 N.C. 646, 374 S.E.2d 858 (1989). If by reason of voluntary intoxication a defendant did not form a specific intent to kill after premeditation and deliberation, an essential element of first-degree murder is absent and the offense is reduced to second-degree murder. *State v. McLaughlin*, 286 N.C.

597, 213 S.E.2d 238, *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976); *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973). However, the law does not require any "specific intent" for a defendant to be guilty of second-degree murder, and a defendant's voluntary intoxication does not negate that crime. *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984); *State v. Caudle*, 58 N.C. App. 89, 293 S.E.2d 205 (1982), *cert. denied*, 308 N.C. 545, 304 S.E.2d 239 (1983).

The jury in the present case, having first been properly instructed as to the foregoing principles, declined to convict the defendant of first-degree murder and convicted him of the lesser-included offense of second-degree murder. This is precisely the verdict to which the defendant Ingold was entitled, if the jury determined that due to his voluntary intoxication he did not form a specific intent to kill after premeditation and deliberation.

The defendant Ingold argues, however, that the trial court should have instructed the jury that it must find the defendant not guilty of any crime if it found that due to his voluntary intoxication he did not join in a "common purpose" with his co-defendant Harvell. Ingold argues that he could not be guilty of any crime on the theory of "acting in concert" unless he could join his co-defendant in such a common purpose. This argument is without merit. The "defense" of voluntary intoxication applies, at most, only to negate the "specific intent" element of a *crime* which includes such an element. *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980). The "acting in concert" principle merely provides one among the several alternative theories upon which a defendant may be found guilty of any criminal act; it is not a crime in and of itself. *See State v. Thomas*, 325 N.C. 583, 593, 386 S.E.2d 555, 560-61 (1989). Therefore, a defendant's voluntary intoxication, even if established, will not prevent a determination that he acted in concert with another. For the foregoing reasons, this assignment of error is without merit.

Having considered all of the assignments of both defendants, we conclude that the defendants received a fair trial free of prejudicial error.

No error.

IN RE FORECLOSURE OF GOFORTH PROPERTIES, INC.

[334 N.C. 369 (1993)]

IN THE MATTER OF THE FORECLOSURE OF A DEED OF TRUST, EXECUTED BY GOFORTH PROPERTIES, INC., A N.C. CORPORATION, IN THE PRINCIPAL AMOUNT OF $100,000.00 DATED DECEMBER 22, 1989, RECORDED IN BOOK 367, PAGE 133 IN THE ORANGE COUNTY REGISTRY BY WILLIAM J. BAIR, SUBSTITUTED TRUSTEE BY INSTRUMENT RECORDED IN BOOK 934, PAGE 325, ORANGE COUNTY REGISTRY; EDWIN W. TENNEY, JR., WILLIAM A. REPPY, JR. AND JULIANN TENNEY v. STEPHEN S. BIRDSALL, MARGO L. PRICE, TAWFIK A. ZEIN AND RIMA F. ZEIN

No. 123PA93

(Filed 30 July 1993)

1. **Mortgages and Deeds of Trust § 12 (NCI4th)— supplemental deed of trust—condition precedent to foreclosure—foreclosure under original deed of trust**

Foreclosure under a purchase money deed of trust was a condition precedent to petitioners' exercise of their right to foreclose on property conveyed in a supplemental deed of trust providing additional security for the purchase money note where the supplemental deed of trust provided that "if the net proceeds realized from a foreclosure of said former deed of trust be not sufficient to pay the debt secured by said prior deed of trust, this deed of trust may be foreclosed," and the supplemental deed of trust did not suggest that a substitution of property for that in the purchase money deed of trust was intended. Because petitioners released the property encumbered by the purchase money deed of trust, foreclosure thereunder, the condition precedent to the exercise of their right to foreclose under the supplemental deed of trust, could not occur.

Am Jur 2d, Mortgages § 10.

2. **Mortgages and Deeds of Trust § 119 (NCI4th)— purchase money deed of trust—supplemental deed of trust—violation of anti-deficiency statute**

Provisions of a supplemental deed of trust purporting to provide additional security for a purchase money note violated the anti-deficiency judgment statute, N.C.G.S. § 45-21.38, and were not enforceable.

Am Jur 2d, Mortgages § 920.

Conflict of laws as to application of statute proscribing or limiting availability of action for deficiency after sale of collateral real estate. 44 ALR2d 922.

Justice WEBB dissenting.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order barring foreclosure entered 14 February 1992 by Hight, J., in Orange County Superior Court. Heard in the Supreme Court 10 May 1993.

Thomas H. Stark for petitioner-appellants.

Maxwell & Hutson, P.A., by James H. Hughes and Lauren M. Mikulka, for respondent-appellees.

PARKER, Justice.

This proceeding was initiated by the substitute trustee's petition for hearing prior to foreclosure sale pursuant to N.C.G.S. § 45-21.16, filed 28 October 1991 in Orange County. After a hearing on 4 December 1991, the assistant clerk of superior court authorized foreclosure. Respondents Birdsall, Price, and Zein appealed pursuant to N.C.G.S. § 45-21.16(d). The appeal came on for hearing at the 21 January 1992 Civil Session of Superior Court for Orange County but was continued on account of the presiding judge's recusal. The parties agreed to waive venue and the matter was heard at the 27 January 1992 Civil Session of Superior Court for Durham County. By his order entered 14 February 1992, the judge concluded petitioners Tenney and Reppy were not entitled to foreclose and vacated the clerk's order. On 20 February 1992 petitioners gave notice of appeal to the Court of Appeals; this Court granted review prior to determination by the Court of Appeals. For the reasons which follow we agree that foreclosure was barred and affirm the order of the superior court.

On 24 April 1981 petitioner Edwin W. Tenney, Jr., and wife, Anita L. Tenney (not a party to this proceeding), and petitioners William A. Reppy, Jr., individually and as trustee, and wife, Juliann Tenney, executed a general warranty deed conveying to Goforth Properties, Inc. (herein "Goforth"), two tracts of land on the southeast corner of Henderson and Franklin Streets in Chapel Hill, North Carolina. As part of the consideration for this conveyance, Goforth executed a purchase money note in the amount of $100,000, payable to Edwin W. Tenney, Jr. or Anita L. Tenney; and William A.

Reppy, Jr. or Juliann Tenney. This purchase money note was secured by a purchase money deed of trust of even date in which Goforth conveyed this same property to William Griffin Graves, III, trustee for Edwin W. Tenney, Jr. and wife, Anita L. Tenney; and William A. Reppy, Jr. and wife, Juliann Tenney.

On 2 July 1981 Goforth executed a document entitled "Supplemental Deed of Trust" conveying certain property to the trustee for the benefit of the beneficiaries in the April purchase money deed of trust. Since this document is central to the parties' dispute, we include the following pertinent parts:

> This Indenture, made and entered into on this the 2nd day of July, 1981, by and between GOFORTH PROPERTIES, INC., P.O. Drawer 967, Chapel Hill, North Carolina, 27514, Party of the First Part; WM. GRIFFIN GRAVES, III, Trustee, Party of the Second Part; and EDWIN W. TENNEY, JR. and wife, ANITA L. TENNEY, WILLIAM A. REPPY, JR. and wife, JULIANN TENNEY, Parties of the Third Part; all of Orange County, North Carolina;
>
> W I T N E S S E T H:
>
> THAT WHEREAS, the party of the first part has heretofore executed to said Wm. Griffin Graves, III, Trustee for the parties of the third part, a deed of trust dated April 24, 1981, and recorded in Book 361, at Page 440, in the office of the Register of Deeds of Orange County, North Carolina, conveying certain lands therein described; and whereas said party of the first part desires to give additional security for said prior deed of trust upon the terms and conditions herein set out;
>
> NOW THEREFORE, said party of the first part in consideration of the premises and of the sum of Ten Dollars and other valuable considerations paid to said party of the first part by said party of the second part, the receipt of which is hereby acknowledged, has bargained and sold and by these presents does bargain, sell and convey unto the said party of the second part, and his heirs and assigns, a certain parcel of land lying and being in Chapel Hill Township, Orange County, North Carolina, and more particularly described as follows:
>
> BEGINNING at an iron stake located in the northwestern intersection of Estes Drive (S.R. 1780) and Seawell School

> Road (S.R. 1848) . . . containing 17.31 acres and known as Phase II, IRONWOODS SUBDIVISION, according to the plat and survey of The John R. McAdams Company, Inc.[,] dated October, 1980.
>
> To have and to hold the aforesaid tract of land, together with all privileges and appurtenances thereunto belonging, to him, the said party of the second part, as Trustee as aforesaid, upon the trust and for the uses and purposes as follows:
>
> If the debt secured by said former deed of trust be paid in full, then and in that event this deed of trust shall become null and void.
>
> If said former deed of trust be foreclosed under the conditions and in the manner therein provided and the net proceeds of such foreclosure, after deducting legal costs and expenses, be sufficient to pay the debt thereby secured, this deed of trust shall become null and void.
>
> If, however, the net proceeds realized f[ro]m a foreclosure of said former deed of trust be not sufficient to pay the debt secured by said prior deed of trust, this deed of trust may be foreclosed in the same manner as therein provided for the foreclosure of said former deed of trust and the net proceeds realized from the foreclosure of this deed of trust may be used by the Trustee as far as the same may be necessary or may extend to the payment of the then unpaid balance of the debt secured by said former deed of trust and the surplus thereafter remaining, if any, shall be paid by the Trustee to the party of the first part or his legal representatives.

On that same day trustee Graves, all the Tenneys, and Reppy executed a deed releasing to Goforth the property conveyed in the April purchase money deed of trust securing the purchase money note.

Sometime after the July transactions, Goforth conveyed Lot 9, Phase II, Ironwoods Subdivision, to respondents Birdsall and Price and Lot 1 in the same subdivision to respondents Zein. Goforth subsequently defaulted on the purchase money note. In July 1991 petitioners Edwin W. Tenney, Jr., William A. Reppy, Jr., and Juliann Tenney, then owners and holders of the purchase money note and beneficiaries of the purchase money deed of trust, executed and recorded a document appointing William J. Bair substitute trustee

under the supplemental deed of trust. Pursuant to the supplemental deed of trust Bair sought to foreclose on Ironwoods Lots 9 and 1, petitioning for a hearing as described above.

On hearing respondents' appeal from the clerk's order permitting foreclosure, the superior court judge made written findings of fact and the following conclusions of law:

> 1. There is a valid debt of which the parties seeking to foreclose are the holders and there has been a default in the repayment of said debt. Proper notice has been given to those parties entitled to such under the provisions of G.S. 45-21.16(b).
>
> 2. The plain and unambiguous language of the Supplemental Deed of Trust requires that, before the Supplemental Deed of Trust may be foreclosed, there must be a foreclosure of the purchase money deed of trust and insufficient proceeds realized therefrom to satisfy the purchase money note secured by said purchase money deed of trust. Said provision constitutes a condition precedent to the petitioners' rights to foreclose the Supplemental Deed of Trust.
>
> 3. The noteholders[,] having released all of the property described in the purchase money deed of trust, no longer have the right to foreclose pursuant thereto and, therefore, cannot perform the condition precedent. Therefore, the Substituted Trustee has no right to proceed to foreclose pursuant to the power of sale contained in the Supplemental Deed of Trust.
>
> 4. The provision of the Supplemental Deed of Trust dated July 2, 1981 quoted above in Paragraph 4 of the Findings of Fact purporting to provide additional security for the purchase money note [is] violative of N.C.G.S. 45-21.38.
>
> 5. Petitioners are not entitled to proceed against the property described in the Supplemental Deed of Trust as security for the debt evidenced by the purchase money deed of trust from Goforth Properties, Inc.

On appeal to this Court petitioners' contentions include that the superior court erred in concluding (i) the supplemental deed of trust included a condition precedent and (ii) the provisions of the supplemental deed of trust were violative of the anti-deficiency judgment statute, N.C.G.S. § 45-21.38. We first address the issue of a condition precedent in the supplemental deed of trust.

Article 2A of Chapter 45 of the General Statutes sets out the procedure for sale pursuant to a power of sale in a deed of trust. N.C.G.S. § 45-21.16 (1991). "Historically, foreclosure under a power of sale has been a private contractual remedy. *Brown v. Jennings*, 188 N.C. 155, 124 S.E. 150 (1924); *Eubanks v. Becton*, 158 N.C. 230, 73 S.E. 1009 (1912)." *In re Foreclosure of Burgess*, 47 N.C. App. 599, 603, 267 S.E.2d 915, 918, *appeal dismissed*, 310 N.C. 90 (1980). After the trustee's compliance with the notice provisions of the statute, the clerk of court may conduct a hearing for the limited purpose of determining (i) the existence of a valid debt of which the party seeking foreclosure is the holder, (ii) the existence of default, (iii) the trustee's right to foreclose, and (iv) the sufficiency of notice of the hearing to the record owners of the property. *In re Foreclosure of Deed of Trust*, 55 N.C. App. 68, 71, 284 S.E.2d 553, 555 (1981) ("Foreclosure of Helms"), *disc. rev. denied*, 305 N.C. 300, 291 S.E.2d 149 (1982). On appeal from an order of the clerk authorizing the trustee to proceed with sale, the judge is limited to determining those same four issues resolved by the clerk. *In re Foreclosure of Fortescue*, 75 N.C. App. 127, 128, 330 S.E.2d 219, 220, *disc. rev. denied*, 314 N.C. 330, 335 S.E.2d 890 (1985). Nevertheless, the intent of the legislature in enacting the notice and hearing provisions of N.C.G.S. § 45-21.16

> was not to alter the essentially contractual nature of the remedy, but rather to satisfy the minimum due process requirements of notice to interested parties and hearing prior to foreclosure and sale which the district court in *Turner v. Blackburn*, 389 F. Supp. 1250 (W.D.N.C. 1975), held that our then existing statutory procedure lacked. *In re Foreclosure of Sutton Investments*, 46 N.C. App. 654, 266 S.E.2d 686 (1980).

In re Foreclosure of Burgess, 47 N.C. App. at 603, 267 S.E.2d at 918; *see also In re Foreclosure of Michael Weinman Associates*, 333 N.C. 221, 227, 424 S.E.2d 385, 388 (1993) (stating that parties to a deed of trust have agreed to abandon the traditional foreclosure by judicial action in favor of a private contractual remedy).

Equitable defenses to foreclosure, such as waiver of the right to prompt payment through acceptance of late payments, may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to enjoin the foreclosure sale under N.C.G.S. § 45-21.34. *In re Foreclosure of Fortescue*, 75 N.C. App. at 131, 330 S.E.2d at 222. By contrast, evidence of

legal defenses tending to negate any of the four findings required under N.C.G.S. § 45-21.16 may properly be raised and considered. For example, whether the property to be sold at the foreclosure sale is legally encumbered by the lien of the deed of trust is a proper issue to be proved and resolved by the clerk of superior court in determining the trustee's right to foreclose. *In re Foreclosure of Michael Weinman Associates*, 333 N.C. at 230, 424 S.E.2d at 388-89; *see also In re Foreclosure of Deed of Trust*, 55 N.C. App. 373, 375, 285 S.E.2d 615, 617 ("Foreclosure of Bonder") (affirming trial court's exclusion of evidence insufficient to create a legal defense), *aff'd*, 306 N.C. 451, 293 S.E.2d 798 (1982).

In *Weinman*, this Court also reiterated that foreclosure under a power of sale is not favored in the law, and its exercise " 'will be watched with jealousy.' " 333 N.C. at 228, 424 S.E.2d at 389 (quoting *Spain v. Hines*, 214 N.C. 432, 435, 200 S.E. 25, 28 (1938)). Unambiguous language in a deed of trust is controlling on the issue of whether the instrument raises a legal defense to foreclosure. *Foreclosure of Bonder*, 55 N.C. App. at 376, 285 S.E.2d at 617 (finding deed of trust did not restrict the lender's right to withhold consent to transfer to those situations wherein the lender deemed itself insecure).

In general, a condition creates no right or duty but is merely a limiting or modifying factor in a contract. 17A Am. Jur. 2d *Contracts* § 468 (1991). "Almost any event may be made a condition." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.2 (1990). The event may be largely within the control of the obligor or the obligee. *Id.* Conditions agreed to by the parties "are commonly referred to as 'express conditions.' Parties often use language such as 'if,' 'on condition that,' 'provided that,' 'in the event that,' and 'subject to' to make an event a condition, but other words may suffice." *Id.*

A condition precedent is an event which must occur before a contractual right arises, such as the right to immediate performance. *Farmers Bank v. Brown Distributors*, 307 N.C. 342, 350, 298 S.E.2d 357, 362 (1983). " 'Breach or non-occurrence of a condition prevents the promisee from acquiring a right, or deprives him of one, but subjects him to no liability. . . .' " *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962) (quoting 3 Samuel Williston, *A Treatise on the Law of Contracts* § 665 (rev. ed. 1936)). " '[T]he provisions of a contract will not be construed as conditions precedent in the absence of language

plainly requiring such construction.' " *Id.* at 118, 123 S.E.2d at 596 (quoting *Larson v. Thoresen*, 116 Cal. App. 2d 790, 794, 254 P.2d 656, 658 (1953)). "The weight of authority is to the effect that the use of such words as 'when,' 'after,' 'as soon as,' and the like, gives clear indication that a promise is not to be performed except upon the happening of a stated event." *Jones v. Realty Co.*, 226 N.C. 303, 306, 37 S.E.2d 906, 908 (1946); *see also Farmers Bank v. Brown Distributors*, 307 N.C. at 351, 298 S.E.2d at 362 (quoting same passage and adding that "whether" and "if" are "words of 'the like' ").

[1] With these principles in mind we turn to the facts of the instant case. We note first that the purchase money note and deed of trust comprised the parties' underlying contract in which promisor Goforth agreed to make payments under the note. The purchase money deed of trust gave petitioners a contractual remedy for default, namely a right to foreclose as in *Burgess* and *Weinman*. A condition precedent to exercise of that right was default in payment by Goforth.

Unlike the original purchase money deed of trust, the supplemental deed of trust contains no authorization for outright foreclosure of the Ironwoods property in the event of default on the purchase money note. To the contrary, the language of the supplemental deed of trust explicitly imposes a condition on petitioners' exercise of their right to foreclose under the supplemental deed of trust, namely, "if the net proceeds realized from a foreclosure of said former deed of trust be not sufficient to pay the debt secured by said prior deed of trust, this deed of trust may be foreclosed . . . ." Thus, by specific language in the supplemental deed of trust, the right to foreclose thereunder was linked to proceeds from foreclosure under the former deed of trust, *i.e.*, the purchase money deed of trust. Furthermore, if the debt secured by the former deed of trust was paid in full, the supplemental deed of trust became null and void; and if the former deed of trust was foreclosed and net proceeds from foreclosure sufficed to pay the debt secured, the supplemental deed of trust became null and void. Hence, under the plain language of the instrument, foreclosure of the purchase money deed of trust had to occur before petitioners could exercise their right to foreclose under the supplemental deed of trust. We conclude, therefore, that foreclosure under the purchase money deed of trust was a condition precedent to petitioners' exercise of their right to foreclose on the property conveyed in the supplemental deed of trust. Because petitioners

released the property encumbered by the purchase money deed of trust, however, foreclosure thereunder, the condition precedent to exercise of their right to foreclose under the supplemental deed of trust, could not occur.

Petitioners argue that the interpretation set out above is hypertechnical and stretches the language of the supplemental deed of trust beyond its plain meaning and the intention of the parties. Further, according to petitioners, the release deed clearly indicates the parties' intention was to substitute collateral; but even without considering the release deed, the most expansive reading of the supplemental deed of trust leads to the conclusion that the intention of the parties was to create a priority among properties securing the obligation under the purchase money note. We do not find these arguments persuasive.

The supplemental deed of trust nowhere suggests that a substitution of property for that in the purchase money deed of trust is intended. To the contrary, the instrument itself is titled "Supplemental Deed of Trust," not "Substitute Deed of Trust." Further, the instrument states: "whereas said party of the first part desires to give *additional* security for said prior deed of trust . . . ." (Emphasis added.) The supplemental deed of trust does not refer to the release deed. If the Franklin Street property conveyed in the purchase money deed of trust were being released and the Ironwoods property merely substituted in its place, there would have been no need to mention foreclosure of the Franklin Street property in the supplemental deed of trust. The intent of the parties ascertained from the unambiguous language of the supplemental deed of trust, not the release deed, governs foreclosure. Having voluntarily rendered the condition precedent impossible of performance by releasing the property conveyed in the purchase money deed of trust, petitioners cannot now contend that the language of the supplemental deed of trust, which they accepted, does not reflect their intentions.

[2] We also find petitioners' contention that the supplemental deed of trust did not violate the anti-deficiency judgment statute, N.C.G.S. § 45-21.38, to be without merit. In construing the meaning of this statute, this Court has said:

> [T]he manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate

> and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Realty Co. v. Trust Co., 296 N.C. 366, 370, 250 S.E.2d 271, 273 (1979). Thereafter in *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), a case involving collection of attorney's fees, the Court, after quoting the above language from *Realty Co.*, stated:

> We did not restrict this construction of the statute to cases in which the purchase money creditor was suing on the note or was seeking only to recover the unpaid balance of the purchase price. Given our prior construction of our anti-deficiency statute in *Realty Co.*, and more recently in *Barnaby*, we now hold that when the purchase money debtor defaults, the purchase money creditor is limited *strictly to the property conveyed in all cases* in which the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

Id. at 335, 372 S.E.2d at 562 (emphasis added).

In the present case, the property to be sold at foreclosure under the supplemental deed of trust was not the property conveyed for which the purchase money note and purchase money deed of trust were given; yet the debt to be satisfied was that reflected by the purchase money note. Moreover, petitioners have argued to this Court that the supplemental deed of trust created a priority among properties securing the obligation expressed in the purchase money note. The record does not reveal, and we cannot speculate why the parties elected to structure the transaction in this fashion. Regardless of their motivation, however, under the unequivocal language in *Merritt*, the provisions of the supplemental deed of trust purporting to provide additional security for the purchase money note were unenforceable under N.C.G.S. § 45-21.38.

For the foregoing reasons we hold the trial court did not err in concluding foreclosure under the supplemental deed of trust was barred and in vacating the clerk's order authorizing foreclosure. Accordingly, we affirm the judgment of the trial court.

AFFIRMED.

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

Justice WEBB dissenting.

I dissent. I believe there is only one way the transactions in this case may be construed and that is that the parties intended that the Ironwoods property be substituted for the Franklin Street property as security for the debt owed by Goforth Properties to the petitioners. This the parties had a right to do. The recording of the supplemental deed of trust on the same day as the release of the first deed of trust shows the recording of the two instruments was part of a single transaction. It is inconceivable to me that as a part of this transaction the parties intended that a deed of trust would be recorded which could not be foreclosed. I do not believe the foreclosure of the first deed of trust was a condition precedent to the foreclosure of the supplemental deed of trust and I would let the foreclosure proceed.

I also do not believe the anti-deficiency judgment statute, N.C.G.S. § 45-21.38 (1991), is any impediment to the foreclosure in this case. Certainly the two cases upon which the majority relies, *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979) and *Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988), are not authority for the result reached in this case. The parties had the right, which they exercised in this case, to substitute for the original security. When this substitution was made, the new deed of trust was not a purchase money deed of trust. There is no reason why this deed of trust cannot be foreclosed.

I vote to reverse the superior court.

THOMAS E. DEBNAM v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 397PA92

(Filed 30 July 1993)

Constitutional Law § 354 (NCI4th); Public Officers and Employees § 65 (NCI4th)— State employee—administrative investigation—termination for refusal to answer questions—self-incrimination—warnings not required

Where a State employee was informed during an internal investigation that refusal to answer questions about his employment could result in his dismissal and the State did not seek a waiver of the employee's immunity from the use of his answers in any criminal action against him, the State did not violate the employee's Fifth Amendment right against self-incrimination by terminating him for refusing to answer questions without advising him (1) that his answers could not be used against him in any subsequent criminal prosecution, or (2) that the questions would relate specifically and narrowly to the performance of official duties. Once the employee was informed by the investigating officials that he could be dismissed for failing to answer their questions, any and all responses the employee gave and any information discovered as a result of those responses automatically became excludable from any criminal proceeding which might be brought against him, and such assurances by the investigating officials would not have provided him any greater protection from self-incrimination than that to which he was automatically entitled.

Am Jur 2d, Criminal Law §§ 703, 937; Public Officers and Employees § 253.

Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers. 15 ALR4th 1207.

On appeal by the respondent North Carolina Department of Correction and on discretionary review of a decision of the Court of Appeals, 107 N.C. App. 517, 421 S.E.2d 389 (1992), reversing an order entered on 7 February 1991, by Stephens, J., in the Superior Court, Wake County. Heard in the Supreme Court on 12 April 1993.

R. Bradley Miller for the petitioner-appellee, Thomas E. Debnam.

Michael F. Easley, Attorney General, by Andrew A. Vanore, Jr., Chief Deputy Attorney General, and Valerie L. Bateman, Assistant Attorney General, for the respondent-appellant, North Carolina Department of Correction.

McGuiness & Parlagreco, by J. Michael McGuiness, on behalf of all amici curiae; William G. Simpson, on behalf of the North Carolina Civil Liberties Union Legal Foundation; Ferguson, Stein, Watt, Wallas, Adkins & Gresham, by Tom Stern, on behalf of the North Carolina Association of Educators, and by Adam Stein, on behalf of the North Carolina Academy of Trial Lawyers; Joseph Delorey, on behalf of the National Association of Government Employees and the International Brotherhood of Corrections Officers, amici curiae.

MITCHELL, Justice.

The facts which are determinative of this appeal are not in dispute. Beginning in January 1982, the petitioner-appellee Thomas E. Debnam was employed by the respondent-appellant North Carolina Department of Correction (DOC) as Assistant Superintendent of the Gates County Correctional Facility. Debnam was a permanent employee subject to the State Personnel Act. On 10 September 1985, two officials from the DOC Regional Office interviewed Debnam for approximately one hour concerning an allegation made by an inmate that a ladies' class ring had been stolen from him and that Debnam had forced him to buy the ring back from another inmate for five dollars. Debnam asked the officials about the possibility of criminal charges being brought against him as a result of the incident. The officials replied that they had been directed to conduct an administrative investigation but that further action would be taken.

On 19 September 1985, three DOC officials interviewed the entire staff of the Gates County Correctional Facility, including the petitioner Debnam, regarding numerous allegations of mismanagement at the facility. During his interview with the officials, Debnam expressed concern that he might be criminally prosecuted for the incident involving the allegedly stolen ring. He stated that he would not answer any questions until he was given a written decision as to whether there would be a criminal prosecution brought

against him relating to the ring incident. One DOC official, Area Administrator James Varner, informed Debnam that he could be dismissed for failing to cooperate with an internal investigation. Debnam still refused to respond to any questions. Varner then suspended Debnam for his failure to cooperate with the internal investigation.

On 8 October 1985, Debnam again met with the three officials who had interviewed him on 19 September 1985. Varner read several allegations to Debnam and informed Debnam that he was recommending his dismissal. On 17 October 1985, Debnam received written notice of Varner's recommendation and the supporting reasons. On 2 December 1985, Debnam received written notice that his dismissal had been approved by DOC. Debnam was provided a hearing before the DOC Employment Grievance Committee on 13 February 1986. The Committee recommended that his dismissal be affirmed, and the Secretary of the Department of Correction agreed on 3 March 1986. Debnam was given written notice of this decision and of his appeal rights.

On 27 March 1986, Debnam appealed his dismissal to the North Carolina Office of State Personnel. In a recommended decision filed on 25 January 1989, an Administrative Law Judge concluded that DOC had dismissed Debnam for just cause, because DOC had proven that he committed several violations of departmental policy; therefore, Debnam was not entitled to reinstatement. However, the Administrative Law Judge also concluded that Debnam was entitled to back pay covering the period from 19 September 1985 through 11 December 1987, because, *inter alia*, DOC's suspension and dismissal of him violated his Fifth Amendment right to protect himself from self-incrimination in possible later criminal proceedings.

The State Personnel Commission declined to adopt the Administrative Law Judge's recommended findings and conclusions concerning certain procedural violations and Debnam's privilege against self-incrimination. Instead, the Commission issued a decision on 27 June 1989 (amended 12 July 1989) concluding that DOC committed neither a procedural violation nor a violation of Debnam's Fifth Amendment privilege against self-incrimination. The Commission further concluded that DOC had dismissed Debnam for just cause.

Debnam petitioned, pursuant to Chapter 150B of the General Statutes, for judicial review of the Commission's decision, challeng-

ing the Commission's conclusions on both the procedural issues and the Fifth Amendment issue. On 7 February 1991, Judge Donald W. Stephens entered an order in Superior Court, Wake County, dismissing Debnam's petition and affirming the decision of the Commission upholding the respondent DOC's dismissal of the petitioner Debnam. Regarding the Fifth Amendment issue, the trial court held that:

> From the record it appears that both the Petitioner and the Administrative Law Judge erroneously concluded that Petitioner, as an Assistant Superintendent of the Gates County Prison Unit who was the subject of an internal mismanagement investigation by the Department which also included conduct that could have created a potential for criminal charges, was somehow shielded by the Constitution when he refused to answer job-related questions and was subsequently suspended and dismissed for such failure to cooperate and for other misconduct. Clearly, an internal Departmental investigation into mismanagement at the Gates Prison Unit was a matter in which the Petitioner had no right to refuse to cooperate; he was required to answer all appropriate questions, even those which may have incriminated him regarding criminal misconduct, so long as he was not required to waive any 5th Amendment protections at subsequent criminal proceedings. In essence, the law provides to all public employees automatic "use" immunity that excludes statements which they are required to make during internal administrative investigations from use by prosecutors as evidence against them at any subsequent criminal proceeding. The law does not require any form of warning to any such employee regarding his rights or obligations. A government employer may lawfully require a public employee to answer potentially incriminating questions about the performance of his duties under threat of dismissal. A refusal to answer or otherwise cooperate can constitute just cause for dismissal. Likewise, incriminating answers given by a cooperating employee can form the basis for dismissal. However, neither lack of cooperation nor incriminating statements can form the basis of any subsequent criminal prosecution. Any public employee who refuses to answer appropriate questions regarding his job performance does so at the risk of employment termination. Petitioner in this case accepted that risk by his refusal to cooperate with a proper internal

Departmental administrative investigation and was, therefore, subject to lawful termination.

The record in this case clearly shows that the Petitioner refused to answer questions from the beginning of the internal investigation on the basis of a defective 5th Amendment claim. This refusal standing alone was sufficient to support his suspension and subsequent discharge.

The petitioner Debnam appealed to the Court of Appeals, arguing that he could not be discharged—consistent with the Fifth Amendment—for refusing to answer potentially incriminating questions, because the officials who had questioned him had not advised him that his answers could not be used against him in any later criminal proceeding. The Court of Appeals agreed and held that "a person's right to be free from self-incrimination under the Fifth Amendment to the United States Constitution is so basic, so fundamental, that the government is required to fully inform the person of that right in both grand jury and disciplinary proceedings." 107 N.C. App. at 525, 421 S.E.2d at 394. The Court of Appeals concluded that "a state employee subject to administrative investigation must be advised (1) that the questions will relate specifically and narrowly to the performance of official duties; (2) that the answers cannot be used against the employee in any subsequent criminal prosecution; and (3) that the penalty for refusal is dismissal." *Id.* at 526, 421 S.E.2d at 395. The Court of Appeals further held that, in the absence of such advice, no penalties could be imposed on the petitioner for failing to answer questions. *Id.* The respondent DOC then appealed to this Court pursuant to N.C.G.S. § 7A-30(1). DOC also petitioned for a writ of supersedeas and for discretionary review, and this Court allowed those petitions on 23 November 1992.

The respondent-appellant DOC argues that the Court of Appeals erred in concluding that the Fifth Amendment to the Constitution of the United States required that DOC inform Debnam that his answers to the questions asked him during the internal investigation could not be used against him in any subsequent criminal prosecution. We conclude that DOC's argument is correct and that the Fifth Amendment to the Constitution of the United States, applicable to the States through the Fourteenth Amendment, did not require that DOC make such a declaration to its employee Debnam before dismissing him for refusing to cooperate with its internal investigation.

The Supreme Court of the United States does not appear to have decided a case directly presenting the precise question presented by this appeal. However, based on clear language in that Court's decisions, we conclude that the State does not violate a public employee's Fifth Amendment right against self-incrimination by terminating the employee for refusing to answer questions relating to his employment, when the employee is informed that failure to answer may result in his dismissal and the State does not seek a waiver of the employee's immunity from the use of his answers in any criminal action against him.

The Fifth Amendment to the Constitution of the United States provides that "[n]o person . . . shall be compelled *in any criminal case* to be a witness against himself." (Emphasis added). In addition to protecting an individual "against being involuntarily called as a witness against himself in a criminal prosecution," the Fifth Amendment also privileges an individual "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might *incriminate* him in future *criminal* proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 75, 38 L. Ed. 2d 274, 281 (1973) (emphasis added). An individual therefore properly may refuse to answer questions asked in an internal investigation by a government employer "unless and until he is protected at least from the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant." *Id.* at 78, 38 L. Ed. 2d at 282 (citing *Kastigar v. United States*, 406 U.S. 441, 32 L. Ed. 2d 212 (1972)).

In *Garrity v. New Jersey*, 385 U.S. 493, 17 L. Ed. 2d 562 (1967), police officers were questioned by the Attorney General of New Jersey regarding allegations of "fixing" traffic cases in municipal courts. Before being questioned, each officer was advised that anything he said might be used against him in a later criminal proceeding and that he had the right to refuse to answer if the answer would tend to incriminate him, but that, if he did refuse to answer, he would be subject to dismissal. *Id.* at 494, 17 L. Ed. 2d at 564. The officers answered the attorney general's questions, and some of their answers were used as evidence against them in subsequent criminal prosecutions. *Id.* at 495, 17 L. Ed. 2d at 564. The Supreme Court of the United States held that, where the officers were forced to choose between incriminating themselves by answering questions or losing their jobs by remaining silent, the responses made by the officers to the attorney general's ques-

tions were involuntary. *Id.* at 497, 17 L. Ed. 2d at 565-66. Thus, "the protection of the individual under the Fourteenth Amendment against coerced statements prohibits [the use] *in subsequent criminal proceedings* of statements obtained under threat of removal from office." *Id.* at 500, 17 L. Ed. 2d at 567 (emphasis added).

In *Gardner v. Broderick*, a New York City patrolman was discharged after he had appeared before a grand jury which was investigating charges of police corruption, had been told that he would be fired if he did not sign a waiver of immunity, and had refused to sign the waiver. 392 U.S. 273, 20 L. Ed. 2d 1082 (1968). The Supreme Court of the United States held that the officer could not be dismissed on the basis of his refusal to waive the immunity provided by the privilege against self-incrimination, concluding that "the mandate of the great privilege against self-incrimination does not tolerate the attempt . . . to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Id.* at 279, 20 L. Ed. 2d at 1087. However, the Court noted, by way of *obiter dictum*, that if the officer "had refused to answer questions . . . without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, . . . the privilege against self-incrimination would not have been a bar to his dismissal." *Id.* at 278, 20 L. Ed. 2d at 1087. The case at bar presents a fact situation precisely like that described in the *Gardner dictum. Id.* Although we recognize that statements in the nature of *obiter dictum* are not binding authority, we nevertheless find the reasoning of *Gardner* on the issue before us compelling and follow that reasoning in this case.

In *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*, 392 U.S. 280, 20 L. Ed. 2d 1089 (1968), decided on the same day as *Gardner*, the Supreme Court also addressed the propriety of the dismissal of a public employee for refusal to waive the privilege against self-incrimination. In *Sanitation Men*, employee witnesses were summoned before the City Commissioner of Investigation and were told that their failure to testify on the grounds of the privilege against self-incrimination would result in their dismissal. Twelve employees also were told that their answers could be used against them in later criminal proceedings and were discharged for refusing to testify following this warning; three additional employees were discharged after they refused to sign waivers of immunity. *Id.* at 283-84, 20 L. Ed. 2d at 1092. The Supreme Court held that, under these circumstances,

the "[p]etitioners were . . . dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to *criminal prosecution* based on testimony which they would give under compulsion, despite their constitutional privilege." *Id.* at 284, 20 L. Ed. 2d at 1092 (emphasis added). Noting that *Garrity* had not yet been decided when the twelve employees were told that their responses could be used against them in later criminal proceedings and were forced to decide whether they wished to answer questions, the Court stated that the employees were "entitled to remain silent because it was clear that New York was seeking, not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition, could be used to prosecute them criminally." *Id.* at 284, 20 L. Ed. 2d 1092. In conclusion, the Court stated that

> if New York had demanded that petitioners answer questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake.

Id. at 284, 20 L. Ed. 2d at 1093.

Following *Garrity*, *Gardner* and *Sanitation Men*, the Supreme Court has continued to hold that "the State may not insist that [employees] waive their Fifth Amendment privilege against self-incrimination and consent to the use of the fruits of the interrogation in any later proceedings brought against them," *Lefkowitz v. Turley*, 414 U.S. at 84-85, 38 L. Ed. 2d at 286, because such an insistence constitutes an attempt "to accomplish what *Garrity* specifically prohibit[s]—to compel testimony that ha[s] not been immunized." *Id.* at 82, 38 L. Ed. 2d at 284. While so holding, the Court also has emphasized that, so long as they "have not been required to surrender their constitutional immunity," public employees "may constitutionally be discharged for refusing to answer potentially incriminating questions concerning their official duties." *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 53 L. Ed. 2d 1, 7 (1977). "Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and con-

tractors that may be used against them in *criminal* proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available *for such use." Lefkowitz v. Turley*, 414 U.S. at 84, 38 L. Ed. 2d at 285 (emphasis added).

The decisions of the Supreme Court of the United States in *Gardner, Sanitation Men, Turley* and *Cunningham* "emphasize that the employee's rights are imperilled *only* by the combined risks of both compelling the employee to answer incriminating questions and compelling the employee to waive immunity from the use of those answers." *Arrington v. County of Dallas*, 970 F.2d 1441, 1446 (5th Cir. 1992) (citing *Gulden v. McCorkle*, 680 F.2d 1070, 1074 (5th Cir. 1982), *cert. denied*, 459 U.S. 1206, 75 L. Ed. 2d 439 (1983)). We agree with the United States Court of Appeals for the Fifth Circuit, which has held that a government employer is not required to affirmatively inform an employee of the law relating to use immunity before discharging that employee for refusal to answer questions which may incriminate him. *Gulden v. McCorkle*, 680 F.2d at 1076. *But see Weston v. U.S. Dept. of Housing and Urban Development*, 724 F.2d 943 (Fed. Cir. 1983) (Employee must be advised of his options to answer under *Garrity* immunity or to remain silent and face dismissal); *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975, 44 L. Ed. 2d 466 (1975) (Disciplinary action cannot be taken against an employee witness unless the employee is first advised that evidence obtained as a result of testimony will not be used against the employee in subsequent criminal proceedings); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of the City of New York*, 426 F.2d 619 (2d Cir. 1970), *cert. denied*, 406 U.S. 961, 32 L. Ed. 2d 349 (1972) (implies that "proper proceedings" are required before employee may be dismissed and that such proceedings include advice that any statements made under threat of dismissal cannot later be used in a criminal proceeding against the employee). In *Gulden*, the court reasoned that

> [a]n employee who is compelled to answer questions (but who is not compelled to waive immunity) is protected by *Garrity* from subsequent use of those answers in a criminal prosecution. It is the very fact that the testimony was compelled which prevents its use in subsequent proceedings, not any affirmative tender of immunity.

Id. at 1075. The court concluded that "[f]ailure to tender immunity simply [is] not the equivalent of an impermissible compelled waiver of immunity." *Id.*

In the present case, Debnam does not contend, nor does the record show, that DOC ever asked him to waive his constitutional immunity from the use in any future *criminal* prosecution of any information obtained from him by threat of dismissal. The officials investigating the allegations of misconduct at the Gates County Correctional Facility informed Debnam only that he could be dismissed if he failed to cooperate with the internal investigation. They did not attempt to determine whether anything he said could be used against him in any subsequent criminal prosecution or to advise him of his legal rights in that regard.

Under the circumstances presented by this case, Debnam's Fifth Amendment right to be free from compelled self-incrimination was not violated by his dismissal. Once he was informed by the investigating officials that he could be dismissed for failing to answer their questions, any responses Debnam gave and any information discovered as a result of such responses automatically became excludable from any criminal proceeding which might be brought against him. *See Garrity*, 385 U.S. at 500, 17 L. Ed. 2d at 567. "In essence, the privilege against self-incrimination affords a form of use immunity which, absent waiver, automatically attaches to compelled incriminating statements as a matter of law." *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496 (11th Cir. 1985). Assurances by the DOC investigating officials that any answers given by Debnam could not be used against him in a criminal prosecution would not have provided him any greater protection from self-incrimination than that to which he was entitled automatically under the Fifth and Fourteenth Amendments upon answering the officers' questions after being threatened with dismissal for failure to answer. *See id.; Erwin v. Price*, 778 F.2d 668, 670 (11th Cir. 1985).

The respondent-appellant DOC further argues that the Court of Appeals erred by holding that the Fifth Amendment requires that a public employee subject to administrative investigation must be advised "that the questions will relate specifically and narrowly to the performance of official duties." 107 N.C. App. at 526, 421 S.E.2d at 395. Once Debnam was threatened with dismissal for failure to answer questions, *any and all* responses he made to

any of the officers' questions automatically became excludable from any criminal proceeding against him. *See Garrity*, 385 U.S. at 500, 17 L. Ed. 2d at 567. Therefore, because Debnam was fully protected from self-incrimination by this automatic constitutional immunity and DOC made no attempt to procure a waiver of this immunity, DOC did not violate *the Fifth Amendment* by dismissing Debnam for refusing to answer questions without first advising him that such questions would "relate specifically and narrowly to the performance of official duties."

We conclude that, because DOC made no attempt to elicit a waiver of Debnam's immunity from the use in any criminal prosecution of any statement he might make, no Fifth Amendment violation occurred. The Court of Appeals erred in holding that the Fifth Amendment prohibited the respondent-appellant DOC from discharging Debnam for refusing to answer questions during its internal investigation because he was not advised that his responses could not be used against him in any criminal prosecution and that the questions would relate specifically and narrowly to the performance of official duties.

Our conclusions and holding in this case are limited to the arguments before us, which are based solely and exclusively upon the Fifth Amendment to the Constitution of the United States, made applicable to the States by the Fourteenth Amendment. We neither consider nor decide any other constitutional or legal questions. Having performed our limited function in this regard, it is not for this Court to determine whether warnings to public employees prior to their dismissal, such as those argued for by the petitioner-appellee Debnam, represent desirable public policy; such questions are left to the Executive and Legislative Branches under this State's constitutional system of government.

For the reasons stated in this opinion, the decision of the Court of Appeals is reversed.

REVERSED.

JUDITH COKER COLEMAN NEWELL v. NATIONWIDE MUTUAL INSURANCE COMPANY, STATE CAPITAL INSURANCE COMPANY, MICHAEL BLACKMON AND ROBERT LEE BLACKMON

No. 282A91

(Filed 30 July 1993)

1. **Insurance §§ 598, 1175 (NCI4th)— automobile liability insurance—son forbidden to use vehicle—entitlement exclusion**

The insured's son was excluded from coverage under an automobile liability policy while driving the insured's vehicle by the "entitlement" exclusion of the policy, even though he was a "family member" within the meaning of the policy, where the policy provided in the exclusion section that liability coverage was not provided for "any person . . . 8. Using a vehicle without a reasonable belief that that person is entitled to do so," and the uncontradicted forecast of evidence showed as a matter of law that the son could not have had a reasonable belief that he was entitled to use his father's vehicle in that his driver's license had been permanently revoked for a previous driving while impaired conviction, he had been expressly forbidden by his father and stepmother to use any of the father's vehicles while living in his father's home, and on the night of the accident he was again charged with driving while impaired. The words "any person" as used in the exclusion section of the policy are not ambiguous and encompass the named insured, a family member or a third party unless express exceptions in the policy provide otherwise.

Am Jur 2d, Automobile Insurance §§ 254 et seq.

2. **Insurance § 499 (NCI4th)— automobile liability insurance—entitlement exclusion—no prohibition by Financial Responsibility Act**

The public policy goals of the Financial Responsibility Act did not preclude application of the entitlement exclusion of an automobile liability policy where plaintiff conceded that the Act itself provided no mandatory coverage to the tortfeasor because he was not driving the vehicle with the insured's permission and he was not in lawful possession of the vehicle at the time of the accident. N.C.G.S. § 20-279.21(b)(2).

Am Jur 2d, Automobile Insurance §§ 28 et seq.

On appeal pursuant to N.C.G.S. § 7A-30(2), and on discretionary review of additional issues pursuant to N.C.G.S. § 7A-31, from the decision of a divided panel of the Court of Appeals, 102 N.C. App. 622, 403 S.E.2d 525 (1991), affirming summary judgment entered in plaintiff's favor by R. G. Walker, Jr., J., on 13 November 1990 in Superior Court, Randolph County. Heard in the Supreme Court on 13 March 1992.

O'Briant, O'Briant, Bunch, Whatley & Robins, by Lillian B. O'Briant and Thomas D. Robins, for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Joseph R. Beatty, for defendant-appellant Nationwide.

EXUM, Chief Justice.

On 9 February 1987 plaintiff was injured in an automobile accident allegedly caused by the negligence of Robert Lee Blackmon, who was operating a 1977 Ford pickup truck owned by his father Michael Blackmon. Nationwide had issued an automobile liability policy to Michael Blackmon and wife which contained, among other exclusions, the following: "We do not provide Liability Coverage for any person . . . 8. Using a vehicle without a reasonable belief that that person is entitled to do so." Nationwide, contending that Robert Blackmon was operating the vehicle without a reasonable belief that he was entitled to do so, denied liability coverage. Plaintiff, contending the exclusion has no application to Robert Blackmon because he is a family member of the named insured, brings this declaratory judgment action to determine the coverage issue. The question to be determined is the application of this exclusion, sometimes called the "entitlement" exclusion, in light of the facts and policy provisions before us.

Both the Superior Court and the Court of Appeals concluded the exclusion had no application. We disagree and reverse.

Plaintiff brought this declaratory judgment action on 13 February 1989 seeking a declaration of the rights, duties and obligations of defendant Nationwide under its policy issued to the Blackmons. Plaintiff also joined defendant State Capital, seeking

a declaration of rights under the uninsured motorists (UM) coverage of an automobile policy which State Capital issued to plaintiff.[1]

On 30 August 1989 defendant State Capital moved for summary judgment; Nationwide opposed the motion. The trial court granted summary judgment in State Capital's favor, specifically concluding that defendant Robert Blackmon was insured by the Nationwide policy. The trial court further concluded that there was no genuine issue of material fact that Robert Blackmon (1) was the son of Michael Blackmon, (2) was a resident of his father's household at the time of the accident with plaintiff, and (3) was therefore a covered person under the Nationwide policy which was in full force and effect at the time of the accident.

The next day, 1 November 1989, plaintiff moved for summary judgment. In response, defendants Nationwide and Michael Blackmon moved jointly for summary judgment. On 14 November 1989 the trial court granted plaintiff's motion for summary judgment against Nationwide, once again determining that the Nationwide policy insured the defendant tortfeasor. The trial court also denied the summary judgment motion of defendants Nationwide and Michael Blackmon.

Defendant Nationwide appealed from these rulings in plaintiff's favor. The Court of Appeals affirmed. We now reverse, concluding that on the forecast of evidence at the summary judgment hearing, which included the Nationwide policy itself, the Nationwide policy provides no liability coverage to the alleged tortfeasor, Robert Blackmon.

At the respective summary judgment hearings the trial court had before it not only the automobile insurance policies issued, respectively, to plaintiff by State Capital and to Mr. and Mrs. Blackmon by Nationwide, but also separate affidavits from the two elder Blackmons. Michael Blackmon's affidavit stated unequivocally that his son, Robert Blackmon, was "told . . . that he was not to drive any of my vehicles. . . . I knew that Robert Lee Blackmon's driver's license had been permanently revoked. Both my wife [Nan Blackmon] and I had told him that he could

1. On the same date, plaintiff brought a separate tort action against the individual defendants. The two insurers and defendant Robert Blackmon filed answers individually, and on 19 April 1989 defendant Michael Blackmon moved to dismiss the action against him. This action is not before us.

not drive our vehicles." Likewise, Nan Blackmon, Robert Blackmon's stepmother, stated in her own affidavit that

> I had told Robert Lee Blackmon, and I heard my husband tell Robert Lee Blackmon during the time Robert Lee Blackmon lived with us from the middle of January, 1987, until February 9, 1987, that he was not to drive any of our vehicles. Both my husband and I knew that Robert Lee Blackmon's driver's license had been permanently revoked.

Plaintiff failed to present any evidence at the summary judgment hearing contrary to the affidavits of Mr. and Mrs. Blackmon and has conceded in her brief that Robert Blackmon was not driving his father's vehicle with either the express or implied permission of his father and stepmother.

Other evidence before the trial court showed that Robert Blackmon, who was twenty years old at the time of the accident, was, as a result of the accident and the investigation which followed, convicted of driving while impaired and driving while his license was revoked. This was his second driving while impaired offense in less than two years.

Nationwide's policy issued to the elder Blackmons provided liability coverage for the named insureds, Michael Lacy Blackmon and Nan Brigman Blackmon, the alleged tortfeasor's father and stepmother. The "Insuring Agreement" for the policy's liability coverage, found in Part B of the policy, states:

> "We will pay damages for bodily injury or property damage for which any **covered person** becomes legally responsible because of an auto accident. . . . '**Covered person**' as used in this Part means:
>
> 1. You or any **family member** for the ownership, maintenance or use of any auto or **trailer**.

(Bold in original.) In the Definitions section at the beginning of the policy, "**[f]amily member**" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household."

Part B of the policy also contains certain exclusions. The "**EXCLUSIONS**" section of Part B provides:

> We do not provide Liability Coverage for *any person*:

1. Who intentionally causes bodily injury or property damage.

This exclusion applies only to damages in excess of the minimum limit required by the financial responsibility law of North Carolina.

. . . .

5. For that person's liability arising out of the ownership or operation of a vehicle while it is being used to carry persons or property for a fee. This exclusion does not apply to a share-the-expense car pool.

6. While employed or otherwise engaged in the business or occupation of:

a. selling;

b. repairing;

c. servicing;

d. storing; or

e. parking

vehicles designed for use mainly on public highways. This includes road testing and delivery. This exclusion does not apply to the . . . use of **your covered auto** by:

a. you;

b. any **family member**; or

c. any partner, agent or employee of you or any **family member**.

8. *Using a vehicle without a reasonable belief that that person is entitled to do so.*

(Bold in original; italics added.)

Throughout these proceedings, Nationwide has contended that Michael Blackmon's son, Robert, was not insured under its policy issued to the elder Blackmons for two reasons. First, Nationwide has argued that Robert Blackmon was not a "covered person" under the policy because he was not a "resident of [his father's] household" pursuant to the policy's definition of "family member." Under the policy, a "covered person" is defined as including "You [the named insured] or any **family member** . . . ." (Emphasis in policy.) Because, Nationwide argues, there are genuine issues of material fact to

be resolved on the issue of Robert's *intent* to reside in his father's house and, therefore, on whether Robert was a resident of the named insured's household under the terms of the policy, summary judgment was improperly granted for plaintiff on these issues.

[1] Second, Nationwide contends that Robert Blackmon was specifically and unambiguously excluded from coverage by Exclusion 8, the entitlement exclusion, because he was, as a matter of law, using the vehicle in question "without a reasonable belief that [he was] entitled to do so." Agreeing with this second contention, we need not discuss, and hazard no opinion, as to the validity of Nationwide's first argument. We assume for purposes of this opinion only that Robert Blackmon was a "family member" within the meaning of the policy.

We note, too, that plaintiff has conceded that the provisions of N.C.G.S. § 20-279.21(b)(2) of the Financial Responsibility Act do not afford mandatory minimum coverage for Robert Blackmon and that "Nationwide's liability must be measured by the terms of the policy." Plaintiff Appellee's New Brief, p. 5. N.C.G.S. § 20-279.21(b)(2) provides that an "owner's policy of liability insurance: . . . (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession . . . ." Plaintiff makes no argument that Robert Blackmon was operating his father's vehicle with his father's permission or that he was in lawful possession of the vehicle at the time of the accident.

We have previously upheld in principle the entitlement exclusion in an automobile liability policy in a case where the alleged tortfeasor was operating a vehicle without a driver's license. *Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 392 S.E.2d 377 (1990). However, we held that summary judgment in the liability insurer's favor was improper where the tortfeasor, Mr. Slater, was directed to use the vehicle by an employee of the vehicle's owner, the named insured. Writing for a unanimous court, Justice Frye stated that the tortfeasor's testimony

> raises a question of whether he reasonably believed under the circumstances that he was entitled to drive the truck. Although Slater answered in the negative when asked if he believed he was entitled to operate the truck, he qualified his answer by giving as a reason the fact that he was driving

> without a license. A jury might well conclude that while he knew that it was "wrong to be driving without a license regardless of what goes on," he nevertheless believed he was entitled to drive the truck under the circumstances because he believed that he had the permission of the owner to do so. . . . *Slater's reasonable belief is a question of fact to be determined by a jury.* . . .

Id. at 776-77, 392 S.E.2d at 380 (emphasis added).

In the present case, however, based on the forecast of evidence below, we conclude as a matter of law that Robert Blackmon could not have had a reasonable belief that he was entitled to use his father's vehicle. Not only was Robert's driver's license under revocation by the North Carolina Division of Motor Vehicles for a previous driving while impaired conviction, the Record also contains separate affidavits of his father and stepmother stating that Robert was expressly forbidden to use *any* of his father's motor vehicles while living in his father's home. There is no forecast of evidence to the contrary. The Record further discloses, without contradiction, that, on the night of the accident with plaintiff, Robert was once again charged with driving while impaired. On this forecast of evidence there is simply no genuine issue of material fact as to whether Robert Blackmon could have had a reasonable belief that he was entitled to use his father's vehicle. The forecast shows conclusively that he could not have had such a belief.

In its opinion below, the Court of Appeals declined to decide whether Robert Blackmon was using his father's vehicle "without a reasonable belief that [he was] entitled to do so." *Newell v. Nationwide Mut. Ins. Co.*, 102 N.C. App. 622, 627, 403 S.E.2d 525, 528 (1991). After concluding that Robert Blackmon was a "resident" of his father's household and included within the policy's definition of a "family member," the Court of Appeals held that Robert was a "covered person" under the terms of the policy. The Court of Appeals further held that, although the Exclusions section by its terms applies to "any person," none of the exclusions, including the entitlement exclusion, applies to a family member. *Id.*

Relying on *Economy Fire & Casualty Co. v. Kubik*, 142 Ill. App. 3d 906, 492 N.E.2d 504 (1986), and *State Auto. Mut. Ins. Co. v. Ellis*, 700 S.W.2d 801 (Ky. Ct. App. 1985), the Court of Appeals found coverage for Robert Blackmon as a "family member" because the court thought the policy's use of that term and the

terms "covered person" and "any person" creates an ambiguity as to whether the term "any person" as used in the Exclusion section applies to family members. Applying the familiar principle that ambiguities in the language of an insurance policy will be resolved in favor of coverage, *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970), the Court of Appeals held that the term "any person" did not apply to family members. The court stated:

> [T]he Nationwide policy uses "covered person," "family member," and "any person" selectively throughout the policy and more specifically in the Exclusions section of the policy. . . . Under the express terms of the policy, "any person" is not an "all inclusive" term; *it does not include family members*. The policy establishes mutually exclusive classes. The selective use of these terms creates an ambiguity.

Newell, 102 N.C. App. at 629, 403 S.E.2d at 529 (emphasis added).

We think the cases relied on by the Court of Appeals are clearly distinguishable. The policy which the Illinois court considered in *Kubik* was different from the Nationwide policy before us. The policy in *Kubik* used the terms "any person" and "family member" selectively within the Exclusions section itself, implying, as the Illinois court noted,

> that some exclusions are applicable to only a "family member," some exclusions are applicable to only the class comprising "any person" (a group separate and distinct from a "family member"), and some exclusions are applicable to both a "family member" and "any person."
>
> . . . . Exclusion #11 [the entitlement exclusion] does not bar, as several other exclusions specifically do, coverage for a family member. . . . As a result . . . an ambiguity is created with regard to whether a "family member" is barred from coverage by exclusion #11."

Kubik, 142 Ill. App. 3d at 910, 492 N.E.2d at 507.

The Kentucky court in *Ellis*, also relied on by the Court of Appeals, simply concluded that the policy's lack of guidance as to how the terms of the entitlement exclusion should be applied created an ambiguity in its application which should be resolved in favor of not applying the exclusion in that case. The *Ellis* decision

is of little help since we have already sustained in principle the validity of the entitlement exclusion. *See Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co.*, 326 N.C. 771, 392 S.E.2d 377.

Our examination of the Nationwide policy convinces us that there is no ambiguity in the term "any person" as it is used in the Exclusions section even when the use of this term is considered with the use of the terms "family member" and "covered person." The term "covered person" never appears in the Exclusion section, and the term "family member" appears quite clearly only for the purpose of defining an exception to one of the exclusions.

Within the Exclusions section at least two of the exclusionary categories, the first and the sixth, plainly show that family members, and even the named insureds, *are* contemplated by the use of the term "any person."

In the first exclusion listed, the policy states that coverage is not provided for one who "intentionally causes bodily injury or property damage." Following the rule that liability insurance coverage is generally not provided for anyone who intentionally commits injurious acts, this exclusion is obviously intended to include not only family members of named insureds but also named insureds themselves. This exclusion, however, by its terms and in recognition of case law, *see Swain v. Nationwide Mut. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (1960), does not apply to minimum coverages which may be mandated by the Financial Responsibility Act.

The sixth exclusion listed provides even more support for our conclusion that no ambiguity exists with regard to whether the term "any person" applies to family members. This exclusion by its terms "does not apply to the . . . use of **your covered auto** by: . . . any **family member**." (Emphasis in original.) That the policy expressly provides for a family member exception to the sixth exclusion compels the conclusion that other exclusions which do not contain a family member exception apply to family members.

We are also persuaded by a well-reasoned decision of the Maryland Court of Special Appeals, *Gen'l Accident Fire & Life Assurance Co. v. Perry*, 75 Md. App. 503, 541 A.2d 1340 (1988), in which the Maryland court conducted an exhaustive review of the decisions of other states on whether the entitlement exclusion applies to family members. Construing a policy almost identical

to the one before us, the *Perry* court found that the entitlement exclusion does indeed apply to family members of the named insured. The *Perry* court stated:

> Appellee argues "that an ambiguity may exist with respect to 'family member' and 'any person' as used in the policy exclusion A.8 [which is, we note, the same exclusion as the one at issue here]." Appellee's argument is based on the holding of the court in *Economy Fire & Casualty v. Kubik*, 97 Ill.Dec. [68], 72, 492 N.E.2d at 507, 508. The reasoning of the *Kubik* court necessarily depended upon the policy it was construing. The *Kubik* court concluded that the insurer's policy was ambiguous because the policy's terms "family member" and "any person" were used in the policy's exclusions "in such a way as to create the impression that they refer to mutually exclusive classes." *Id.*, 97 Ill.Dec. at 71, 492 N.E.2d at 507. The *Kubik* court pointed out that some of the exclusions referred only to a "family member", others referred only to the class constituting "any person" and still other exclusions applied to both classes. The *Kubik* court concluded that because the exclusion at issue did not include the term "family member", "it is apparent that at the very least, an ambiguity is created with regard to whether a 'family member' is barred from coverage. . . ." *Id.* In *Georgia Farm Bureau*, 350 S.E.2d at 326, the court construed a policy identical to the policy at issue in the case *sub judice*, *see* note 6, *supra*. The *Georgia Farm Bureau* [*v. Fire & Casualty Ins. Co.*, 180 Ga.App. 777, 350 S.E.2d 325 (1986)] court rejected the identical argument made by appellee here. That court said, "[c]overage of all types is set forth in one part and all the exclusions are grouped separately. The language 'any person' refers to each of the nine exclusions listed, including the named insured." *Id.*, 350 S.E.2d at 326. We note that the policy at issue in *Kubik* and the policy at issue in *Georgia Farm Bureau* were different, structurally. We hold that there is *no* ambiguity in the exclusion *sub judice* based on the "vagueness created by the manner in which [the insurer] use[d] the term 'family member' and 'any person' interchangeably throughout the policy's exclusions." *Cf. Kubik*, 97 Ill.Dec. at 71, 492 N.E.2d at 507.

Perry, 75 Md. App. at 521-22, 541 A.2d at 1349 (emphasis in original). The language in the Nationwide policy before us is nearly identical

also to the language in the policy considered in *Georgia Farm Bureau*, upon which *Perry* relies.

To the extent that plaintiff relies on the decisions in *Kubik* and other cases to support her position that the Exclusions section of the Nationwide policy does not include family members, we have satisfied ourselves that those cases are either distinguishable or unpersuasive.

Since the words "any person" as used in the Exclusions section of Nationwide's policy are not ambiguous and have no technical or otherwise defined meaning in the policy itself, they should be accorded their plain, everyday meaning. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978). As a result, "any person" encompasses *any* person, whether that person is the named insured, a family member or a third party, unless express exceptions in the policy, as in the sixth exclusion, provide otherwise.

[2] Plaintiff also argues that the "broad public policy goals" of the Financial Responsibility Act operate to nullify any exclusionary language in the Nationwide policy which contravenes those stated goals. On the facts here we disagree. The public policy goals of the Financial Responsibility Act apply only when the Act itself is being construed or when determinations are being made regarding the extent to which the Act as to its mandatory minimum coverages may override conflicting insurance policy provisions. Plaintiff has conceded that the Act itself provides no mandatory coverage to the tortfeasor here; this concession forecloses plaintiff's argument, as we understand it, on this point.

Neither do the cases relied on by plaintiff support this argument. The cases are *Nationwide Mut. Ins. Co. v. Aetna Life and Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964); and *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971). It is true that in all of these cases the courts refused to apply exclusionary provisions in insurance policies which conflicted with mandatory minimum coverage requirements of the Financial Responsibility Act. But in all the cases the courts first determined that the Financial Responsibility Act afforded mandatory coverage to the tortfeasor. In *Aetna* the tortfeasor was operating the motor vehicle with the permission of the named insured; in *Roberts* and *Webb* the tortfeasor was the named insured. Because of these facts in these cases, facts which are not present here, the Act

afforded mandatory minimum coverage despite any conflicting exclusionary provisions in the policies under consideration.

For the reasons given, the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for remand to the trial court for entry of judgment for Nationwide on the coverage issue.

REVERSED AND REMANDED.

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

STATE OF NORTH CAROLINA v. JOHN COY LYNCH

No. 87A92

(Filed 30 July 1993)

1. **Evidence and Witnesses §§ 2983, 2898.5 (NCI4th)— murder—details of prior convictions—not admissible—*Gibson* overruled**

The trial court erred in a first-degree murder trial by allowing the district attorney to exceed the scope of inquiry allowable under N.C.G.S. § 8C-1, Rule 609(a) in cross-examining defendant about prior convictions. Although the Court of Appeals in *State v. Harrison*, 90 N.C. App. 629, read *State v. Murray*, 310 N.C. 541, as broadening the scope of cross-examination about the facts of prior convictions and the Supreme Court took the same view in *State v. Gibson*, 333 N.C. 29, both the Court of Appeals and the Supreme Court overstated the holding in *Murray*. *Harrison* and *Gibson* are overruled and the rule stated in *State v. Finch*, 293 N.C. 132 and reaffirmed in *State v. Garner*, 330 N.C. 273, is affirmed. The State is prohibited from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under N.C.G.S. § 8C-1, Rule 609(a) in the guilt-innocence phase of a criminal trial.

Am Jur 2d, Witnesses § 926.

2. Evidence and Witnesses § 2916 (NCI4th)— murder—cross-examination—prior convictions—relevance

Details of defendant's prior convictions were not admissible in a murder prosecution where the State contended that the governing rule is N.C.G.S. § 8C-1, Rule 611(b) rather than 609(a) because the evidence arose during cross-examination rather than on direct. Rule 611(b) neither stands alone nor preempts other rules of evidence; evidence admissible during cross-examination remains subject to the limits of other rules governing relevancy, including Rules 402, 403, and 404, as well as Rule 609.

Am Jur 2d, Evidence §§ 339-341, 346.

3. Evidence and Witnesses § 263 (NCI4th)— murder—cross-examination of defendant—details of prior offenses—not admissible to rebut character evidence

The trial court erred in a first-degree murder prosecution in allowing the State to cross-examine defendant about the details of past convictions. Although the State argued that N.C.G.S. § 8C-1, Rule 404(a)(1) permits the prosecution to offer evidence of a pertinent trait of the defendant's character to rebut such evidence when offered first by the defendant, defendant's brief summary of his criminal record did not constitute evidence of a pertinent character trait for Rule 404(a)(1) purposes.

Am Jur 2d, Evidence §§ 339-341, 346.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR4th 402.

4. Evidence and Witnesses § 287 (NCI4th)— murder—cross-examination—prior offenses—not admissible

Evidence of a murder defendant's prior offenses was not admissible under N.C.G.S. § 8C-1, Rule 404(b) where the Supreme Court could discern no logical relationship between the details of the prior crimes brought out on cross-examination and the crimes charged.

Am Jur 2d, Evidence §§ 339-341, 346.

5. Evidence and Witnesses § 3019 (NCI4th)— murder—cross-examination—prior offenses—door not opened

A murder defendant did not open the door to cross-examination about prior offenses with his brief summary of

his criminal record. Although the State argued that it may elicit evidence on cross-examination that would be otherwise incompetent or irrelevant in order to rebut or explain evidence offered by the defendant, such cross-examination is permissible not to expose an entirely new line of inquiry otherwise impermissible under the Rules, but only to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom. Defendant's brief summary of his criminal record was accurate and complete and he did not use it to create inferences favorable to himself. The only purpose served by eliciting the details of the prior convictions was to create for the jurors an image of defendant as a person with a bad character who was inclined to commit crimes and who probably had no justification for the shootings in this case.

Am Jur 2d, Evidence § 341; Witnesses §§ 834 et seq.

6. **Evidence and Witnesses § 725 (NCI4th)— murder—cross-examination of defendant—other offenses—prejudicial**

There was prejudicial error in a first degree murder prosecution where the court permitted the State to cross-examine defendant about prior offenses. Defendant's defense was that he was subjected to a violent and unprovoked physical assault under circumstances which made him fear that his life was endangered by both of the victims; testimony pertinent to his self-defense claim was conflicting; and the jurors may have found defendant's claim of self-defense less persuasive, or may have been inclined to view defendant as more culpable, as a result of the detailed evidence tending to show that he was naturally prone to violence and had committed other unjustified assaults.

Am Jur 2d, Appeal and Error §§ 797 et seq.; Evidence §§ 339-341, 346; Witnesses §§ 834-836.

Admissibility of evidence of pertinent trait under Rule 404(a) of the Uniform Rules of Evidence. 56 ALR4th 402.

Appeal of right by defendant pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment upon his conviction of first-degree murder, entered by Allen (J.B., Jr.), J., on 15 October 1991 in Superior Court, Alamance County. Defendant was also convicted of voluntary manslaughter and sentenced

to twenty years imprisonment for that offense. On 22 September 1992 this Court allowed defendant's motion to bypass the Court of Appeals on the voluntary manslaughter conviction. Heard in the Supreme Court 15 April 1993.

Michael F. Easley, Attorney General, by G. Lawrence Reeves, Jr., Assistant Attorney General, for the State.

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

WHICHARD, Justice.

Following a capital trial defendant was found guilty of first-degree murder in the death of James Smith and of voluntary manslaughter in the death of Ted Cook. The jury recommended a sentence of life imprisonment for the murder conviction. The trial court entered judgment accordingly and imposed a sentence of twenty years for the manslaughter conviction. In this appeal defendant challenges the scope of the State's cross-examination regarding details of defendant's prior convictions. He argues the cross-examination violated the scope of inquiry allowable under Rule of Evidence 609(a) and that it was not independently admissible under Rule 611(b), Rule 404(a)(1), or Rule 404(b). We agree that the scope of the inquiry exceeded that which is permissible under these rules, and we accordingly award a new trial.

The evidence tended to show that in the early morning hours of 3 August 1990 defendant came to the trailer victims Smith and Cook shared with their respective girlfriends and children to buy cocaine or to collect money from previous drug dealings. An altercation ensued: Cook hit defendant repeatedly about the face and head, but defendant smiled and stood passively with his arms crossed, neither striking back nor saying anything. When defendant tried to leave, Cook stopped him at the door, threatened to give him "another ass-whipping" if he ever came back early in the morning, and pushed him out the door.

As he walked away from the trailer, defendant turned and said, "Don't worry, m----- f-----, I'll be back." Cook came after him, saying, "What did you say, m----- f-----?" Defendant immediately stopped and shot Cook three times at close range. Defendant began to run away, then turned and came back toward the trailer. He

entered the trailer holding a gun, and Smith pushed one of the women to the floor. Smith struck defendant rapidly with a hammer several times while defendant fired several shots at Smith. Both Smith and Cook died from gunshot wounds.

Whether Smith grabbed the hammer after defendant shot the gun the first time or whether it was already in his hand and was seen by defendant as he came inside was disputed at trial. The exact language of the threat issued by Cook was also disputed. Defendant asserted that Smith said, "We will kill you before you leave here." Defendant testified that the facts that this threat included Smith, and that he saw Smith nod to Cook immediately before Cook attacked him, made him fear an attack from Smith as well as from Cook.

At trial defendant began his testimony during direct examination with brief autobiographical information that included a summary of his criminal record. He admitted the following prior convictions: simple assault and being drunk and disruptive on 13 February 1980; carrying a concealed weapon on 29 April 1980; trespassing on 27 March 1981; being drunk and disruptive and carrying a concealed weapon on 17 September 1981; assault with a deadly weapon inflicting serious injury on 12 August 1982; and carrying a concealed weapon and possession of marijuana in Georgia in March 1985.

During cross-examination the prosecution asked defendant what type of weapon was involved in his 1980 conviction for carrying a concealed weapon. Defense counsel immediately objected. In the absence of the jury defense counsel argued that details of prior crimes should be impermissible for impeachment purposes under Rule 609(a) on the grounds that they are not germane to defendant's truthfulness. The court overruled these objections. The jury returned, and cross-examination by the District Attorney proceeded as follows:

> Q. Mr. Lynch, your 1980 conviction for carrying a concealed weapon, what kind of weapon was that?
>
> MR. MONROE [Defense Counsel]: Object for the record, your Honor.
>
> COURT: Overruled. You may answer.
>
> A. Brass knuckles.
>
> MR. MONROE: Move to strike from the record.

COURT: Motion denied.

Q. Your 1981 conviction for carrying a concealed weapon, what kind of weapon was that?

MR. MONROE: We object again, your Honor.

COURT: Objection overruled.

A. A box cutter.

MR. MONROE: Move to strike that.

COURT: Motion denied.

Q. Your 1985 conviction in Georgia for carrying a concealed weapon, what kind of weapon was that?

MR. MONROE: Object.

COURT: Overruled.

A. A lock-blade knife in a pouch on my side.

MR. MONROE: Move to strike.

COURT: Motion denied.

Q. In 1982 your assault with a deadly weapon inflicting serious injury, what kind of weapon did that involve?

A. A knife.

MR. MONROE: Object.

COURT: Overruled.

. . . .

MR. MONROE: . . . [M]ove to strike his answer then.

COURT: Motion denied.

Q. Your 1985 convictions for two counts of assault with a deadly weapon inflicting serious injury, what kind of weapon did they involve?

MR. MONROE: Object.

COURT: Objection overruled.

A. A gun.

Q. What kind of gun?

A. A .22 caliber pistol.

MR. MONROE: Move to strike the last two answers, your Honor.

COURT: Motion denied.

Q. And what sentence did you receive in that incident, October 12, 1985?

MR. MONROE: Object to that, your Honor.

COURT: Objection overruled.

A. I took a plea bargain for two counts of assault—assault with a deadly weapon inflicting serious bodily injury.

MR. MONROE: Move to strike.

COURT: Motion denied.

Q. What was the sentence, Mr. Lynch?

MR. MONROE: Object.

COURT: Objection overruled.

A. Six years.

MR. MONROE: Move to strike.

COURT: Motion denied.

The prosecution proceeded to inquire about a shooting incident in 1985 involving Shirley Sutton and Wesley Hall. Defense counsel entered a line objection to all further questioning about this incident and a motion to strike all related answers. Over these overruled objections, defendant answered numerous, detailed questions about his living arrangements with Sutton, words he spoke to her when he entered her home, his confusion about the circumstances, his confusion about whether he pled guilty to those shootings, and the fact that he was in a blackout at the time.

At the conclusion of defendant's evidence, defense counsel moved for a mistrial on the grounds that the excessive scope of cross-examination violated Rules 607, 608, 606, and 404 and prejudiced defendant. Defendant's motion was denied.

[1] When a defendant chooses to testify, evidence of prior convictions is admissible for the purpose of impeaching his credibility

under Rule 609(a). This rule provides: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter." N.C.G.S. § 8C-1, Rule 609(a) (1992). The permissible scope of inquiry into prior convictions for impeachment purposes is restricted, however, to the name of the crime, the time and place of the conviction, and the punishment imposed. *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 825 (1977). "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." *Id.* This Court recently reaffirmed this rule, stating that although *Finch* is a pre-Rules case, its limitations on inquiries concerning prior convictions are consistent with Rule 609(a). *State v. Garner*, 330 N.C. 273, 288-89, 410 S.E.2d 861, 870 (1991). In addition, the Court of Appeals has applied the *Finch* rule in a number of decisions holding that exceeding the limits stated in *Finch* is reversible error. *See, e.g., State v. Gallagher*, 101 N.C. App. 208, 211, 398 S.E.2d 491, 493 (1990); *State v. Wilson*, 98 N.C. App. 86, 91, 389 S.E.2d 626, 629 (1990); *State v. Rathbone*, 78 N.C. App. 58, 64, 336 S.E.2d 702, 705 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E.2d 582 (1986).

In *State v. Harrison*, 90 N.C. App. 629, 633-34, 369 S.E.2d 624, 626-27 (1988), however, the Court of Appeals read *State v. Murray*, 310 N.C. 541, 551, 313 S.E.2d 523, 530 (1984) as broadening the scope of cross-examination about facts of prior convictions beyond the *Finch* rule. In *State v. Gibson*, 333 N.C. 29, 47-48, 424 S.E.2d 95, 105 (1992), this Court took the same view. In the process, both the Court of Appeals and this Court overstated the holding in *Murray*, a pre-Rules case. The questions asked of the defendant in *Murray* related to the factual elements of the prior offenses and were descriptive of the particular crimes of which the defendant had been convicted. The questions did not relate to tangential circumstances of the offenses involved, as did the questions here. See *Murray*, 310 N.C. at 549-50, 313 S.E.2d at 529-30. More importantly, in *Gibson* this Court overlooked a holding in *Garner*, a case filed only a little over a year earlier, which held that the *Finch* limitations on inquiries concerning prior convictions comported with Rule 609(a). *Murray*, then, was a pre-Rules case which

did not expand the *Finch* rule to the extent we held it did in *Gibson*, while *Garner* was a post-Rules case that expressly confirmed the applicability of the *Finch* limitations in interpreting and applying Rule 609(a).

"This Court has never overruled its decisions lightly. No court has been more faithful to *stare decisis.*" *Rabon v. Hospital*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967); *see also Mial v. Ellington*, 134 N.C. 131, 139, 46 S.E. 961, 963-64 (1903). Here, however, we are forced to acknowledge that in *Gibson* we overruled, *sub silentio*, our recent precedent established in *Garner*. Thus, we now face conflicting lines of authority in our recent decisions, one represented by *Garner* and the other by *Gibson*. Both lines cannot stand; we must declare to which line we will adhere.

In the interest of clarity and certainty for the bench and bar, we conclude that we should overrule *Harrison* and *Gibson* and adhere to the rule established in *Garner*, *viz*, that the "*Finch* . . . limitations on inquiries concerning prior convictions are consistent with rule 609(a)." *Garner*, 330 N.C. at 288-89, 410 S.E.2d at 870. For the "[s]trong policy reasons" stated in *Finch*, we again reaffirm the rule stated therein prohibiting the State from eliciting details of prior convictions other than the name of the crime and the time, place, and punishment for impeachment purposes under Rule 609(a) in the guilt-innocence phase of a criminal trial. This result conforms to the federal practice and to the generally prevailing state practice. *See, e.g., United States v. Harding*, 525 F.2d 84, 88-89 (7th Cir. 1975); *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987). *See generally* Wade R. Habeeb, Annotation, *Propriety, on Impeaching Credibility of Witness in Criminal Case by Showing Former Conviction, of Questions Relating to Nature and Extent of Punishment*, 67 A.L.R. 3d 775 (1975). In this case, we hold the prosecution's repeated inquiries into the facts of prior crimes improperly exceeded the *Finch* limitations on admissibility of evidence of prior convictions for impeachment purposes under Rule 609(a).

[2] Alternatively, the State contends that because the prior crimes evidence here arose during cross-examination rather than on direct, the governing rule is Rule 611(b), not Rule 609(a) or the *Finch* rule. Rule 611(b) provides: "A witness may be cross-examined on any matter relevant to any issue in the case, including credibility." N.C.G.S. § 8C-1, Rule 611(b) (1992). Rule 611(b), however, neither stands alone nor preempts other rules of evidence. It allows cross-

examination only on matters *relevant* to issues in the case; " '[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." N.C.G.S. § 8C-1, Rule 401 (1992). Evidence admissible during cross-examination remains subject to the limits of other rules governing relevancy, including Rules 402, 403, and 404, as well as to Rule 609.

[3] The State also argues that Rule 404(a)(1) permits the prosecution to offer evidence of a pertinent trait of the defendant's character to rebut such evidence when offered first by the defendant, despite the general prohibition in that rule against character evidence. Typically, Rule 404(a)(1) authorizes the prosecution to delve into examples of the defendant's violent actions when the defendant has put his character into evidence by testifying, for example, about his peaceable nature. *E.g.*, *State v. Syriani*, 333 N.C. 350, 382, 428 S.E.2d 118, 133 (1993) (cross-examination about defendant's threats and acts of violence toward his wife and children permissible after defendant testified that he was a loving husband and father); *State v. Garner*, 330 N.C. at 289-90, 410 S.E.2d at 870 (cross-examination on details of defendant's prior assaults on his wife properly allowed after defendant put on evidence of his general good character and devotion to her).

If in this case defendant had offered testimony about his peaceable nature or other positive character trait, the prosecution would have been entitled under Rule 404(a)(1) to rebut such character evidence by showing his prior violent crimes and drug use. Defendant's brief summary of his criminal record did not constitute evidence of a pertinent character trait for Rule 404(a)(1) purposes, however. Because he did not put his general character in evidence, the State was not entitled to do so in the guise of rebuttal.

[4] The State also argues detailed evidence of prior crimes is admissible under Rule 404(b), which provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). Rule 404(b) operates as a general rule of inclusion, but it excludes evidence if its *only* probative value relates to the defendant's character or propensity to commit the crimes. *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). The admissibility of evidence under this rule is guided by two further constraints—similarity and temporal proximity. *State v. Price*, 326 N.C. 56, 69, 388 S.E.2d 84, 91 (1990), *judgment vacated on other grounds*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *judgment vacated on other grounds*, --- U.S ---, 122 L. Ed. 2d 113 (1993).

In the case before us, we cannot discern any logical relationship between the details of the prior crimes brought out on cross-examination and the crimes charged. That the defendant had used various weapons in other crimes had no bearing on any element of the offenses for which he was being tried, and the 1985 assault incidents involving Shirley Sutton and Wesley Hall were not only remote in time but were factually dissimilar from the present case. Neither the prosecution nor the trial court suggested any grounds on which the evidence objected to might be relevant to the present charges. The State argues that the fact that a blackout prevented defendant from accurately remembering the details of the 1985 shooting might indicate an inability to remember details of the incident resulting in his current charges. Because nothing in the record suggests defendant was in a blackout during the latter incident or that he has other memory problems, we find that argument unpersuasive.

[5] Finally, the State also argues it may elicit evidence on cross-examination that would be otherwise incompetent or irrelevant in order to rebut or explain evidence offered by the defendant. *State v. Garner*, 330 N.C. at 290, 410 S.E.2d at 80. Such cross-examination is permissible, however, not to expose an entirely new line of inquiry otherwise impermissible under the Rules, but only to correct inaccuracies or misleading omissions in the defendant's testimony or to dispel favorable inferences arising therefrom. For example, when the defendant "opens the door" by misstating his criminal record or the facts of the crimes or actions, or when he has used his criminal record to create an inference favorable to himself, the prosecutor is free to cross-examine him about details of those prior crimes or actions. *See, e.g., State v. Darden*, 323 N.C. 356, 372 S.E.2d 539 (1988); *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984).

In this case, however, defendant's brief summary of his criminal record was accurate and complete, and he did not use it to create inferences favorable to himself. Instead, his testimony raised unfavorable inferences: that he lied in his initial statement to police, that he was a drug user, that he routinely carried a pistol, and that he had numerous prior convictions. Such accurate yet unfavorable testimony did not open the door to further damaging questions about the details of his prior crimes.

The only purpose served by eliciting the details of the prior convictions here was to create for jurors an image of defendant as a person with a bad character who was inclined to commit crimes and who, as a man who carried weapons and had a propensity for engaging in violent crimes without justification, probably had no justification for the shootings in this case. This is precisely the inference, logically unrelated to the offenses for which defendant was on trial, that the *Finch* rule prohibits.

[6] In summary, the trial court erred in allowing cross-examination of defendant about details of his prior convictions in that: (1) such inquiry exceeded the scope allowable for impeachment purposes under Rule 609(a); (2) it was not authorized by Rule 404(a) because defendant did not put his character into evidence; (3) it bore no logical relevance to the crimes charged that would render it admissible under Rule 404(b), and (4) it was not admissible to refute any inaccurate or misleading testimony or inferences raised by defendant. Defendant's defense was that he was subjected to a violent and unprovoked physical assault under circumstances which made him fear that his life was endangered by both of the victims. Testimony pertinent to his self-defense claim was conflicting. The jurors may well have found defendant's claim of self-defense less persuasive, or may have been more inclined to view defendant as more culpable, as a result of the detailed evidence tending to show that he was naturally prone to violence and had committed other unjustified assaults. Because defendant's defense was self-defense, we cannot conclude that the error was harmless. *See* N.C.G.S. § 15A-1443(a) (1988). Accordingly, defendant is entitled to a new trial.

In view of this disposition and of the improbability that other errors asserted will recur at defendant's new trial, we need not address defendant's remaining assignments of error.

NEW TRIAL.

JANICE HARDING v. NORTH CAROLINA DEPARTMENT OF CORRECTION

JANICE HARDING v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 113PA93
No. 114PA93

(Filed 30 July 1993)

1. **Administrative Law and Procedure § 54 (NCI4th); Public Officers and Employees § 63 (NCI4th)— State employee grievance—appellate jurisdiction of superior court**

N.C.G.S. §§ 7A-250(a) and 150B-43 confer on the superior courts only appellate jurisdiction over final decisions of the State Personnel Commission on State employee grievances.

Am Jur 2d, Administrative Law § 560; Civil Service §§ 52 et seq.

2. **Administrative Law § 65 (NCI4th)— decision of State Personnel Commission—superior court review**

The superior court's review of a final decision of the State Personnel Commission is limited to (1) determining whether the Commission heard new evidence after receiving the decision of the Office of Administrative Hearings and (2) affirming, remanding for further proceedings, reversing, or modifying the Commission's decision.

Am Jur 2d, Administrative Law § 730.

3. **Public Officers and Employees § 59 (NCI4th)— State employee—amount of back pay—no jurisdiction in superior court—jurisdiction of State Personnel Commission**

The superior court lacked jurisdiction to enter an order awarding a specific amount of back pay to a State employee given the authority of the State Personnel Commission over back pay, the absence of record findings of fact by the Commission, and the superior court's lack of fact-finding authority in appeals from employee grievances. A request for determination of the amount of back pay to which petitioner was entitled should have been addressed to the Commission.

Am Jur 2d, Civil Service § 48.

4. Contempt of Court § 8 (NCI4th)— void order—no basis for contempt

Where the superior court lacked jurisdiction to order respondent State agency to pay a specific amount of back pay to petitioner, the order could not be the basis of punishment for civil contempt.

Am Jur 2d, Contempt §§ 4, 5, 13 et seq.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous. 12 ALR2d 1059.

Case Number 113PA93 on discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order enforcing a judgment for petitioner entered 16 October 1992 by Farmer, J., in Wake County Superior Court. Heard in the Supreme Court 10 May 1993.

Case Number 114PA93 on discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of an order directing respondent to appear and show cause why it should not be punished for civil contempt entered 9 November 1992 by Farmer, J., in Wake County Superior Court. Heard in the Supreme Court 10 May 1993.

Schiller Law Offices, by Marvin Schiller, for petitioner-appellee Janice Harding.

Attorney General Michael F. Easley, by Assistant Attorney General Valerie L. Bateman, for respondent-appellant North Carolina Department of Correction.

PARKER, Justice.

The issues presented by these two cases are whether the superior court erred (i) in determining the amount of back pay due petitioner and in ordering respondent to make payment thereof and (ii) in issuing a show cause order for contempt proceedings upon respondent's failure to comply with the order. We conclude the court lacked jurisdiction to enter the order purporting to enforce the prior award of back pay and that the order could not be the basis for contempt.

Since the underlying facts are set out in *Harding v. N.C. Dept. of Correction*, 106 N.C. App. 350, 416 S.E.2d 587 ("*Harding I*"), *disc. rev. denied*, 332 N.C. 147, 419 S.E.2d 567 (1992), we repeat here only those facts necessary to an understanding of these appeals. Petitioner's grievance arising from respondent's refusal to reinstate her was heard in the Office of Administrative Hearings, and the administrative law judge recommended that the adverse personnel action be reversed. The State Personnel Commission ("the Commission"), however, ordered that respondent's decision remain undisturbed. On appeal the superior court reversed the decision of the Commission and ordered the following:

> [T]hat the Decision and Order of the State Personnel Commission dated December 13, 1989, is reversed. The Petitioner shall be reinstated in her employment with back pay, awarded attorneys fees and afforded all benefits of continuous state employment. *Accordingly, this matter is hereby remanded to the State Personnel Commission for entry of an order and for further proceedings not inconsistent with this Judgment.*

(Emphasis added.) The Court of Appeals affirmed. *Harding I*, 106 N.C. App. at 356, 416 S.E.2d at 591.

After this Court declined to review the decision of the Court of Appeals, petitioner's attorney wrote to respondent's counsel on 16 July 1992 to request expeditious calculation and payment of back pay. Although petitioner was reinstated, she soon became unable to work because of deteriorating arthritic function and stopped work on the advice of her doctor. Negotiations over back pay continued but the parties failed to reach an agreement. In September 1992 petitioner filed a document entitled "Motion for Enforcement of Judgment and Other Relief" in Wake County Superior Court. Citing the prior superior court order directing that petitioner be reinstated with back pay, petitioner alleged that respondent "intentionally, deliberately and wilfully refused to comply with the" order. Petitioner requested the superior court to

> order that the actual payment of the back pay be made by Respondent no later than October 15, 1992[,] and to award Petitioner interest at the legal rate of 8% from July 8, 1992[,] until the back pay is paid and for further attorneys [sic] fees to be paid to Mrs. Harding's attorney for the time he has devoted or will devote to obtaining her back pay and to issue a civil fine in the amount of $10,000.00 against Respondent

for willful failure to comply with the Court's Judgment, find the Respondent in Contempt of Court and order all other necessary and appropriate relief.

After a hearing the superior court ordered respondent to pay petitioner back pay in the amount of $86,806.01 no later than 31 October 1992, with interest at the legal rate of eight percent from 8 July 1992. The court also ordered respondent to pay attorney's fees but made no findings as to the amount due. On 30 October 1992 respondent gave notice of appeal to the Court of Appeals.

Respondent did not comply with this order, and petitioner moved that V. Lee Bounds, Secretary for the Department of Corrections, appear and show cause why he should not be punished for civil contempt. On 9 November 1992 the superior court ordered that Bounds appear and show cause on 20 November 1992; on 12 November respondent gave notice of appeal to the Court of Appeals.

On 15 March 1993 respondent petitioned this Court for discretionary review prior to determination of its appeals by the Court of Appeals. Respondent also moved to consolidate the two appeals with that in *North Carolina Department of Transportation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993), arguing in part that the disposition in the latter case would affect respondent's appeals. This Court granted the petitions and motions on 31 March 1993.

On the issue of subject matter jurisdiction, we note first that in *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990), this Court addressed the issue of jurisdiction of other tribunals over appeals of state employee grievances. Of the Office of Administrative Hearings ("OAH"), this Court said:

> The jurisdiction of the OAH over the appeals of state employee grievances derives not from Chapter 150B, but from Chapter 126. The administrative hearing provisions of Article 3, Chapter 150B, do not establish the right of a person "aggrieved" by agency action to OAH review of that action, but only describe the procedures for such review. *See* N.C.G.S. § 150B-23(a) (1987). The purpose of that Chapter is narrowly defined: "to establish as nearly as possible a uniform system of administrative rule making and adjudicatory procedures for State agencies." N.C.G.S. § 150B-1(b) (1987).

Batten, 326 N.C. at 342-43, 389 S.E.2d at 38. Furthermore, "only section 126-37 confers upon the State Personnel Commission or upon the OAH the jurisdiction, or power, to deal with the action in question." *Id.* at 343, 389 S.E.2d at 39 (referring to appeal of grievance arising from reallocation of employee). The latter statute provides in pertinent part:

> Appeals involving a disciplinary action, alleged discrimination, and any other contested case arising under this Chapter [126] shall be conducted in the Office of Administrative Hearings as provided in Article 3 of Chapter 150B; provided that no grievance may be appealed unless the employee has complied with G.S. 126-34. The State Personnel Commission shal[l] make a final decision in these cases as provided in G.S. 150B-36. The State Personnel Commission is hereby authorized to reinstate any employee to the position from which he has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied *or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority.*

N.C.G.S. § 126-37(a) (1991) (emphasis added).

[1] Jurisdiction of the superior courts over final decisions of the Commission derives not from Chapter 126, but from Chapters 7A and 150B. The former chapter provides in pertinent part:

> Except as otherwise provided in subsections (b) and (c) of this section, the superior court division is the proper division, without regard to the amount in controversy, for review by original action or proceeding, or *by appeal, of the decisions of administrative agencies, according to the practice and procedure provided for the particular action, proceeding, or appeal.*

N.C.G.S. § 7A-250(a) (1989) (emphasis added).

The Administrative Procedure Act provides as follows:

> Any person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article, unless adequate procedure for judicial review is provided by

> another statute, in which case the review shall be under such other statute. Nothing in this Chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article.

N.C.G.S. § 150B-43 (1991). By their plain language these statutes confer on the superior courts only appellate jurisdiction over final decisions of the Commission on state employee grievances.

[2] As in *Batten*, "practice and procedure" are provided by statutes other than those conferring jurisdiction. On appeal to the superior court from the Commission's final decision, appellate procedure is governed exclusively by Chapter 150B. The Commission is required to transmit a copy of the official record in a contested case to the superior court. N.C.G.S. § 150B-47. Although on appeal a party may apply to the superior court to present additional evidence, the court cannot hear such evidence but may only remand for the taking of additional evidence. N.C.G.S. § 150B-49. The court's review is limited to (i) determining whether the Commission heard new evidence after receiving the decision of the OAH and (ii) affirming, remanding for further proceedings, reversing, or modifying the Commission's decision. N.C.G.S. § 150B-51. Construing a prior enactment of the latter statute, the Court of Appeals said credibility of witnesses and resolution of conflicts in their testimony is for the agency, not the reviewing court. *In re Dailey v. Board of Dental Examiners*, 60 N.C. App. 441, 444, 299 S.E.2d 473, 476, *rev'd on other grounds*, 309 N.C. 710, 309 S.E.2d 219 (1983). In addition, "[a]gency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986).

The foregoing statutory procedures constitute the only authority for a state employee to sue the State for an employee grievance. As this Court stated in *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E.2d 618 (1983):

> "When statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action."

Id. at 539, 299 S.E.2d at 628 (quoting *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961)) (citations omitted).

This Court has previously recognized that under applicable statutes, whether to award back pay is within the discretion of the Commission. *Jones v. Dept. of Human Resources*, 300 N.C. 687, 691-92, 268 S.E.2d 500, 503 (1980) (citing N.C.G.S. §§ 126-4, -37). Pursuant to its statutory rulemaking authority, N.C.G.S. § 126-4, the Commission has enacted detailed rules governing back pay and the calculation thereof. 25 NCAC 1B .0421 (Oct. 1991). For example, gross back pay must be reduced by interim earnings, except earnings from secondary employment approved prior to dismissal. *Id.* 1B .0421(c). In addition, back pay must "include any across the board compensation which would have been included in the grievant's regular salary except for the interruption in employment." *Id.* 1B .0421(i). Further, "[i]f the grievant's longevity eligibility date occurred during the period of interrupted employment, back pay shall include the difference between the pro-rated longevity payment made at dismissal and the amount of longevity pay that would have been payable had employment not been interrupted." *Id.* 1B .0421(j). "Back pay must be applied for on Office of State Personnel form PD 14." *Id.* 1B .0421(k). These and other rules require the Commission to make findings of fact, even though no rule addresses this specific issue.

[3] The record before this Court does not include any back pay findings by the Commission. Given the authority of the Commission over back pay, the absence of record findings, and the superior court's lack of fact-finding authority in appeals from employee grievances, the superior court in the instant case could not enter an order awarding back pay in a specific amount. Therefore, we hold the superior court erred in ordering respondent to pay petitioner back pay in the amount of $86,806.01.

In light of the Commission's authority over back pay, that tribunal is the proper forum for resolution of the issues raised by petitioner's motion. Under the authority of *Meyers v. Dept. of Human Resources*, 105 N.C. App. 665, 415 S.E.2d 70, *aff'd in part*, 332 N.C. 655, 422 S.E.2d 576 (1992), the request for determination of the amount of back pay to which petitioner was entitled should have been addressed to the Commission.

[4] Because the superior court lacked jurisdiction to enter the order for enforcement of judgment directing respondent to pay petitioner back pay, the order was invalid. Accordingly, we also hold the court erred in issuing the show cause order. "Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. *State v. Black*, 232 N.C. 154, 59 S.E.2d 621 (1950)." *In re Smith*, 301 N.C. 621, 633, 272 S.E.2d 834, 842 (1981); *see also Harding v. Harding*, 46 N.C. App. 62, 64, 264 S.E.2d 131, 132 (1980) (stating that since court had no jurisdiction to expand contract obligations, order purporting to do so was void and violation of the order could not be basis for contempt).

For the foregoing reasons, the order entered 16 October 1992 purporting to enforce the prior judgment by awarding $86,806.01 in back pay and the order to show cause are vacated.

VACATED.

BOARD OF ADJUSTMENT OF THE TOWN OF SWANSBORO, IAN SMITH, MARY ELLEN YANICH, LELAND ZIEGLER, ALLEN E. GUIN, WESLEY STANLEY, AND RAYMOND C. FRENCH, JR. v. THE TOWN OF SWANSBORO, A MUNICIPAL CORPORATION, MATTHEW TEACHEY, JOHN D. LICKO, MARK J. ALEXANDER, AND VERNON TAYLOR (IN THEIR OFFICIAL CAPACITIES AS THE PURPORTED MEMBERS OF THE BOARD OF ADJUSTMENT OF THE TOWN OF SWANSBORO), JOAN DEATON, LESLIE W. EDMONDS, JR., GEORGE W. KIETZMAN, AND PAUL W. EDGERTON (IN THEIR OFFICIAL CAPACITIES AS THE BOARD OF COMMISSIONERS OF THE TOWN OF SWANSBORO), AND WILLIAM E. RUSSELL, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE TOWN OF SWANSBORO

No. 16A93

(Filed 30 July 1993)

Municipal Corporations § 154 (NCI4th)— board of adjustment—abolition of old board and creation of new—power of board of commissioners

A town board of commissioners has the authority to abolish a board of adjustment and to thereafter create a new board of adjustment and make appointments thereto. The fact that defendants' action had the effect of shortening the terms of some of the old board members is not dispositive. Statutes dealing with the same subject matter must be construed *in*

pari materia and harmonized, if possible, to give effect to each. Construing N.C.G.S. § 160A-388(a) and N.C.G.S. § 160A-146 together, if the board of commissioners creates a separate board of adjustment, then it must consist of at least five appointees, each for three year terms, and those terms may not be reduced by the board of commissioners as long as that board of adjustment is in existence. However, the prohibition against the reduction in the length of the terms of the members of the existing board of adjustment does not diminish the authority of the board of commissioners to abolish the board of adjustment. The board of commissioners cannot abolish and reestablish the board of adjustment at its whim; any such actions would require amendments to the zoning ordinance, as was carried out in this case, following newspaper publication of notice of public hearing, the holding of a public hearing, and the subsequent adoption of an amendment.

Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 140 et seq.

Appeal by plaintiffs 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. 198, 423 S.E.2d 498 (1992), affirming a judgment granting defendants' motion for summary judgment entered by Trawick, J., at the 29 April 1991 Civil Session of Superior Court, Onslow County. Heard in the Supreme Court 13 May 1993.

Jeffrey S. Miller for plaintiff-appellants.

Richard L. Stanley for defendant-appellees.

MEYER, Justice.

The issue that we must resolve in this case is whether the power of a town's board of commissioners to organize city government pursuant to N.C.G.S. § 160A-146 includes the power to abolish a board of adjustment, appointed and created pursuant to N.C.G.S. § 160A-388, and to thereafter create a new board of adjustment and make appointments thereto. We conclude that the Court of Appeals was correct in affirming the trial court's granting of defendants' motion for summary judgment and hold that a town Board of Commissioners has such authority.

The facts pertinent to this appeal are as follows. On 20 September 1985, the Board of Commissioners of the Town of Swansboro, North Carolina, enacted Section 9-2-16 of its Code of Ordinances, which provided, among other things, that:

> The Swansboro Board of Commissioners shall provide for the appointment of the Board of Adjustment consisting of five (5) members who must be bonafide [sic] residents of The Town of Swansboro and two (2) members who reside outside The Town of Swansboro and are bonafide [sic] residents of the area of zoning jurisdiction as stated in Sec. 9-2-4 herein. Insofar as possible, members shall be appointed from different areas within the zoning jurisdiction. Initial appointments shall be for staggered terms with subsequent appointments being for three (3) years.

On 8 June 1989, plaintiffs Ian Smith and Mary Ellen Yanich were appointed to the Swansboro Board of Adjustment for three-year terms. On 9 November 1989, plaintiff Leland Ziegler was appointed to the Board of Adjustment for a three-year term.

On 14 December 1989, at a meeting of the Board of Commissioners, defendant Mayor William E. Russell presented a proposed change to Section 9-2-16 regarding the appointments and terms of the members of the Board of Adjustment. On 27 December 1989 and again on 3 January 1990, the Board of Commissioners published the following notice in a local newspaper:

> PUBLIC HEARING NOTICE
>
> The Board of Commissioners of the Town of Swansboro will hold a public hearing on Thursday[,] January 11, 1990 at 6:30 p.m. to give parties of interest an opportunity to be heard on the proposed ordinance amendment regarding length of appointment terms, etc. for the Board of Adjustment.
>
> Town Administrator

At the public hearing, the Board of Commissioners voted to readvertise notice of the public hearing in order to inform the public that one of the purposes of the proposed amendment was to abolish the Board of Adjustment. On 17 January and again on 24 January 1990, the Board of Commissioners published the following notice:

PUBLIC HEARING
TOWN OF SWANSBORO

The Board of Commissioners of the Town of Swansboro will hold a public hearing on Thursday, January 25, 1990 at 7:00 p.m. to give parties of interest an opportunity to be heard on the changes to the Town of Swansboro Zoning Ordinance, in respect to abolishing the Board of Adjustment. A copy of the proposed change is on file with the Town Clerk's Office. Additional amendments may be presented and changes made prior to adoption.

Town Administrator

At the 25 January 1990 public hearing, the Board of Commissioners adopted an amendment to Section 9-2-16, which provides as follows:

Section 1

Section 9-2-16(a) of the Zoning Ordinance of the Town of Swansboro is hereby repealed and the Board of Adjustment established therein is abolished.

Section 2

Section 9-2-16(a) of the Zoning Ordinance of the Town of Swansboro is hereby adopted to read as follows:

Sec. 9-2-16 The Board of Adjustment.

(a) The Swansboro Board of Commissioners shall provide for the appointment of the Board of Adjustment consisting of five (5) members and two (2) alternate members who must be bonafide [sic] residents of the Town of Swansboro and two (2) members and one (1) alternate member who reside outside the Town of Swansboro and are bonafide [sic] residents of the area of the zoning jurisdiction as stated in Sec. 9-2-4 herein. Insofar as possible, members shall be appointed from different areas within the zoning jurisdiction. Members of the Town governing body, Mayor and Commissioners, are not eligible to serve on the Board of Adjustment while serving on the governing body or for a period of one (1) year after service on the governing body is terminated. All appointments to the Board of Adjustment shall be for three (3) years. However,

> to allow for staggered terms, three (3) initial appointments of in-town members will be for periods of two (2) years. All other appointments will be for three (3) year terms. Previous Board of Adjustment members who are eligible under the criteria established by this section may be considered for appointment to the Board of Adjustment. An appointee to the Board of Adjustment may serve no more than two (2) consecutive terms, provided however, that if an appointee has served more than half of any term, the appointee shall be considered to have served the full three (3) year term on the Board of Adjustment.

At the 8 February 1990 regular meeting of the Board of Commissioners, appointments were made to the new Board of Adjustment. None of the members of the old Board were appointed. Plaintiffs Yanich and Ziegler, as former members of the City Council, were ineligible for appointment to the new Board pursuant to the changes effected by the amendment to Section 9-2-16. On 21 March and 28 March 1990, the Board of Commissioners readvertised notice of public hearing and held a public hearing on 3 April 1990 to once again consider the proposed amendment to Section 9-2-16. Following the hearing, the Board of Commissioners adopted Section 9-2-16 in the same form as that adopted at the 25 January 1990 public hearing, the amendment to become effective after 16 April 1990.

On 26 April 1990, the trial court denied plaintiffs' motion for a preliminary injunction. On 20 August 1990, plaintiffs filed a motion for summary judgment. On 30 August 1990, defendants filed a motion for summary judgment. On 1 May 1991, the trial court granted defendants' motion for summary judgment. Following an appeal by plaintiffs, the Court of Appeals affirmed the trial court's granting of defendants' motion for summary judgment, with one judge dissenting. *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 108 N.C. App. 198, 423 S.E.2d 498 (1992).

Plaintiffs contend that defendants shortened the three-year terms of Smith, Yanich, and Ziegler and therefore violated N.C.G.S. § 160A-388(a). Plaintiffs argue that N.C.G.S. § 160A-388(a) mandates that all Board of Adjustment members serve for three years. We disagree.

N.C.G.S. § 160A-388(a) provides in pertinent part:

> The city council may provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three years.

N.C.G.S. § 160A-388(a) (Supp. 1992). Subsection (a) expressly provides that "the city council *may* provide for the appointment and compensation of a board of adjustment." (Emphasis added.) Whether to appoint a board of adjustment is left to the discretion of the city council. "Essentially the governing body has three options: (a) provide no agency of this type; (b) designate another 'planning agency' to perform the duties of a Board of Adjustment; or (c) create a Board of Adjustment." Michael B. Brough & Philip P. Green, Jr., *The Zoning Board of Adjustment in North Carolina* 33 (2d ed. 1984).

N.C.G.S. § 160A-146 grants to city councils the right to organize city government and provides:

> The council may create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the city government and generally organize and reorganize the city government in order to promote the orderly and efficient administration of city affairs, subject to the following limitations:
>
> (1) The council may not abolish any office, position, department, board, commission, or agency established and required by law;
>
> (2) The council may not combine offices or confer certain duties on the same officer when such action is specifically forbidden by law;
>
> (3) The council may not discontinue or assign elsewhere any functions or duties assigned by law to a particular office, position, department, or agency.

N.C.G.S. § 160A-146 (1987). This statute empowers the city council (here, called the Board of Commissioners) to create and abolish boards that are not established and required by law. As we have previously noted, the establishment of a board of adjustment is not required by law, and therefore, pursuant to N.C.G.S. § 160A-146, the Board of Commissioners has the authority to abolish a board of adjustment.

We agree with the Court of Appeals' conclusion that "[t]he fact that defendants' action had the effect of shortening the terms of some of the old Board members is not dispositive." *Bd. of Adjmt.*, 108 N.C. App. at 205, 423 S.E.2d at 502. Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each. *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 167, 166 S.E.2d 78, 86 (1969). In the case *sub judice*, construing N.C.G.S. § 160A-388(a) and N.C.G.S. § 160A-146 together, if the Board of Commissioners creates a separate Board of Adjustment, then it must consist of at least five appointees, each for three-year terms. Such terms may not be reduced by the Board of Commissioners as long as that Board of Adjustment is in existence. However, the prohibition contained in N.C.G.S. § 160A-388(a) against the reduction of the length of the terms of the members of the existing Board of Adjustment does not diminish the authority of the Board of Commissioners to abolish the Board of Adjustment pursuant to N.C.G.S. § 160A-146.

Contrary to plaintiffs' assertions, the Board of Commissioners could not abolish and reestablish a Board of Adjustment and appoint and reappoint at its whim. Any such actions would require amendments to the zoning ordinance, as carried out by the Town of Swansboro in this case, following newspaper publication of notice of the public hearing, the holding of a public hearing, and the subsequent adoption of an amendment. The public hearings ensure accountability to the public with regard to any such action by the Board of Commissioners. The Board of Commissioners of the Town of Swansboro conducted the required public hearings after proper notice to the public from November 1989 through April 1990. We affirm the decision of the Court of Appeals.

AFFIRMED.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. RONALD E. DAVENPORT

No. 3A93

(Filed 30 July 1993)

Contempt of Court § 2 (NCI4th); State § 4.2 (NCI3d)— State agency—contempt of court—sovereign immunity

Because the State of North Carolina has not consented to be subject to the contempt power of the courts, the doctrine of sovereign immunity barred the superior court from holding the N.C. Dept. of Transportation, an administrative agency of the State, in contempt. Therefore, the superior court erred in issuing an order requiring the Dept. of Transportation to appear and show cause why it should not be held in contempt for failure to obey a prior order directing the reinstatement of respondent employee.

Am Jur 2d, Contempt §§ 2, 62 et seq.; States, Territories, and Dependencies §§ 99-104.

Appeal by respondent Davenport 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. 178, 423 S.E.2d 327 (1992), reversing the order of Farmer, J., at the 31 May 1991 session of Superior Court, Wake County. Heard in the Supreme Court 10 May 1993.

Attorney General Michael F. Easley, by Assistant Attorney General Patsy Smith Morgan, for petitioner-appellee North Carolina Department of Transportation.

Crisp, Davis, Page, Currin & Nichols, by M. Jackson Nichols, for respondent-appellant.

PARKER, Justice.

The issue presented by this case is whether respondent Davenport could petition the superior court for a show cause order against petitioner the North Carolina Department of Transportation ("DOT"), an administrative agency of the State, for contempt pursuant to N.C.G.S. § 5A-11(a)(3) or § 5A-21. For reasons which follow we conclude no action for contempt will lie against petitioner.

This case arose from the dismissal of respondent Davenport from employment by petitioner. Respondent was employed from 5 August 1967 to 27 March 1987, when he was suspended. He was dismissed on 3 September 1987. Respondent petitioned the Office of Administrative Hearings for a hearing pursuant to the Administrative Procedure Act, *see* N.C.G.S. § 150B-23(a) (1991). An administrative law judge concluded respondent was dismissed without just cause and recommended reinstatement with back pay. The State Personnel Commission ("the Commission") adopted the administrative law judge's recommendation on reinstatement but rejected the conclusion that respondent was entitled to back pay. DOT then petitioned the superior court for review of the Commission's final decision. On review the superior court affirmed reinstatement but modified the Commission's decision by ordering that respondent receive back pay. Petitioner appealed and the Court of Appeals affirmed the decision of the superior court affirming reinstatement and awarding back pay. *N.C. Dept. of Transportation v. Davenport*, 102 N.C. App. 476, 402 S.E.2d 477 (1991).

Prior to dismissal respondent's title was "District Engineer" in petitioner's Lenoir County, North Carolina, district office, and respondent's pay grade was 77. Upon returning to work respondent's new title was "Division Operations Engineer" in Wilson, North Carolina, and his pay grade was 77.

On 22 May 1991 respondent moved in Wake County Superior Court for an order directing petitioner to appear and show cause why it should not be held in contempt for failure to obey the prior order directing reinstatement of respondent. Respondent's motion stated that "reinstatement" as ordered by the superior court meant reinstatement to his former position and not employment in a comparable position. The motion also stated respondent's adjusted salary included only legislative increases and no additional compensation for his extended commute. Petitioner moved to dismiss the contempt proceeding and for summary judgment, alleging the court lacked personal and subject matter jurisdiction. The court denied the motion to dismiss and ordered that

> 1. The Department of Transportation appear before this court on July 22, 1991, at 10:00 a.m., or as soon thereafter as counsel can be heard, then and there to show cause why Respondent should not be adjudged guilty o[f], and punished

> for contempt of court because of Respondent's failure to reinstate Petitioner in his previous position . . . .

Petitioner appealed to the Court of Appeals and petitioned for writ of certiorari, which the Court of Appeals granted to consider whether the superior court lacked subject matter jurisdiction.

The Court of Appeals concluded the superior court did not have subject matter jurisdiction to hear the contempt proceeding because in appeals from agency decisions, the superior court sits as an appellate court and may not make findings of fact. *N.C. Dept. of Transportation v. Davenport*, 108 N.C. App. 178, 181, 423 S.E.2d 327, 329 (1992), *motion to dismiss appeal denied*, 333 N.C. 463, 430 S.E.2d 676 (1993). The court thus held petitioner's motion to dismiss should have been granted. Dissenting, Judge Wells stated that in denying petitioner's motion to dismiss, the superior court judge "was not acting in an appellate review context. He was acting in response to Mr. Davenport's motion to require the DOT to do what it had been ordered to do in Judge Weeks' judgment." *Id.*

Since the superior court's order was directed to an administrative agency of the State of North Carolina, the threshold question is whether the court had authority to hold the sovereign in contempt. We conclude the court could not do so.

> The doctrine of sovereign immunity—that the State cannot be sued without its consent—has long been the law in North Carolina. The doctrine has proscribed both contract and tort actions against the state and its administrative agencies, as well as suits . . . to control the exercise of judgment on the part of State officers or agencies.

Smith v. State, 289 N.C. 303, 309-10, 222 S.E.2d 412, 417 (1976). In *Smith* the Court noted that by the enactment of the Tort Claims Act, the State specifically consented to be sued for certain torts. *Id.* at 313, 222 S.E.2d at 419; *see also* N.C.G.S. §§ 143-291 to 143-300.1 (1990 and Supp. 1992). The Court went on to hold that the doctrine of sovereign immunity did not bar an action against the State for breach of a duly authorized State contract but noted that since execution to enforce the judgment is unavailable, the collectibility of any judgment is dependent upon legislative appropriation. *Id.* at 320-21, 222 S.E.2d at 424. *See also Smith v. State*, 298 N.C. 115, 123, 257 S.E.2d 399, 404 (1979) (addressing the merits of plain-

tiff's claim). In reaching this result, the Court enumerated specific statutes constituting "contractual situations" in which the legislature had specifically consented to be sued. *Id.* at 321, 222 S.E.2d at 424. In addition, the Court emphasized that its decision had "no application to the doctrine of sovereign immunity as it relates to the State's liability for torts." *Id.* at 322, 222 S.E.2d at 424. By the limited way in which it abrogated the doctrine of sovereign immunity, the majority in *Smith* underscored the doctrine's strength and continuing vitality; and after *Smith* this Court reaffirmed the doctrine. *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983) (stating that no action can be maintained against the State of North Carolina or an agency thereof unless it consents to be sued or upon its waiver of immunity, and such immunity is absolute and unqualified).

Dissenting from even the limited abrogation of the doctrine in *Smith*, Justice Lake pointed out that immunity from suit is "the natural, inherent attribute of sovereignty." *Smith v. State*, 289 N.C. at 341, 222 S.E.2d at 436. The feudal English monarch "could not be held liable for damage to its subjects" not because the king could do no wrong but because

> he could not be sued in *his* courts, because the courts had no jurisdiction the king did not see fit to confer upon them. The courts were his instrumentalities, not his superiors. A subject who deemed himself wronged by the king could petition the king for redress, but could not sue the king without the king's consent. Thus, sovereign immunity antedated *Russell v. Men of Devon* by at least five centuries and was not judge-made, but sovereign-made law. It was the common law of England, axiomatically, long before the American Declaration of Independence and so was brought into our law by G.S. 4-1 and, so far as I have been able to ascertain, was not rejected by any decision of this Court prior to today.

Id. Moreover, in America, "the State, i.e., the people in their collective capacity, is the sovereign" and the courts are instruments of that sovereign, by whom their jurisdiction is conferred. *Id.* at 341-42, 222 S.E.2d at 436-37.

In the case now before us, respondent has not cited any statute in which the sovereign State of North Carolina has consented to be subject to the contempt power of the court. Indeed, we are convinced that none exists. The contempt statutes refer generally

to persons. *E.g.*, N.C.G.S. § 5A-12(a) (1986) (stating person who commits criminal contempt is subject to censure, imprisonment, and fine); § 5A-21(b) (stating person found in civil contempt may be imprisoned as long as contempt continues). "[I]n common usage, the term 'person' does not include the sovereign [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 105 L. Ed. 2d 45, 53 (1989). Chapter 126 confers on the Commission and the Office of Administrative Hearings jurisdiction over appeals of state employee grievances. N.C.G.S. § 126-37 (1991); *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 342-43, 389 S.E.2d 35, 39 (1990). Contempt is not mentioned in Chapter 126. Similarly, Chapter 7A and Chapter 150B, the Administrative Procedure Act, confer on the superior court appellate jurisdiction over final decisions by the Commission on such grievances. N.C.G.S. § 7A-250 (1989); § 150B-43 (1991). Again, contempt is not mentioned, and as this Court reiterated in *Guthrie*

> "[w]hen statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, *and the remedies thus afforded are exclusive*. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action."

307 N.C. at 539, 299 S.E.2d at 628 (quoting *Insurance Co. v. Gold, Commissioner of Insurance*, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961)) (emphasis added) (citations omitted).

Applying the foregoing principles, we conclude that respondent, an administrative agency of the State of North Carolina, is not subject to contempt. For this reason we modify the decision of the Court of Appeals reversing the superior court's order; and as modified, the decision is affirmed.

MODIFIED AND AFFIRMED.

BLACK v. WESTERN CAROLINA UNIVERSITY

No. 154P93

Case below: 109 N.C.App. 209

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 29 July 1993.

BROWN v. DISCIPLINARY HEARING COMM.

No. 141P93

Case below: (9210NCSB373)

Notice of Appeal by plaintiff pursuant to G.S. 7A-30 dismissed 29 July 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 dismissed 29 July 1993. Petition by plaintiff for writ of certiorari to review the order of the North Carolina Court of Appeals denied 29 July 1993.

GIBSON v. HUNSBERGER

No. 229P93

Case below: 109 N.C.App. 671

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

HALL v. N.C. LICENSING BD. FOR GENERAL CONTRACTORS

No. 276P93

Case below: 110 N.C.App. 490

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

HALL v. NELSON

No. 265P93

Case below: 110 N.C.App. 661

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

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

HEINZE v. PATCH

No. 239P93

Case below: 110 N.C.App. 490

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

HOLLOWAY v. WACHOVIA BANK AND TR. CO.

No. 183A93

Case below: 109 N.C.App. 403

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 29 July 1993 only as to the first issue, intentional infliction of emotional distress. Petition by plaintiffs for writ of certiorari to the North Carolina Court of Appeals denied 29 July 1993.

JEFFERSON-PILOT LIFE INS. CO. v. SPENCER

No. 224PA93

Case below: 110 N.C.App. 194

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 July 1993. Cross-petition by defendant for writ of certiorari to the North Carolina Court of Appeals allowed 29 July 1993.

N.C. FARM BUREAU MUTUAL INS. CO. v. WINGLER

No. 237P93

Case below: 110 N.C.App. 397

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

RAYMER BROTHERS, INC. v.
CATAWBA AUTO/TRUCK PLAZA, INC.

No. 222P93

Case below: 110 N.C.App. 314

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

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

REICH v. PRICE

No. 253P93

Case below: 110 N.C.App. 255

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 29 July 1993.

SMITH v. GUPTON

No. 272P93

Case below: 110 N.C.App. 482

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. BAKER

No. 216P93

Case below: 106 N.C.App. 687

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. BUCKOM

No. 314A93

Case below: 111 N.C.App. 240

Petition by Attorney General for writ of supersedeas and temporary stay denied 10 August 1993.

STATE v. CALDWELL

No. 244P93

Case below: 110 N.C.App. 316

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. DAVIS

No. 243P93

Case below: 110 N.C.App. 272

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. FARRIS

No. 320P93

Case below: 111 N.C.App. 254

Petition by Attorney General for writ of supersedeas and temporary stay denied 10 August 1993.

STATE v. FORESTER

No. 302P93

Case below: 111 N.C.App. 267

Motion made by Attorney General for temporary stay allowed 5 August 1993.

STATE v. HAMRICK

No. 227P93

Case below: 110 N.C.App. 60

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 July 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. HAWKINS

No. 286P93

Case below: 110 N.C.App. 837

Petition by Attorney General for writ of supersedeas and temporary stay denied 23 July 1993.

STATE v. HUTCHENS

No. 234P93

Case below: 110 N.C.App. 455

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. KING

No. 184P93

Case below: 109 N.C.App. 698

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. LONG

No. 254P93

Case below: 110 N.C.App. 317

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 29 July 1993.

STATE v. MCKINNEY

No. 238P93

Case below: 110 N.C.App. 365

Motion by the Attorney General to dismiss appeal for lack of substantial constitutional question allowed 29 July 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993. Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993. Petition by Attorney General for writ of certiorari to the North Carolina Court of Appeals denied 29 July 1993.

STATE v. MIXION

No. 250P93

Case below: 110 N.C.App. 138

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. PHARR

No. 269P93

Case below: 110 N.C.App. 430

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. SPAULDING

No. 260P93

Case below: 110 N.C.App. 492

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STATE v. TALLEY

No. 214P93

Case below: 110 N.C.App. 180

Motion by Attorney General to dismiss appeal for lack of substantial constitutional question allowed 1 July 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 1 July 1993.

STATE v. WILLIAMS

No. 245P93

Case below: 110 N.C.App. 306

Upon consideration of the petition by defendant for discretionary review pursuant to G.S. 7A-31, the following order was entered 29 July 1993: Remanded to Court of Appeals for reconsideration in light of *Sullivan v. Louisiana*, 508 U.S. ---, 124 L. Ed. 2d 182 (1993).

STATE v. WILLS

No. 247P93

Case below: 110 N.C.App. 206

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 29 July 1993.

STEGALL v. STEGALL

No. 268PA93

Case below: 110 N.C.App. 655

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 29 July 1993.

STATE OF NORTH CAROLINA v. MARVIN EARL WILLIAMS, JR.

No. 264A90

(Filed 10 September 1993)

1. **Criminal Law § 762 (NCI4th)— murder—reasonable doubt—instructions**

An instruction on reasonable doubt in a prosecution for murder, burglary with explosives, and attempted safecracking was erroneous under *State v. Bryant*, 334 N.C. 333.

Am Jur 2d, Trial § 832.

2. **Homicide § 244 (NCI4th)— murder—premeditation and deliberation—sufficiency of evidence**

The evidence was clearly sufficient to support a conclusion that a murder was premeditated and deliberate where defendant carried a knife with him during an attempted safecracking, indicating that he had anticipated a violent confrontation and the need for deadly force; defendant struck the victim numerous times with a heavy object, causing at least three lethal injuries; some of the lethal blows may have been inflicted while the victim was lying helpless on the ground; and there was no evidence to show that defendant was provoked.

Am Jur 2d, Homicide §§ 437 et seq.

3. **Homicide § 279 (NCI4th)— first-degree murder—instructions—guilty if killing occurred during burglary with explosives**

The trial court did not err by instructing a jury that it could convict defendant of first-degree murder if it found that the killing had occurred during the commission of a burglary with explosives. Although defendant contended that burglary with explosives is not a crime within the purview of the felony murder rule, the language of the burglary with explosives statute, the statute's history, and the rationale underlying the felony murder rule compel the conclusion that the legislature intended burglary with explosives to be one of the felonies upon which first-degree murder could be premised. N.C.G.S. § 14-17; N.C.G.S. § 14-57.

Am Jur 2d, Homicide § 442.

4. Constitutional Law § 281 (NCI4th)— murder—right to appear pro se—sufficiency of request

A first-degree murder defendant's right to proceed *pro se* was not infringed where the right was not properly asserted. Although the trial court erroneously based its denial of the right to appear *pro se* on defendant's ability to adequately represent himself, it is apparent that defendant's primary desire was to ensure adequate representation by counsel and that he never took a firm position on whether to proceed *pro se*. Defendant was not denied his right to represent himself at trial because he never asserted that right clearly and unequivocally. Moreover, had defendant been permitted to represent himself based on his equivocal requests, he would now be arguing with some justification that he was denied the right to counsel and the Supreme Court refused to place the trial courts in a position to be "whipsawed" by equivocal requests to proceed without counsel.

Am Jur 2d, Criminal Law §§ 764 et seq., 993 et seq.

Accused's right to represent himself in state criminal proceeding—modern state cases. 98 ALR3d 13.

5. Evidence and Witnesses § 1623 (NCI4th)— murder—audio tape recording—authentication

The trial court did not err in a prosecution for first-degree murder, burglary with explosives and attempted safecracking by admitting a tape recording allegedly containing admissions by defendant where the tape was partially inaudible. The seven-prong test of *State v. Lynch*, 279 N.C. 1, has been superseded by the authentication requirements of N.C.G.S. § 8C-1, Rule 901, under which authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. The State provided such evidence here in the form of testimony by Angelo Farmer that the tape was a true recording of his conversation with defendant and the trial court did not err in failing to make findings of fact in accordance with the *Lynch* test.

Am Jur 2d, Evidence § 436.

6. Evidence and Witnesses § 1618 (NCI4th)— murder—audio recording—partially audible—admissible

The trial court did not err in a prosecution for first-degree murder, burglary with explosives and attempted safecracking by admitting a tape recording allegedly containing admissions by defendant where the tape was partially inaudible. Authentication is not the only prerequisite to the admissibility of a tape recording; a tape must also be shown to have been legally obtained and to contain otherwise competent evidence. A tape recording which is not sufficiently audible cannot be considered competent evidence. The trial court here found the tape audible enough to be "enlightening to the jury." A tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard.

Am Jur 2d, Evidence § 436.

Omission or inaudibility of portions of sound recording as affecting its admissibility in evidence. 57 ALR3d 746.

7. Evidence and Witnesses § 1617 (NCI4th)— murder—audio recording—partially inaudible—interpretation of tape for jury

There was no error in a prosecution for first-degree murder, burglary with explosives and attempted safecracking where a partially inaudible tape recording was admitted and a witness and the prosecutor were allowed to "interpret" the tape recording for the jury. The witness, Angelo Farmer, testified to defendant's statements from his own knowledge of the conversation, not from listening to the recording, and the prosecutor argued that the tape contained various incriminating statements by defendant. It was up to the jury to decide what defendant said.

Am Jur 2d, Evidence § 436.

8. Evidence and Witnesses § 1686 (NCI4th)— murder—photographs of victim—introduced twice—not repetitious

The trial court did not abuse its discretion in a murder prosecution by allowing the State to use two photographs showing the victim as found at the crime scene with blood streaked across his face and head to illustrate the testimony of the person who found the body and to illustrate the testimony of the SBI agent who analyzed the crime scene. Although defendant argued that the second showing had no value other

than to inflame the passions of the jury, the republication of the photographs would have been quite useful in illustrating the SBI agent's more detailed testimony. Moreover, there was very little danger of unfair prejudice because the photographs were not nearly as gory as those in *State v. Hennis*, 323 N.C. 279, to which defendant analogizes the case at bar, nor were the photographs presented in a fashion likely to heighten the jury's emotional reaction.

Am Jur 2d, Evidence § 787; Homicide § 419.

9. **Evidence and Witnesses § 1263 (NCI4th)— murder—silence when rights read—subsequent statements by defendant and consent to search—implied waiver of rights**

The trial court properly admitted defendant's statements and some boxes seized from him in a prosecution for first-degree murder, burglary with explosives, and attempted safe-cracking where defendant was arrested at a boarding house; defendant was informed of his *Miranda* rights and asked whether he understood those rights; defendant responded that he did but stood mute when asked whether he wished to waive his right to remain silent and whether he wished to waive his right to have counsel present during questioning; someone asked defendant whether anything in the room belonged to him; defendant responded that he owned the boxes on the floor; defendant was then asked whether he would consent to a search of the boxes; and he responded, "yes." Defendant answered the officers' questions free from coercion and after indicating that he understood his rights; these facts are sufficient to justify the trial court's ruling that he impliedly waived his rights.

Am Jur 2d, Evidence §§ 555-557, 614; Criminal Law § 797.

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

Justice MEYER dissenting.

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 30 April 1990 Criminal Session of Superior Court, Wayne County, upon a jury verdict of first-degree murder. Defendant's motion to bypass the Court of Appeals as to his conviction of burglary

by explosives was allowed by this Court on 13 August 1991. Heard in the Supreme Court 10 February 1992.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda Anne Morris, Assistant Attorney General, for the State.

William F.W. Massengale, Barry T. Winston, and Marilyn G. Ozer for defendant-appellant.

EXUM, Chief Justice.

After a trial in which he was convicted of the murder of Theron Price, of burglary with explosives and of attempted safe-cracking, defendant was sentenced to death. He now raises numerous assignments of error spanning both the guilt-innocence and the sentencing phases of the trial. We find one of these meritorious and therefore grant him a new trial.

I

Defendant introduced no evidence at trial. The State's evidence tended to show the facts narrated below.

In the early morning of 12 February 1989, Lewis Rich, a security guard for Dewey Brothers, Inc., arrived at the company's premises for his 12:30 a.m. to 6:30 a.m. shift to find the guardhouse gate locked. Unable to enter the premises or locate Theron Price, the guard he was scheduled to relieve, Rich telephoned Richard Helms, the company president. Helms arrived shortly and opened the gate. Helms found the door to the payroll office partially open, a light emanating from within, and just outside the office door an acetylene torch and a cart bearing oxygen and acetylene tanks. Helms then summoned the police. Inside the payroll office, the police observed a floor safe illuminated by a gooseneck lamp. There was carbon on the safe's hinges and knob. The police determined that the torch was improperly adjusted, that it would have created a lot of smoke and carbon but would not have cut metal.

Joining the police in a search of the rest of the premises, Helms discovered Theron Price. Lifeless, Price was lying on his back in the steel shed next to the payroll office, and had blood on his face and head. Parallel lines in the dirt indicated he had been dragged into the shed. Various of his possessions, including his time clock, were nearby, as were a yellow hard hat and a

welder's mask. The time clock, hard hat and welder's mask had blood on them. There were cracks in the fiberglass of the welder's mask, and, in the cracks, gray hairs. Also found on the scene were Reebok tennis shoe impressions leading to the building which housed the acetylene torches and related equipment. The lock on the cabinet where the torches were kept had been cut off.

Several days after the discovery of Price's body, an employee of Dewey Brothers named Angelo Farmer reported to his supervisors that he knew the identity of the killer. According to Farmer, he and defendant had discussed breaking into Dewey Brothers and robbing its safe in the early part of February. On 11 February, defendant asked Farmer whether he was "ready to move." When Farmer indicated that he was not, defendant said, "I'm gone. I'm on my move." The next day, after learning of Price's death, Farmer confronted defendant, saying: "Damn man. You killed a man." Defendant said he did not mean to do it. When Farmer remarked that defendant could have tied Price up, defendant replied that he had wanted to but "the man kept coming."

Having revealed this information, Farmer agreed to cooperate with the police. The police furnished him with a tape recording device. Wearing the device, Farmer engaged defendant in conversation about the crimes. During the conversation, defendant said he had tried to break into Dewey Brothers' safe using an acetylene torch he found on the premises. When surprised by the watchman, he had pulled a knife but the guard had "kept coming." He had then taken the guard's time clock and hit him with it "two or three times." Defendant further stated: "I got scared then, but then I thought about the money. I kept checking on him and he had not come back to. I knew I had done killed the m----- f----- then." Defendant had continued to work on the safe and had checked on the guard more than once. When he heard a truck pull up, and later a car, defendant had attempted to wipe away his fingerprints and hide some of the evidence, and had then fled.

The police obtained a warrant based on Farmer's allegations and the tape recording and arrested defendant at a boarding house called the Salem Lodge. The police seized defendant's clothing and some of his possessions. The shoes he was wearing matched the footprints found at Dewey Brothers. Other than the shoes, however, the police obtained no physical evidence tending to link defendant to the crime scene.

An autopsy of the victim's body revealed several wounds on the face and head caused by blunt force trauma and a small laceration on each hand. The wounds on the face would have caused mild to moderate pain. The wounds on the head resulted in skull fractures and could have caused death. Two of these wounds would have required the force of a five-pound steel ball dropped from seven to twelve feet. The victim may have been conscious during the infliction of all the wounds, and for two to five minutes thereafter, and may have been hit while lying on the ground. The victim probably lived for five to ten minutes after the fatal blows were struck.

Defendant was convicted of first-degree murder on theories of felony murder, the underlying felony being burglary with explosives, and premeditation and deliberation. He was also convicted of burglary with explosives and attempted safe-cracking. After a sentencing hearing, the jury recommended and the trial court imposed a sentence of death. The trial court also sentenced defendant to thirty years' imprisonment on the burglary conviction, but arrested the attempted safe-cracking judgment.

II

[1] Defendant contends, and we agree, that the trial judge gave the jury an unconstitutional instruction on the meaning of "reasonable doubt." The challenged instruction, given midway through the jury's deliberations in response to a juror's request for clarification, was taken almost verbatim from *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954). The instruction stated:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or to put it another way, satisfied to a moral certainty of the truth of the charge. If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt, otherwise not. A reasonable doubt as that term is employed in the administration of criminal law, is a[n] honest substantial misgiving generated by the insufficiency of the proof, an insufficiency which fails to convince your judgment and conscience and satisfy your reason as to the guilt of the accused.

In the recent case of *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993), we held that the United States Supreme Court's decisions in *Cage v. Louisiana*, 498 U.S. 39, 112 L. Ed. 2d 339 (1990), and *Sullivan v. Louisiana*, 508 U.S. ---, 124 L. Ed. 2d 182 (1993), required us to declare an essentially identical instruction violative of the Due Process Clause of the Fourteenth Amendment and plain error warranting a new trial. Our decision in *Bryant* controls this issue and requires that we grant defendant a new trial.

III

Though the instructional error is dispositive of this appeal, we must also discuss defendant's contention that the trial court should have dismissed the first-degree murder charge for insufficiency of the evidence. Were his contention correct, he would be shielded from further prosecution on this charge by the Double Jeopardy Clause of the United States Constitution. *State v. Silhan*, 302 N.C. 223, 267, 275 S.E.2d 450, 480 (1981). In addition, we will discuss those issues likely to arise again at defendant's next trial.

A

[2] Defendant contends that the trial court erred in denying his motion to dismiss the first-degree murder charge since there was insufficient evidence of premeditation and deliberation. We disagree.

In measuring the sufficiency of the evidence, all evidence admitted, whether competent or incompetent, 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 and resolving in its favor any contradictions in the evidence. A motion to dismiss is properly denied if the evidence, when viewed in the above light, is such that a rational trier of fact could find beyond a reasonable doubt the existence of each element of the crime charged. *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984); *State v. Sumpter*, 318 N.C. 102, 107-08, 347 S.E.2d 396, 399 (1986).

A killing is "premeditated" if the defendant contemplated killing for some period of time, however short, before he acted. It is "deliberate" if the defendant acted "in a cool state of blood," free from any "violent passion suddenly aroused by some lawful or just cause or legal provocation." *State v. Fields*, 315 N.C. 191, 200, 337 S.E.2d 518, 524 (1985) (quoting *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983)). The defendant need not have

been placid or unemotional. Rather, whatever passion he felt must not have been such as to overwhelm his faculties and reason. *State v. Williams*, 308 N.C. 47, 68, 301 S.E.2d 335, 348-49, *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 177, *reh'g denied*, 464 U.S. 865, 78 L. Ed. 2d 177 (1983).

Whether a killing was premeditated and deliberate may usually be answered only by resort to circumstantial evidence. *State v. Williams*, 308 N.C. at 68-69, 301 S.E.2d at 349. Among the circumstances generally considered probative on the point, the following are directly applicable to the facts of this case: 1) conduct of the defendant before and after the killing tending to show the requisite state of mind, 2) the dealing of lethal blows after the deceased has been felled and rendered helpless, 3) that the killing was accomplished in a brutal manner and 4) a want of provocation on the part of the deceased. *Id.*

Viewed in the light most favorable to the State, the evidence was clearly sufficient to support a conclusion that the murder was premeditated and deliberate. First, defendant carried a knife with him during the attempted safe-cracking, indicating that he had anticipated a violent confrontation and the need for deadly force. Second, and most importantly, he struck the victim numerous times with a heavy object, causing at least three lethal injuries. Since a number of the blows would have rendered the victim unconscious, some of the lethal blows may have been inflicted while the victim was lying helpless on the ground. This evidence tends to show a conscious decision on the part of defendant to ensure that his victim was dead.

Nor is there any evidence to show that defendant was provoked. Granted, he was surprised by the night watchman, but this fact alone does not justify a conclusion that he lost his capacity for rational thought. In fact, the evidence is all to the contrary. According to defendant himself, he had the presence of mind after felling the victim to resume his efforts to crack the safe and, when the police arrived, to hide various incriminating items and wipe his fingerprints from the scene before fleeing.

We conclude that the trial court did not err in denying defendant's motion to dismiss the first-degree murder charge.

This assignment of error is overruled.

B

[3] Defendant next takes issue with the trial court's instruction to the jury that it could convict of first-degree murder if it found that the killing had occurred during the commission of a burglary with explosives. According to defendant, burglary with explosives is not a crime within the purview of the felony murder rule. Defendant did not object at trial. Therefore, were there error in this instruction, defendant would be entitled to no relief unless the error amounted to plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). We hold that the trial court did not commit error. The language of the burglary with explosives statute, the statute's history, and the rationale underlying the felony murder rule, compel a conclusion that the legislature intended burglary with explosives to be one of the felonies upon which first-degree murder could be premised.

It is an elementary principle of statutory interpretation that, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 Strong, N.C. Index 2d, Statutes § 5 (1968)). Thus, we must begin our analysis with the language of the statutes in question. N.C.G.S. § 14-17 provides that a murder which occurs during the course of any "arson, rape or a sex offense, robbery, kidnapping, *burglary*, or other felony committed or attempted with the use of a deadly weapon" is punishable as first-degree murder. N.C.G.S. § 14-17 (Supp. 1992) (emphasis added). N.C.G.S. § 14-57 reads as follows:

> Any person who, with intent to commit any felony or larceny therein, breaks and enters, either by day or by night, any building, whether inhabited or not, and opens or attempts to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gun-powder, or any other explosive, or acetylene torch, shall be deemed guilty of *burglary* with explosives.

N.C.G.S. § 14-57 (1986) (emphasis added).

We note at the outset that the legislature denominated the crime of burglary with explosives a "burglary." The term "burglary" has a technical legal meaning, and we must presume that the legislature intended this meaning absent strong evidence to the

contrary. As the Court stated in *Asbury v. Albermarle*, 162 N.C. 247, 249-50, 78 S.E. 146, 148 (1913):

> [The] rule applicable to the construction of statutes is that when they make use of words of definite and well known sense in the law, they are to be received and expounded in the same sense in the statute. *Adams v. Turrentine*, 30 N.C. 149. In that case *Chief Justice Ruffin* says: 'Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense different from its proper one in instruments made by a person *inops consilii*. But that is a condition in which the Legislature cannot be supposed, and, therefore, although the intention of the Legislature, as collected from the whole act, is to prevail, a technical term having a settled legal sense, cannot be received in any other sense, unless at the last it be perfectly plain on the act itself what that other sense is.'

Nor is it "plain on the act itself" that the legislature intended the language of the burglary with explosives statute to be received in any but its technical sense. Burglary with explosives was unknown to the common law. *United States v. Brandenburg*, 144 F.2d 656, 663 (3rd Cir. 1944). Rather, it is a statutory crime, first defined in 1921 N.C. Sess. Laws, ch. 5, in language almost identical to that of the present statute. As noted by *Brandenburg*, the crime "bears little resemblance to the crime of burglary as defined at the common law." *Id.* at 662. Burglary, still a common law offense, is defined as a breaking and entering, in the nighttime, of the dwelling house of another, with intent to commit a felony therein. *State v. Williams*, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985). By contrast, burglary with explosives is the breaking and entering, with intent to commit a felony therein, of *any* building, whether during the day *or* night, followed by the requisite opening of or attempt to open any secure place by the use of explosives.

Burglary with explosives, then, much more resembles a felonious breaking or entering, *see* N.C.G.S. § 14-54 (1986), than it does a burglary. This fact makes the legislature's choice of terminology especially significant. In 1921, the crime of breaking or entering was defined by statute as a breaking or entering "*otherwise* than by a burglarious breaking." N.C. Consol. Stat. § 4235 (1919) (emphasis added). We can only surmise that the legislature, having

defined the crime of burglary with explosives in terms almost identical to those of breaking or entering, denominated the crime a "burglary" in order to distinguish it from breaking or entering. That the legislature intended an important distinction between the two crimes is further evidenced by its provision that the crime of burglary "shall be punished as for burglary in the second degree." 1921 N.C. Sess. Laws, ch. 5, § 2. Burglary in the second degree was then punishable by imprisonment "for life, or for a term of years." N.C. Consol. Stat. § 4233. Breaking or entering otherwise than burglariously was punishable by imprisonment for "not less than four months nor more than ten years." N.C. Consol. Stat. § 4235.

Thus, both the language of the statute and its history support a conclusion that the legislature intended burglary with explosives to be considered a species of "burglary." If it is a "burglary," then burglary with explosives must be within the purview of N.C.G.S. § 14-17.

Nor does this conclusion do violence to the rationale of the felony murder rule. Indeed, like the other felonies enumerated in N.C.G.S. § 14-17—arson, rape, robbery, kidnapping and burglary—the crime of burglary with explosives is inherently dangerous to human life. Using explosives is a highly dangerous activity under the best of circumstances. *See Sales Co. v. Board of Transportation*, 292 N.C. 437, 442, 233 S.E.2d 569, 572 (1977) (blasting with explosives considered "ultrahazardous activity"). When done inside a building, and without warning to the occupants of the building, or to those who may be nearby, the risk to human life is only multiplied. We can readily conclude that the legislature considered this crime as inherently dangerous as simple "burglary" and therefore deserving of the highest penalty when its commission results in death.

We hold that the crime of burglary with explosives, as defined by N.C.G.S. § 14-57, is a "burglary" within the purview of the felony murder statute. Therefore, the trial court did not err in instructing the jury on felony murder.

This assignment of error is overruled.

C

[4] Defendant next contends that he was denied the right to represent himself. Based on the record summarized below, we find that defendant did not request to proceed *pro se* with sufficient clarity.

Because the right was not properly asserted, it cannot have been infringed.

On the afternoon of the fourth day of jury selection, defendant informed the judge that he was dissatisfied with his court-appointed counsel, Messrs. Jordan and Braswell. Defendant indicated that his lawyers had not adequately communicated with him about the details of his case, and had failed to provide him with the information (including legal texts) he needed to help defend himself. He also suggested that his case should have been moved to another venue because of negative pretrial publicity. The judge responded that defendant's lawyers were perfectly capable and that it would be impractical at this late stage of the proceedings to substitute other counsel. According to the judge, defendant had only two options. He could either continue with Messrs. Jordan and Braswell, or represent himself. When asked if he wanted to represent himself, defendant answered, "No, sir." The judge reiterated that defendant's lawyers would provide an "adequate defense," and then questioned the lawyers about their representation of defendant.

After his lawyers had spoken, defendant again addressed the court. He said, "You stated that, that there is no other way that I could have no other lawyers . . . But what if I choose to represent myself?" The judge responded that he would consider defendant's request and proceeded to question him at great length regarding his ability to conduct his own defense. Specifically, the judge asked whether defendant was taking drugs or medication, how much schooling he had completed, what his grades had been and whether he had ever studied law. The judge then advised defendant that, given his lack of legal training, he would be at a grave disadvantage in attempting to represent himself against a prosecutor with twenty-five years experience. The judge concluded by asking defendant whether he still wished to represent himself. Defendant responded: "I choose to represent myself." The judge did not rule on defendant's request, but instead adjourned the court so that he could consider the issue for the rest of the afternoon.

The judge opened the next session with another lecture on the dangers of self-representation. The judge reminded defendant that he faced a number of serious charges, including one for first-degree murder, and that he risked receiving the death penalty. The judge then asked defendant again whether he still wanted to represent himself. Defendant responded, "I chose to represent

myself." At this, the judge took a brief recess and then renewed his questioning regarding defendant's ability to represent himself. This time the judge went into greater depth regarding defendant's education and grades, and also asked about defendant's age, IQ, public speaking ability and previous experience in representing himself. The following exchange then occurred:

> MR. WILLIAMS: I understand the situation that I have chosen to represent myself. It is not that I would like to represent myself but if I could get a full new complete set of lawyers representing me and I would feel fair with that representation. I would like to continue on with my trial if I was able to receive things that I am entitled to have concerning my trial or evidence that is brought up against me and so on, state witnesses and so on.
>
> THE COURT: You are saying that if your lawyers would furnish to you everything that you ask for—
>
> MR. WILLIAMS: Concerning my trial.
>
> THE COURT: Then you would be willing to let them stay on your case?
>
> MR. WILLIAMS: Yes, sir.

The discussion then turned to the materials defendant wished to receive. The judge assured defendant that he would order the lawyers to furnish defendant with everything he required, and then said: "Let's try it for a few days and see how things go. I don't want you to represent yourself. I just don't—I think that would be unfair." Defendant did not appear reassured. When asked what was on his mind, defendant responded, "I was thinking of I want to get the right representation from my lawyers concerning this matter." The judge then indicated that he would require defendant's lawyers to stay on the case, and denied defendant's motion "to represent himself in the trial of this case," citing the following factors: 1) that defendant was charged with serious crimes for which he could receive the death penalty or life imprisonment, 2) that defendant was twenty-eight years old and had completed only ten years of education, 3) that defendant had an IQ of 78, "borderline range of intellectual functioning," 4) that Messrs. Braswell and Jordan were competent, experienced attorneys, and 5) that defendant had no access to "law books" in prison and was incapable of retaining a private attorney. The judge concluded "as a matter

of law" that defendant was "incapable of adequately representing himself in the trial of his case."

At the outset, we note that the trial court based its ruling on erroneous grounds. A defendant's right to represent himself, guaranteed in state criminal proceedings by the Sixth and Fourteenth Amendments of the United States Constitution,[1] does not depend on his ability to present an effective defense. *Faretta v. California*, 422 U.S. 806, 834, 45 L. Ed. 2d 562, 581 (1975). The right protects individual free choice and therefore must be honored even though its exercise may undermine the objective fairness of a proceeding. As stated in *Faretta*, "although [the defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the life-blood of the law.' " *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51, 25 L. Ed. 2d 353, 363 (Brennan, J., concurring) (1970)). Under *Faretta*, a defendant who clearly elects to represent himself must be permitted to do so upon the sole condition that he make a knowing and voluntary waiver of the right to counsel. *Id.* at 835, 45 L. Ed. 2d at 581-82. Nor does a defendant need the skill of a lawyer to knowingly waive counsel. Such a waiver will be found if the defendant has been made aware of the benefits of counsel and understands the consequences of foregoing those benefits. *Id.; see also* N.C.G.S. § 15A-1242.

Despite the trial court's erroneous reasoning, we find no error in its ruling since Mr. Williams never clearly asserted his right to proceed *pro se*. Unlike the right to counsel, the *Faretta* right does not arise until asserted. *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982). To properly assert the right, the defendant must "clearly and unequivocally" request to represent himself. *Faretta*, 422 U.S. at 835, 45 L. Ed. 2d at 582; *see also State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992). As explained by the court in *Meeks v. Craven*, 482 F.2d 465 (9th Cir. 1973), this rule is required to prevent defendants from manipulating trial courts by recording an equivocal request at trial and then arguing on appeal, as appropriate, either that they have been denied the right to represent themselves or that they did not make a knowing waiver and have therefore been denied the right to counsel. 482

1. In North Carolina, the right of self-representation is also guaranteed by Article I, Section 23 of the North Carolina Constitution, *State v. Mems*, 281 N.C. 658, 670-72, 190 S.E.2d 164, 172-73 (1972), and by statute, N.C.G.S. § 15A-1242.

F.2d at 467-68. To prevent such gamesmanship, we refuse to find an assertion of the *Faretta* right if the defendant's statements or actions create any ambiguity as to his desire to represent himself.

In *Meeks*, the seminal case on this issue, the defendant requested to proceed *pro se* in order to present a motion his counsel had advised against. The defendant was permitted to present his motion, after which the court asked him whether he wanted to continue representing himself. The defendant replied, " 'Yes, Your Honor, I think I will.' " The Ninth Circuit held that Meeks had never asserted his right to represent himself because his conduct, viewed as a whole, indicated a desire only to present a single motion. The court reasoned further that the statement, " 'I think I will,' " was a "prototype of equivocation." *Id.* at 467.

North Carolina courts have been equally strict in scrutinizing alleged requests to proceed *pro se*. This Court has held on many occasions that a mere request to substitute counsel is insufficient to assert the *Faretta* right. *See, inter alia, State v. Branch*, 288 N.C. 514, 220 S.E.2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L. Ed. 2d 1091 (1977), *overruled on other grounds by State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984); *State v. Cole*, 293 N.C. 328, 237 S.E.2d 814 (1977); *and State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). Similarly, this Court has held that a request to participate with court-appointed counsel in conducting the trial does not constitute a clear and unequivocal request to proceed *pro se*. *State v. Thomas*, 331 N.C. 671, 417 S.E.2d 473 (1992). And, like the Ninth Circuit, we have refused to find an assertion of the *Faretta* right, despite a defendant's request to proceed without counsel, where the defendant's contemporaneous statements made that request ambiguous. *State v. McGuire*, 297 N.C. 69, 254 S.E.2d 165, *cert. denied*, 444 U.S. 943, 62 L. Ed. 2d 310 (1979); *see also State v. Gerald*, 304 N.C. 511, 284 S.E.2d 312 (1981).

In *McGuire*, defendant indicated at his arraignment hearing that he wanted the trial court to appoint him a new lawyer because he could not agree with his present one. Defendant added, " 'I am asking the court to let me defend myself in these cases.' " When the trial court refused to appoint new counsel, defendant repeated, " 'I am asking for another attorney.' " Thereafter, defendant reconciled with his attorney and specifically consented to his representation. On appeal, this Court held that, despite defendant's one request to represent himself, his statements and conduct viewed

as a whole evinced only a desire for new counsel. Thus, defendant had "never 'clearly and unequivocally' asserted his desire to conduct a *pro se* defense." 297 N.C. at 82-83, 254 S.E.2d at 173-74.

We believe the case at bar is properly analogized to *McGuire*. As in *McGuire*, defendant at one point requested to proceed *pro se*. But when this request is viewed in the context of his other statements, it is apparent that defendant's primary desire was to ensure adequate representation by counsel, and that he never took a firm position on whether to proceed *pro se*.

When first addressing the trial judge, defendant expressed concern that his attorneys were not communicating with him adequately, and requested substitute counsel. When informed that he would not be permitted new counsel, and that his only options were to continue with present counsel or proceed *pro se*, defendant initially declined to represent himself. Soon thereafter, he changed his mind. Thus, defendant vacillated from the beginning.

That defendant still wished to be represented by counsel, despite his request to proceed *pro se*, is apparent from his statement the next day:

> I understand the situation that I have chosen to represent myself. It is not that I would like to represent myself but if I could get a full new complete set of lawyers representing me and I would feel fair with that representation. I would like to continue on with my trial if I was able to receive things that I am entitled to have concerning my trial or evidence that is brought up against me and so on, state witnesses and so on.

Thereafter, defendant specifically agreed to continue with present counsel on the trial judge's assurance that he would be provided with all the information he required. Tellingly, defendant never again requested to proceed *pro se*. Though he did reiterate his concern that he receive "the right representation from my lawyers," this statement merely confirms the fact that he wished to be represented by counsel.

We therefore hold that defendant was not denied his right to represent himself at trial because he never asserted that right "clearly and unequivocally." We are reassured in so holding by the knowledge that, had defendant been permitted to represent himself based on his equivocal requests, he would now be arguing

with some justification that he was denied the right to counsel. We refuse to place trial courts "in a position to be whipsawed by defendants clever enough to record an equivocal request to proceed without counsel in the expectation of a guaranteed error no matter which way the trial court rules." *Meeks*, 482 F.2d at 468.

This assignment of error is overruled.

D

[5] Defendant assigns error to certain of the trial court's evidentiary rulings. Specifically, he argues that the trial court erred in admitting a tape recording allegedly containing admissions by defendant, in admitting gory pictures of the victim and in admitting evidence seized at defendant's residence.

The prosecution introduced over defendant's objection a tape recording allegedly containing an admission by defendant that he killed Theron Price. Defendant argues that the recording should not have been admitted because it was largely inaudible. He says he was prejudiced by this error in that the prosecutor and Angelo Farmer, the government witness who made the recording, were permitted to interpret the tape for the jury, putting words in defendant's mouth that the jurors could not have heard themselves. We believe the tape was properly admitted.

At the *voir dire* hearing held to determine admissibility, Angelo Farmer testified to having engaged defendant in conversation about the killing while wearing a concealed tape recording device. The trial court listened to the tape recording twice, once with a transcript prepared by a police officer, and once without the transcript, and found the recording admissible. In its findings of fact and conclusions of law, the court noted that "the tape recording is inaudible and unintelligible in many respects but there are sporadic portions that are audible and intelligible and could be enlightening to the jury."

North Carolina courts have long recognized that a tape recording may be excluded if inaudible. The rule was first articulated in *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), where we held that a trial court may not admit a tape recording without first conducting a *voir dire*, out of the presence of the jury, to determine whether the recording is " 'sufficiently audible, intelligible, not obviously fragmented . . . .' " 279 N.C. at 17, 181 S.E.2d at 571 (quoting *State v. Driver*, 38 N.J. 255, 288, 183 A. 2d 655,

672 (1962)). Numerous subsequent cases have cited with approval the language in *Lynch* requiring that a tape recording be sufficiently audible. *See, e.g., State v. Gibson*, 333 N.C. 29, 41, 424 S.E.2d 95, 102 (1992), *overruled on other grounds by State v. Lynch*, 334 N.C. 402, 432 S.E.2d 349 (1993); *State v. Shook*, 55 N.C. App. 364, 366-67, 285 S.E.2d 328, 329 (1982); *and State v. Jeeter*, 32 N.C. App. 131, 133, 230 S.E.2d 783, 785, *disc. review denied*, 292 N.C. 268, 233 S.E.2d 394 (1977); *cf. State v. Hammette*, 58 N.C. App. 587, 590, 293 S.E.2d 824, 826 (1982) (inaudible tape recording not inadmissible "unless defects are so substantial as to leave the recording without probative value or to render the recording as a whole untrustworthy"); *and Searcy v. Justice*, 20 N.C. App. 559, 565, 202 S.E.2d 314, 317-18, *cert. denied*, 285 N.C. 235, 204 S.E.2d 25 (1974) ("a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard").

Forsaking this line of authority, defendant relies instead on a related, but obsolete, holding of *Lynch. Lynch* not only created the *voir dire* rule discussed above, but also established detailed standards for authenticating tape recordings. *State v. Stager*, 329 N.C. 278, 316-17, 406 S.E.2d 876, 898 (1991). Defendant relies on the latter aspect of *Lynch*, and thus presents his inaudibility claim in improper authentication clothing. Under *Lynch*, the proponent of a tape recording was required to show:

> 1) that the recorded testimony was legally obtained and otherwise competent;
>
> 2) that the mechanical device was capable of recording testimony and that it was operating properly at the time the statement was recorded;
>
> 3) that the operator was competent and operated the machine properly;
>
> 4) the identity of the recorded voices;
>
> 5) the accuracy and authenticity of the recording;
>
> 6) that defendant's entire statement was recorded and no changes, additions, or deletions have since been made; and
>
> 7) the custody and manner in which the recording has been preserved since it was made.

279 N.C. at 17, 181 S.E.2d at 571. Defendant asserts that this test, which he considers binding despite the 1984 adoption of the North Carolina Rules of Evidence, was not met in the case at bar. Specifically, he argues that the trial court failed to make findings of fact as to items 1) through 3). He contends further that the State could not have proven items 2) and 3) because the tape was inaudible.

As the State correctly points out, the seven-prong *Lynch* test has been superseded by the authentication requirements of Rule 901. *Stager*, 329 N.C. at 317, 406 S.E.2d at 898. Under Rule 901, authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901 (1992). The State provided such evidence in the form of testimony by Angelo Farmer that the tape was a true recording of his conversation with defendant. Thus, the tape recording was properly authenticated, and the trial court did not err in failing to make findings of fact in accordance with the *Lynch* test.

[6] Holding that the tape recording was properly authenticated does not, however, answer defendant's contention that the tape was too inaudible to be admissible. Under *Stager*, authentication is not the only prerequisite to the admissibility of a tape recording. A tape must also be shown to have been legally obtained and to contain "otherwise competent evidence." *Stager*, 329 N.C. at 317, 406 S.E.2d at 898. Under the first holding of *Lynch*, and the cases citing it, a tape recording which is not "sufficiently audible" cannot be considered competent evidence.

Whether a tape recording is sufficiently audible to be admitted is to be first determined by the trial court. The trial court in the case at bar found the tape audible enough to be "enlightening to the jury." Having listened to the tape ourselves, we agree. Though defendant's voice is often inaudible, he can clearly be heard describing the incident at Dewey Brothers and, at one point, saying, "I done killed the m----- f-----." As noted in *Searcy*, "a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard." 20 N.C. App. at 565, 202 S.E.2d at 317-18. We hold that the trial court did not err in admitting the tape recording.

[7] Nor is there merit to defendant's argument that he was unfairly prejudiced when Angelo Farmer and the prosecutor were permit-

ted to "interpret" the tape recording for the jury. Farmer testified to defendant's statements from his own knowledge of the conversation, not from listening to the tape recording. The prosecutor, in his closing statement, *argued* that the tape contained various incriminating statements by defendant. It was up to the jury, however, to decide what defendant said. The jury was free to discredit Farmer's testimony, and the prosecutor's arguments, if it saw fit to do so.

This assignment of error is overruled.

E

[8] Defendant next assigns error to the State's use of two photographs showing the victim as found at the crime scene, lying faceup with blood streaked across his face and head. The State first introduced these photographs to illustrate the testimony of Dewey Brothers, Inc., president Richard Helms, who found the victim's body. A few days later, the State published these photographs to the jury a second time to illustrate the testimony of Officer Honeycutt, the SBI agent who analyzed the crime scene. Defendant takes issue not with the initial publication of the photographs, but rather with their republication. Characterizing the photographs as "excessively grim," he argues that the second showing had no value other than to inflame the passions of the jury. We believe the trial court acted correctly in permitting the photographs to be twice published.

Whether to admit gory photographs, how many to admit and how the photographs should be used are questions left to the sound discretion of the trial court, guided by the precept of Rule 403 of the North Carolina Rules of Evidence, N.C.G.S. § 8C-1, that evidence may be excluded if its probative value is "substantially outweighed" by the danger of unfair prejudice. *State v. Hennis*, 323 N.C. 279, 283, 372 S.E.2d 523, 526 (1988). The trial court's ruling will not be overturned absent an abuse of discretion. *Id.* at 285, 372 S.E.2d at 527. As a general rule, gory photographs have been held admissible, if properly authenticated and otherwise competent, as long as they are not aimed solely at arousing the passions of the jury, i.e., if they have some probative value. *See, e.g., State v. Murphy*, 321 N.C. 738, 365 S.E.2d 615 (1988); *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); *see also* 40 Am. Jur. 2d *Homicide* § 419 (1968). By the same token, gory photographs have been held

excludable if they merely reiterate photographic evidence already presented, since the additional photographs may lack probative value, tending only to inflame the jury. *Hennis*, 323 N.C. at 286, 372 S.E.2d at 526-27; *State v. Mercer*, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969). The same logic, of course, has been applied to the repeated publication of the same photograph or set of photographs. *Hennis*, 323 N.C. at 286-87, 372 S.E.2d at 528.

In *Hennis*, a triple murder case, the trial court admitted thirty-five color photographs of the murder victims, taken at the crime scene and at the autopsy. The photographs depicted in graphic detail numerous stab wounds on each of the bodies, and were particularly gruesome since the bodies had begun decomposing by the time the pictures were taken. The trial court permitted the photographs to be shown to the jury twice. The photographs were first shown as slides, projected on a large screen directly above defendant's head, and accompanying testimony by those who found the bodies and by the forensic pathologists. At the close of the State's evidence, the photographs were distributed to the jury one at a time, unaccompanied by further testimony. 323 N.C. at 282-83, 372 S.E.2d at 525-26.

On these facts, this Court ordered a new trial, reasoning that many of the slides were repetitive, showing substantially the same images, and thus added nothing of probative value to the State's case; that the manner in which the repetitive slides were displayed served to compound their prejudicial effect; and that the republication of the photographs was redundant and performed in a prejudicial manner. *Id.* at 286, 372 S.E.2d at 527-28. The Court said, "permitting the photographs with redundant content to be admitted into evidence and to be twice published to the jury was error." *Id.* at 286-87, 372 S.E.2d at 528.

Defendant analogizes the case at bar to *Hennis*, arguing that the republication of the photographs was "unnecessarily repetitive" and that it was performed "for no other reason than to inflame the jurors' anger towards defendant." Defendant's analogy is inapposite. First, unlike the situation in *Hennis*, here the republication of the photographs had probative value. Whereas the photographs were first published to illustrate Helms' testimony describing in broad terms the crime scene as found, they were republished in aid of Officer Honeycutt's detailed testimony reconstructing the manner in which the crime had occurred. Indeed, Helms testified

merely that he had found the body in the steel shed, lying faceup with arms and legs straight out and blood on the face and head. Honeycutt testified to the precise location of the body, measured to the inch from the walls of the shed, and to having discovered no blood on the ground around the body despite a painstaking search. He testified that the blood from the victim's wounds had run across his head horizontally and diagonally and was spattered on the victim's arms, on the front of his jacket and on one of his hands. Clearly, the republication of the photographs would have been quite useful in illustrating Honeycutt's more detailed testimony. By contrast, the photographs in *Hennis* were republished without any further testimony.

Second, the republication of the photographs in the case at bar created very little danger of unfair prejudice. Even though they show the victim's multiple head wounds, and blood covering his face and head, the photographs are not nearly as gory as those in *Hennis*. Nor were the photographs presented in a fashion likely to heighten the jury's emotional reaction. Recall that in *Hennis*, the prosecution concluded its case in chief by passing the thirty-five photographs to the jury one by one and in total silence. By that time, the jury had been exposed to *seventy* gory, disturbing images. 323 N.C. at 286, 372 S.E.2d at 528. Here the prosecution republished the photographs to the jury along with roughly sixty other exhibits germane to Officer Honeycutt's testimony. With the republication, the jury had been exposed to four gory images.

Thus, the republication was probative and created little danger of unfair prejudice. We hold the trial court did not abuse its discretion in allowing it.

This assignment of error is overruled.

F

[9] Defendant contends, finally, that the trial court erred in denying his motion to suppress statements he made at his arrest and physical evidence seized during a search incident to that arrest. According to defendant, the statements should have been suppressed because obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966); the physical evidence should have been excluded because a fruit of the illegally obtained statements. *See*

Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441 (1963).[2] We believe the trial court properly denied defendant's motion.

At the suppression hearing, Officer Sullivan testified as follows: Pursuant to warrants for murder and attempted safe-cracking, he arrested defendant at a boarding house called the Salem Lodge, in the room of one Mr. Artis. Upon placing defendant in custody, he informed him of his *Miranda* rights and asked whether he understood those rights. Defendant responded, "yes." He then asked defendant, first, whether he wished to waive his right to remain silent, and then, whether he wished to waive his right to have counsel present during questioning. Defendant stood mute at each of these questions, making no response whatsoever. Soon thereafter, someone behind Sullivan asked defendant whether anything in the room belonged to him. Defendant responded that he owned the boxes (located on the floor). Sullivan then asked defendant whether he would consent to a search of the boxes, to which defendant responded, "yes." The boxes, containing clothing and other personal effects, were searched for weapons and then removed to the police station.

Sullivan testified further that there were four officers at the scene of the arrest, two in the room and two at the door; that neither promises, nor threats, nor trickery were used to elicit defendant's statements; that defendant appeared to be coherent; and that defendant did not appear to be under the influence of drugs or alcohol.

Crediting this testimony, and discounting defendant's testimony to the contrary, the trial court found as fact that defendant had been read his rights, that he did not respond to Sullivan's questions regarding waiver but thereafter indicated he owned the boxes and consented to having them searched, that he made these statements free from coercion or inducement and while coherent, and that he understood his rights. Based on these findings, the trial court held defendant's statements admissible, concluding that he had "freely, knowingly, intelligently, and voluntarily" waived his rights to remain silent and to counsel. The trial court also held the boxes

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2. In the caption for this assignment of error, defendant also asserts that the evidence was introduced in violation of the Fourth and Sixth Amendments and of Article 19 of the North Carolina Constitution. He has failed to brief these contentions, however, and we deem them abandoned under the authority of N.C. R. App. P. 28(a).

admissible because seized incident to a lawful arrest; it thereupon denied defendant's motion to suppress.

Defendant does not take issue with the trial court's findings of fact. He challenges instead the court's conclusion of law that he knowingly and voluntarily waived his *Miranda* rights. According to defendant, waiver cannot be inferred from his conduct at the arrest since he "never said or did anything . . . to indicate he had waived his rights." To the contrary, however, defendant answered the officers' questions free from coercion and after indicating that he understood his rights. These facts are sufficient to justify the trial court's ruling that he impliedly waived his rights.

North Carolina v. Butler, 441 U.S. 369, 60 L. Ed. 2d 286 (1979), established that waiver of *Miranda* rights may be either express or implied. In that case, the defendant was advised of his *Miranda* rights and indicated that he understood those rights. He refused, however, to sign a written waiver, stating: " 'I will talk to you but I am not signing any form.' " He then made incriminating statements. *Id.* at 371, 60 L. Ed. 2d at 291. Overruling the North Carolina Supreme Court's holding that the defendant's waiver was invalid because not "specifically made," the Court held that an express written or oral statement of waiver was "not inevitably either necessary or sufficient to establish waiver." 441 U.S. at 373, 60 L. Ed. 2d at 292. As the Court explained:

> The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. . . . [I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

Id.

Following the lead of *Butler*, this Court has consistently held that a defendant may validly waive his *Miranda* rights by answering questions from the police, even though he has initially refused to expressly waive his rights. In *State v. Connley*, 297 N.C. 584, 256 S.E.2d 234, *cert. denied*, 444 U.S. 954, 62 L. Ed. 2d 327 (1979), the defendant stated after reading an Advice of Rights form, " 'I

know what it says and I understand, but I'm not going to sign it.' " He then answered questions for a short time, ignoring some questions and terminating the interview by asking for a lawyer. *Id.* at 586-88, 256 S.E.2d at 236. On these facts, we held that the defendant had impliedly waived his *Miranda* rights. *Id.* at 588-89, 256 S.E.2d at 237. Similarly, in *State v. Vickers*, 306 N.C. 90, 291 S.E.2d 599 (1982), we found a valid waiver where the defendant did not expressly waive his rights but rather indicated that he understood them and then answered questions "during a general conversation that occurred on the way to the jail." *Id.* at 92, 96, 291 S.E.2d at 602, 604.

In both of these cases, the critical facts supporting waiver were: 1) that the defendant demonstrated an understanding of his rights, and 2) that the questioner exerted no pressure on the defendant to answer questions, whether by way of coercion, intimidation or trickery. *Connley*, 297 N.C. at 588-89, 256 S.E.2d at 237; *Vickers*, 306 N.C. at 96, 291 S.E.2d at 604. These facts obtain equally in the case at bar. First, though defendant remained silent when asked if he would waive his rights, he did affirmatively state that he understood his rights. He appeared coherent at the time and was, as the trial court also found, "capable of understanding his rights." Second, the police did not pressure him in any way to answer their questions. Thus, we can infer that in answering the officers' questions after expressly acknowledging that he understood his right not to do so in the absence of counsel, defendant impliedly waived his rights to remain silent and to counsel.

Since defendant's statements were legally obtained, the seizure of the boxes he identified as belonging to him, otherwise legal, was not tainted. We conclude that the trial court properly admitted defendant's statements and his boxes.

This assignment of error is overruled.

IV

Having found that the trial court gave an unconstitutional instruction on the meaning of "reasonable doubt," we order a new trial. Those additional assignments of error discussed above are overruled.

NEW TRIAL.

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

Justice MEYER dissenting.

I dissent from the majority's decision to grant a new trial for *Cage* error essentially for the same reasons I expressed concerning that issue in my dissent in *State v. Montgomery*, 331 N.C. 559, 577, 417 S.E.2d 742, 752 (1992), and *State v. Bryant*, 334 N.C. 333, 343, 432 S.E.2d 291, 297 (1993). As in *Bryant*, defendant here did not object to the reasonable doubt instruction given by the trial judge.

Cage does not dictate that we find reversible error in the instant case. In *Cage*, the Supreme Court found error in the Louisiana trial court's reasonable doubt instruction, stating:

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

Cage v. Louisiana, 498 U.S. 39, 41, 112 L. Ed. 2d 339, 342 (1990) (emphasis added).

In reading *Cage* broadly, the majority opinion deviates from virtually every other appellate court in the land that has considered the matter. *See Gaskins v. McKellar*, --- U.S. ---, 114 L. Ed. 2d 728 (Stevens, J., concurring in denial of writ of certiorari and acknowledging that *Cage* is to be read narrowly and emphasizing the critical import of the "grave uncertainty" language), *reh'g denied*, --- U.S. ---, 115 L. Ed. 2d 1098 (1991); *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991) (finding no error in use of terms "actual and substantial doubt" and "moral certainty"); *Adams v. State*, 587 So. 2d 1265 (Ala. Crim. App. 1991) (finding permissible

use of terms "actual and substantial doubt" and "moral certainty"); *Fells v. State*, 587 So. 2d 1061 (Ala. Crim. App. 1991) (finding use of term "moral certainty" to be proper); *People v. Jennings*, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (same), *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 462 (1991); *Commonwealth v. Beldotti*, 409 Mass. 553, 567 N.E.2d 1219 (1991) (instruction permissible with "moral certainty" language); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991) (instruction permissible when "moral certainty" and "actual and substantial doubt" used).

The majority's extremely broad interpretation of *Cage* in *Bryant*, which it says dictates the result here, seems more an excuse than a reason for granting a new trial. The reasonable doubt instruction that the majority finds to be reversible error is one that has been employed by our trial judges for many years and in many cases. I anticipate that this Court will be called upon to review many cases in which the same or a similar jury charge was employed. Unlike *McKoy* error, which affects only the sentencing proceeding of a capital trial, the error here affects both capital and noncapital trials and requires a totally new trial. The impact of *McKoy* on our criminal justice system may dim in comparison to the impact of this Court's interpretation of *Cage*. For this and other reasons, I would allow a federal appellate court to speak to this issue before granting new trials that may prove to be unnecessary.

I believe that the majority errs in its conclusion that the reasonable doubt instruction tendered by the trial court was error requiring a new trial.

STATE OF NORTH CAROLINA v. YVETTE GAY

No. 363A91

(Filed 10 September 1993)

1. Appeal and Error § 360 (NCI4th)— record on appeal—denial of motion to add affidavits

A motion by the State to amend the record on appeal by adding affidavits from the trial judge and the prosecutor

is denied since the Supreme Court will refuse to consider affidavits which are not a part of the record made at trial.

Am Jur 2d, Appeal and Error §§ 515 et seq.

2. **Constitutional Law § 342 (NCI4th)— court's communication with prospective jurors—absence of defendant—harmless error**

While it was error for the trial court to address the prospective jurors outside the presence of defendant in this capital trial, the State met its burden of proving that the error was harmless beyond a reasonable doubt where the record affirmatively reveals that the trial judge went to the grand jury room merely to inform the prospective jurors that they were at break under his prior instructions.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

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

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

3. **Constitutional Law § 342 (NCI4th); Criminal Law § 483 (NCI4th)— bailiff's communications with jury—direction by court—right to be present—no reversible error**

While the shorthand procedure adopted by the trial court in directing the bailiff to communicate on three occasions with venirepersons waiting to be called and on five occasions with the jury itself may run the risk of violating defendant's right to be present, that procedure did not constitute reversible error in this case where the trial court instructed the bailiff on four occasions to inform the jury to take or extend a recess during evidentiary hearings or discussions of legal issues and on the other four occasions to inform the jurors that they were on break and were to continue to abide by earlier instructions; defense counsel approved this shorthand procedure and declined the trial court's offer to be heard on this matter; these communications did not relate to defendant's guilt or innocence and did not implicate defendant's confrontation rights; and defendant's presence would not have been useful to his defense.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.; Trial §§ 1000-1004.

4. Criminal Law § 793 (NCI4th); Homicide § 396 (NCI4th)— first-degree murder—acting in concert—intent—failure to give requested instruction

The trial court did not err by failing to give defendant's requested instruction in a prosecution for three first-degree murders that "[w]here a defendant is charged on a theory of acting in concert for crimes requiring a specific intent, that intent must be shown as to each defendant," where the trial court incorporated an acting in concert instruction into each element of the crimes charged; the instructions given by the court clearly required the jury to find that defendant herself, acting either alone or with a codefendant, intended to kill the victims; the instructions also directed the jury that it could consider evidence of defendant's mental condition as it related to the question of intent; and there was nothing contained in the instruction requested by defendant which was not conveyed to the jury through the instructions given by the trial court.

Am Jur 2d, Homicide §§ 496, 497; Trial § 723.

5. Appeal and Error § 504 (NCI4th)— expert testimony—legal term of art—invited error

Any error in the admission of testimony by defendant's psychiatric expert using the legal term of art "duress" and in the incorporation of the expert's testimony into the closing arguments of both defendant and the prosecution was invited error, and defendant cannot complain of this error on appeal, where defendant herself introduced this testimony, and defendant incorporated the testimony into her closing arguments and did not object to the State's incorporation of the testimony into its closing argument.

Am Jur 2d, Appeal and Error §§ 713-722.

6. Burglary and Unlawful Breakings § 151 (NCI4th)— burglary—intent—requested instruction—inaccurate statement of law

The trial court did not err by refusing to give defendant's requested instruction that the jury could consider defendant's mental ability in connection with her ability to form "the specific intent to commit burglary" since it was not an accurate statement of the law because the specific intent element of burglary

relates solely to the intent to commit a felony within the dwelling place.

Am Jur 2d, Burglary § 69.

7. **Burglary and Unlawful Breakings § 153 (NCI4th); Homicide § 678 (NCI4th)— diminished capacity—instruction for murder—failure to instruct for burglary—absence of prejudice**

An instruction on the defense of duress will not normally encompass the diminished capacity defense. Assuming that an instruction on diminished capacity as a defense to burglary would have been appropriate in light of the evidence presented in this case, the trial court sufficiently instructed the jury on this defense when it gave a diminished capacity instruction in relation to the charge of first-degree murder since, in order for the jury to convict defendant of burglary, it was required to find that defendant intended to commit the named felony of first-degree murder at the time of the breaking and entering, and had the jury accepted that defense to the murder charge, it would also have been unable to convict defendant of burglary.

Am Jur 2d, Burglary § 69; Homicide § 516.

Accused's right, in homicide case, to have jury instructed as to both unintentional shooting and self-defense. 15 ALR4th 983.

8. **Evidence and Witnesses § 2479 (NCI4th)— sequestration order—refusal to except mental health witness—no abuse of discretion**

The trial court did not abuse its discretion by denying defendant's request to have her expert mental health witness view a portion of defendant's testimony because a reciprocal sequestration order had been entered where the motion to sequester witnesses was originally made by defendant; the trial court allowed both sides to except certain persons from the sequestration order; and defendant did not ask at the time the order was entered to have her expert excepted therefrom.

Am Jur 2d, Trial § 61.

9. Burglary and Unlawful Breakings § 165 (NCI4th)— first-degree burglary—felonious intent—failure to submit misdemeanor breaking or entering

There was no evidence that defendant did not have a felonious intent at the time she broke into and entered the victims' residence so as to require the trial court to submit misdemeanor breaking or entering as a lesser included offense of first-degree burglary where all the evidence showed that defendant and a companion entered the victims' home with the intent to kill the family members residing therein, and the question for the jury was whether defendant did so willingly.

Am Jur 2d, Burglary § 69.

10. Criminal Law § 803 (NCI4th)— lesser included offense—effect of refusing opportunity for instruction

A defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error. N.C.G.S. § 15A-1443(c).

Am Jur 2d, Trial § 876 et seq.

Propriety of lesser-included-offense charge to jury in federal criminal case—general principles. 100 ALR Fed. 481.

Lesser-related state offense instructions: modern status. 50 ALR4th 1081.

11. Criminal Law § 34 (NCI4th); Homicide § 118 (NCI4th)— first-degree murder—testimony showing duress—inadmissibility

The trial court in a first-degree murder case did not err in striking defendant's testimony that she was "scared" and "frightened" when her companion told her to hold the victims at gunpoint where defense counsel stated that the testimony was offered solely for the purpose of proving duress or coercion, since duress is not a defense to murder, and the testimony was thus not admissible to prove duress.

Am Jur 2d, Criminal Law § 148.

Coercion, compulsion, or duress as defense to criminal prosecution. 40 ALR2d 908.

12. Constitutional Law § 182 (NCI4th)— first-degree murder—premeditation and deliberation and felony murder—no double jeopardy

Defendant's conviction of first-degree murder under theories of accomplice liability based on (1) premeditation and deliberation and (2) felony murder did not violate defendant's right against double jeopardy.

Am Jur 2d, Criminal Law § 279 et seq.

13. Conspiracy § 38 (NCI4th)— conspiracy to commit burglary—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of a separate conspiracy to commit burglary in addition to conspiracy to commit murder where it tended to show that, weeks before the victims were killed, defendant helped her boyfriend construct a note left at the murder scene; on the evening prior to the murders, the boyfriend told defendant of his intent to kill his wife's family; on the morning of the murders, the boyfriend woke defendant and asked her if she was ready to go; defendant drove with her boyfriend by the house occupied by the wife's family, counted how many lights were on inside, and walked to the house with her boyfriend; and defendant held the firearms while her boyfriend cut the phone lines and broke in the door.

Am Jur 2d, Conspiracy §§ 29, 30.

Criminal conspiracy between spouses. 74 ALR3d 838.

14. Homicide § 696 (NCI4th)— felony murder—failure to instruct on duress—duress instruction for underlying felony—no plain error

The trial court did not commit plain error by failing to instruct the jury on duress as a defense to felony murder predicated upon burglary where the court instructed the jury on duress as a defense to burglary; the jury was instructed that it must find defendant guilty of burglary in order to find her guilty of felony murder predicated upon burglary; and the jury thus could not have found defendant guilty of felony murder had it not found her guilty of burglary due to the defense of duress.

Am Jur 2d, Homicide § 514.

15. Criminal Law § 680 (NCI4th)— capital case—mitigating circumstances—peremptory instructions

A trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted evidence.

Am Jur 2d, Criminal Law § 628.

16. Criminal Law § 680 (NCI4th)— capital case—mitigating circumstances—uncontroverted evidence—refusal to give peremptory instructions—prejudicial error

A defendant sentenced to death for each of three convictions of first-degree murder is entitled to a new sentencing hearing where the trial court refused to give requested peremptory instructions on various nonstatutory mitigating circumstances supported by uncontroverted evidence, and it is impossible to determine what effect this error had on the sentencing decision.

Am Jur 2d, Criminal Law § 628.

17. Criminal Law § 1333 (NCI4th)— capital case—three aggravating circumstances—separate evidence supporting each—required instruction

The trial court did not err in submitting as aggravating circumstances for first-degree murder that the offense was (1) especially heinous, atrocious, or cruel, (2) committed during a burglary, and (3) part of a course of conduct which included the commission by defendant of other crimes of violence against other persons since there was separate evidence to support each of these aggravating circumstances. However, the trial court should have instructed the jury in such a way as to ensure that jurors would not use the same evidence to find more than one aggravating circumstance.

Am Jur 2d, Criminal Law §§ 598 et seq.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from three judgments imposing sentences of death entered by Weeks, J., at the 8 July 1991 Criminal Session of Superior Court, Beaufort County. Defendant's motion to bypass the Court of Appeals as to additional judgments allowed by the Supreme Court 24 June 1992. Heard in the Supreme Court 13 January 1993.

Michael F. Easley, Attorney General, by Debra C. Graves, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes and Janine Crawley, Assistant Appellate Defenders, for defendant-appellant.

FRYE, Justice.

Defendant Yvette Gay was tried capitally on indictments charging her with the first-degree murders of Louise Farris, Shamika Farris, and William Farris, Jr. (William Jr.); first-degree burglary; conspiracy to commit first-degree burglary and conspiracy to commit murder. The jury returned verdicts finding defendant guilty of all charges. Convictions for the three first-degree murders were based upon the theories of (1) premeditation and deliberation and (2) felony murder. At the capital sentencing proceeding for the first-degree murder convictions, the court submitted three aggravating and twenty-six mitigating circumstances. The sentencing findings were identical in each case and the jury recommended a sentence of death for each first-degree murder conviction. The trial court imposed the death sentences as recommended and imposed additional consecutive sentences of fifteen years, three years, and nine years for the additional convictions. For the reasons discussed herein, we conclude that the guilt phase of defendant's trial was free from prejudicial error. However, we conclude that error occurring in the sentencing phase of defendant's trial requires that she receive a new capital sentencing proceeding in accordance with N.C.G.S. § 15A-2000 (1988).

The State presented evidence tending to show the following. At the time the murders in this case were committed, defendant Yvette Gay was involved in a relationship with Renwick Gibbs (Gibbs) and had been so involved for five or six years. Throughout defendant's relationship with Gibbs, Gibbs was married to Anne Farris (Anne). Gibbs and Anne lived together in a mobile home in Chocowinity during most of their marriage. For about a month prior to the homicides, however, Anne lived in a battered woman's shelter, although during other separations from Gibbs she lived with her parents in the Town of Washington, North Carolina. During the last separation, Gibbs lived with defendant, her two children, and her twin sister, Doris, in a converted bus in Washington.

During this period of separation, on 29 May 1990 at 11:30 p.m., Anne went to her parents' residence in Washington to return their car which she often borrowed. Her father drove her to work and then returned home to bed. The following morning, Mr. Farris awoke at 3:45 a.m. in order to get ready for work. Shortly thereafter he left for work. When Mr. Farris returned to his home shortly after 1:00 p.m., he discovered that his wife and two younger children, William Jr. and Shamika, had been killed.

Gibbs' sister, Deborah Blount, testified that on 30 May 1990 between 9:30 and 10:00 a.m. Gibbs asked her to go with him to town. She declined. At about 11:30 a.m. he again asked her to accompany him to town. She did so. Shortly after noon they drove to the Farris house because Gibbs said he wanted Deborah to talk with Anne. Deborah knocked on the door but no one answered. Gibbs encouraged Deborah to peek inside the window. When she refused, Gibbs stepped out of the car and went to the carport on the side of the house and soon emerged yelling, "My wife, my wife." Deborah could not understand why he was screaming, so she went to the side door and entered the house. She glanced in several rooms before seeing William Jr.'s body and that of a young woman she thought was either Shamika or Anne. Deborah ran to a nearby store and called for the police. Police officers soon arrived. They found the bodies of William Jr., Shamika, and Louise Farris in the house. They had been tied up, gagged, and shot to death. They also found a broken window pane in the carport door and a paper bag, to which cutout magazine letters which read "I told you about slapping my mother" were glued.

SBI Agent Eric Tellefsen testified that he obtained consent to search Gibbs' trailer on the afternoon that the bodies were discovered. There he found a .22 caliber rifle. The next day police arrested Gibbs for the murders. After his arrest, he directed officers to a location where they found a 30-30 rifle which was used in the murders.

Defendant was questioned and gave detectives several differing statements regarding the events of 29 and 30 May 1990. SBI Agent Malcolm McLeod testified that he interviewed defendant while she was at work on the afternoon the bodies were discovered. McLeod informed her that he was there to verify Gibbs' alibi. She told him that Gibbs had been with her throughout the night at the bus after 12:30 a.m.

Agent Tellefsen testified that on 1 June 1990 defendant gave a different statement to detectives at the Washington Police Station. She said that Gibbs was with her at the bus on the evening of 29 May 1990. After they went to bed, Gibbs woke her up and said he had to go somewhere. He told her he was mad at Anne's people for coming between him and Anne. He took out a rifle, ordered her to get bullets for him from the front of the bus and then left. He returned about 6:30 or 7:00 a.m., left again, returned about 10:00 a.m., and left once again.

When Investigator Taylor asked if it was her or her sister who accompanied Gibbs on the night of the murder, defendant said that it had been her. Defendant then gave the officers another statement. This statement was similar to defendant's testimony at trial in that defendant admitted going with Gibbs to the Farris' home. In her statement to the officers, defendant said that two or three weeks before the murders, Gibbs pasted together a note on a brown paper bag. On the day before the murders, Gibbs shot at and attempted to run over and kill the Farris' dog. On the evening of 29 May 1990 Gibbs told defendant that he was going to kill Anne and her family. Gibbs was angry after talking with Anne who told him to go back to his "new wife," referring to defendant. Gibbs woke defendant up around 4:00 a.m. on 30 May 1990. They dressed themselves in dark clothing and Gibbs placed a stocking over each of their heads. Gibbs asked defendant if she was ready. She hesitated and then said yes. He told her that she did not have to go and that he knew that she was scared and did not want to go. She told him she was ready but was concerned about her asthma. She got her asthma spray and the note he had made. At Gibbs' request, she retrieved the .22 rifle for him. Gibbs already had the 30-30 rifle with him. They drove to the Farris house in defendant's car. Upon reaching the house, they saw Mr. Farris leave in his car. Gibbs followed and attempted to overtake Mr. Farris but failed. Gibbs said, "F--- it, I'm going to kill the bitch," so they returned to the Farris house. They went up to the house where Gibbs cut the phone lines while defendant held the rifles. Gibbs asked defendant twice if she was ready and she said yes. Gibbs then forced entry into the house through the carport door. There were screams as they entered the house. Gibbs pointed the gun at Mrs. Farris and ordered her to take the children into a bedroom. Gibbs became irritated as Mrs. Farris pleaded with him and Shamika cried. Gibbs ordered one of the victims, William

Jr., to tie up the other victims, Shamika and Mrs. Farris. After Gibbs became irritated with William Jr.'s efforts, Gibbs ordered Shamika to tie up Mrs. Farris. Gibbs then tied up William Jr. while defendant held a gun. There was no reference in defendant's statement that she ever spoke to or bound or gagged anyone. At various times, Gibbs walked to the front of the house to check to see if anyone had driven up. At those times, defendant held a gun on the family while he was gone. Eventually, Gibbs ordered defendant to shoot each person in the head. She said that she could not, so he shot and killed the three victims. Gibbs and defendant went back to the bus, washed up, and put some of their clothing in a paper bag which Gibbs took with him when he drove defendant's twin sister to work. He returned, slept a bit, then left to find Anne.

At trial, defendant's testimony as to the events differed somewhat from this statement. Defendant testified that she was twenty-seven years old at the time of the murders. She was one of six children but she had little contact with any of her family except her twin sister because Gibbs did not want her to have contact with them. She described her relationship with Gibbs as that of boyfriend and girlfriend, except that she was constantly afraid of him. He was physically and verbally abusive to her and had threatened her with a gun on the day before the murders after he attempted to kill the Farris' dog. She testified that she helped Gibbs with spelling when he made the note which he left at the murder scene.

She testified that when Gibbs returned to the bus on 30 May 1990 at 12:30 a.m. he was angry because Anne had said that defendant was going to be Gibbs' new wife. He began to hit defendant and told her that if she ever left him he would kill her. He then told her he was going to kill the Farris family. He told defendant and her twin sister to wake him up at 4:00 a.m. They did not wake him, but when he woke up he realized he had overslept and got angry and hit both women. He made defendant get dressed and, when she was slow getting his gun for him from his car, he got angry and hit her with the barrel. Defendant told him she did not want to go, but he said that she had to go in order to see what it would be like if she left him. As they approached the Farris house Gibbs was carrying the guns. At one point he made defendant hold the guns after warning her not to try anything. He took the guns back. After he cut the telephone wires he asked

her if she was ready. She said she was not. He angrily told her to get ready because she was going in whether she liked it or not. She was scared he would kill her.

They entered the house and heard screaming voices. Gibbs ordered the family members into one room then ordered William Jr. to tie up his mother and Shamika. Gibbs then tied up William Jr. In response to the pleas by the mother, Gibbs told her that he was tired of her coming between him and his wife. After Gibbs ordered defendant to shoot the victims and she refused, Gibbs shot and killed them. Gibbs then turned the gun on defendant and appeared to pull the trigger. He told her he was going to kill her, her family, and "everybody that I was ever involved with. I'm going to kill all of you and then I'm going to kill myself." They left and returned to the bus where they removed their clothes. Gibbs left after telling defendant that he would kill her or her sister if she did anything. When police questioned her at work, she lied to them because she was afraid of what would happen to her or her sister if she talked to them.

Defendant also testified that both she and her sister gave their paychecks to Gibbs, that he sometimes abused her and failed to provide them with food. At the time of the killings, she had not eaten for two days. Defendant was aware that Gibbs wanted to reunite with Anne but said that she loved him and wanted to marry him and live in the trailer he shared with Anne. Defendant acknowledged that she failed to tell the police of Gibbs' threats to her or of his prior abuse. She testified that she had received medical attention twice as a result of his abuse but had said, as instructed by Gibbs, that she had received the injuries by accident.

Psychiatric expert testimony was offered on defendant's behalf. Dr. Bob Rollins testified that defendant was suffering from "atypical dissociative disorder" at the time of the murders which resulted from domination, mistreatment or abuse. He testified that the disorder might commonly be called "brainwashing." He further testified that her reaction to Gibbs was typical of what is seen in the battered spouse syndrome, although they were not married. As a result of the abuse, the expert believed that defendant was essentially a slave to Gibbs. The expert also testified to defendant's mother's mental problems (paranoid schizophrenia) and that mental health records from April 1989 reported her father's suspicion that defendant was being abused by Gibbs.

In rebuttal, the State offered evidence that the officers who interrogated defendant at work saw no injuries to her face or body. The jail matron who processed defendant and an emergency room doctor who saw defendant on 5 June 1990 also saw no signs of injury.

At the capital sentencing proceeding, defendant offered the testimony of three women who knew defendant through their jail ministry. All three witnesses testified to their belief in defendant's religious sincerity. A jail matron testified that defendant had adapted well to incarceration. Defendant's mother testified about her own schizophrenia and how defendant had helped with the family while the mother was hospitalized. Defendant's father testified that defendant was a good daughter and had never been any trouble to the family. He testified that he suspected that Gibbs had abused defendant. Defendant's brother testified that defendant had contributed to the family but that she had cut off contact after she moved out. Dr. Rollins reiterated his previous testimony and opined that defendant was susceptible to treatment and rehabilitation.

JURY SELECTION

Defendant first contends that her constitutional right to be present at all stages of her capital trial was violated because the trial judge engaged in *ex parte* communication with prospective jurors during jury selection. We find no prejudicial error.

We have recognized that the protection of Article I, Section 23 of the North Carolina Constitution "guarantees an accused the right to be present in person at every stage of his trial." *State v. Payne*, 320 N.C. 138, 139, 357 S.E.2d 612, 612 (1987) (*Payne I*) (citing *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969)), *appeal after remand*, 328 N.C. 377, 402 S.E.2d 582 (1991). We have previously found prejudicial error where a trial judge admonished a jury outside the presence of the defendant. *Payne I*, 320 N.C. at 140, 357 S.E.2d at 613.

In this case the jury selection lasted several days. The procedure used by the trial court involved general questioning of the entire venire by the court, general questioning of a panel of twelve by the State, and then individual death qualification of those twelve by the State. During the individual questioning, the venirepersons who had been seated in the jury box, but who were not being questioned, waited in the jury deliberation room; venirepersons

who had not yet been called to the box waited together in various available rooms in the courthouse, including the grand jury room on the day in question. On the fifth full day of jury selection, the alleged *ex parte* exchange about which defendant now complains occurred.

The record reveals that after the individual questioning of a prospective juror, the trial judge indicated that he thought a recess would be appropriate. The following exchange occurred.

> THE COURT: IF YOU WILL, BRING IN THE MEMBERS OF THE JURY PANEL IN THE JURYROOM, MR. SADLER. WITH THE CONSENT OF ALL COUNSEL, I'M SIMPLY GOING TO INFORM THE MEMBERS OF THE JURY IN THE GRAND JURYROOM THAT THEY ARE AT BREAK UNDER THE COURT'S PRIOR INSTRUCTION UNTIL TWENTY-FIVE AFTER. IS THAT SATISFACTORY?
>
> MR. HARRELL [DEFENSE COUNSEL]: YES, SIR, YOUR HONOR.
>
> THE COURT: AGAIN, THANK YOU, MR. EVANS [THE INDIVIDUAL PROSPECTIVE JUROR]. IF YOU WILL, BRING IN THE OTHER MEMBERS OF THIS PANEL.
>
> (THE BAILIFF DID AS REQUESTED.)
>
> (ALL PROSPECTIVE MEMBERS OF THE JURY PANEL WERE PRESENT.)
>
> THE COURT: LADIES AND GENTLEMEN, WE'RE GOING TO TAKE THE MORNING RECESS AT THIS TIME AND GIVE YOU AN OPPORTUNITY TO STRETCH YOUR LEGS AND GET SOME REFRESHMENT IF YOU WOULD LIKE TO DO SO. PLEASE REASSEMBLE IN THE SEATS YOU NOW OCCUPY AT TWENTY-FIVE AFTER AND WE WILL CONTINUE WITH THE MATTER NOW BEFORE US. AND PLEASE RECALL AND ABIDE BY ALL OF MY EARLIER INSTRUCTIONS. EVERYONE ELSE PLEASE REMAIN SEATED. THE MEMBERS OF THE JURY ARE EXCUSED AT THIS TIME UNTIL TWENTY-FIVE AFTER. THANK YOU.
>
> (THE EIGHT PROSPECTIVE JURORS OF THE JURY PANEL RETIRED FROM THE COURT ROOM AT 11:11.)
>
> THE COURT: WE ARE AT EASE UNTIL TWENTY-FIVE AFTER, FOLKS.

Defendant contends that the transcript reveals the trial judge's intention to go into the grand jury room (outside the presence of the defendant) to deliver instructions to the prospective jurors waiting there. Defendant argues that this scenario is identical to

that which occurred in *Payne I* and thus is governed by that case. The State contends that the transcript reveals that no *ex parte* contact in fact occurred and thus there was no error.

[1] On 11 January 1993, two days before the oral argument of this case on appeal, the State filed a motion to amend the record on appeal in this Court. The motion included affidavits from the trial judge and the lead prosecutor in this case which, if considered, would tend to show that the presiding judge did not communicate with any juror or prospective juror *ex parte* at any time. In opposing the motion, defendant points out that this Court has consistently denied attempts by parties to amend a settled record with affidavits, citing *State v. McCarver*, 329 N.C. 259, 260, 404 S.E.2d 821, 822 (1991) (where this Court refused to allow amendment to the record to include an affidavit made three years after the event). In a supplemental response, defendant raises questions about the accuracy of the affidavits.

The State's motion to amend the record is denied. As we have consistently done in the past, we again refuse to consider affidavits which are not part of the record made at trial. *See State v. Boyd*, 332 N.C. 101, 107, 418 S.E.2d 471, 474 (1992); *McCarver*, 329 N.C. at 260, 404 S.E.2d at 822.

[2] We agree with defendant that the transcript lends support to her contention that the trial judge did in fact go to the grand jury room to instruct the prospective jurors that they were at break. However, we disagree with defendant's contention that *Payne I* requires us to find prejudicial error based on this contact.

In *Payne I* the record showed that at the conclusion of jury selection the trial court instructed the court reporter to "show that I am giving the jury a break and that I am going to administer my admonitions to them in the jury room." *Payne I*, 320 N.C. at 139, 357 S.E.2d at 612. We then observed that "[a]s there is no indication of record to the contrary, we must assume that the trial court caused the record to speak the complete truth in this regard, and that the trial court actually took the steps indicated." *Id.* However, as there was nothing in the record to indicate what admonitions the trial court delivered to the jury outside the presence of the defendant, the State could not meet its burden of proving harmlessness beyond a reasonable doubt. *Id.* at 140, 357 S.E.2d at 613.

In this case, unlike in *Payne I*, the record affirmatively reveals exactly what the trial court intended to say to the prospective jurors. The trial judge did not merely indicate his intention "to administer admonitions" but instead informed the parties that he was going to inform the prospective jurors that they were at break under his prior instructions. There is no indication that anything to the contrary occurred. Again we must assume that the trial court caused the record to speak the complete truth. While it was error for the trial court to address the prospective jurors outside the presence of the defendant, the State has met its burden of proving that the error was harmless beyond a reasonable doubt. *See State v. Willis*, 332 N.C. 151, 173-74, 420 S.E.2d 158, 168 (1992); *State v. Huff*, 325 N.C. 1, 35, 381 S.E.2d 635, 654 (1989), *sentence vacated*, 497 U.S. 1021, 111 L. Ed. 2d 770 (1990), *on remand*, 328 N.C. 532, 402 S.E.2d 577 (1991).

[3] The defendant also argues that the trial court improperly directed the bailiff to communicate on three occasions with venirepersons waiting to be called and on five occasions with the jury itself. On four of the eight occasions, the trial court instructed the bailiff to inform the jury to take or extend a recess during evidentiary hearings or discussions of legal issues. On the other four occasions, the trial court instructed the bailiff to inform the jurors they were on break and they were to continue to abide by his earlier instructions. The transcript reveals that defense counsel approved of this shorthand procedure and declined the trial court's offer to be heard on the matter.

We observe initially that it would be unreasonable to hold that bailiffs may have no contact with the jury. In carrying out their custodial duties bailiffs must necessarily engage in some contact with the jury or prospective jurors. While a bailiff certainly may not attempt to instruct jurors as to the law, a simple reminder by the bailiff to the jurors that they are to abide by the court's earlier instructions should not be considered an instruction as to the law. Communications such as these do not relate to defendant's guilt or innocence. The subject matter of these communications "in no way implicates defendant's confrontation rights, nor would defendant's presence have been useful to his defense." *State v. Buchanan*, 330 N.C. 202, 223-24, 410 S.E.2d 832, 844-45 (1991). This is demonstrated by the fact that defendant's attorney had no objection to the shorthand procedure. While we believe that shorthand procedures, such as the one instituted by the trial court in this

case, may run the risk of violating defendant's right to be present, we do not find reversible error on these facts.

GUILT PHASE

[4] By another assignment of error, defendant complains that the trial court erred by failing to give a requested jury instruction. Defendant contends that failure to give the instruction was error because the instruction was proper in law, supported by the evidence and was not completely communicated by instructions given by the court. *See State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654 (1982). We reject this assignment of error.

Defendant requested that the following jury instruction be given at trial: "Where a defendant is charged on a theory of acting in concert for crimes requiring a specific intent, that intent must be shown as to each defendant." Rather than give the requested instruction, the trial court incorporated an acting in concert instruction into each element of the crimes charged. For example, the trial court instructed the jury on the elements of premeditated and deliberate murder, in relevant part, as follows:

> FIRST, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, YVETTE GAY, ACTING EITHER BY HERSELF OR ACTING TOGETHER WITH RENWICK GIBBS, INTENTIONALLY AND WITH MALICE KILLED THE VICTIM IN EACH CASE WITH A DEADLY WEAPON.
>
> . . . .
>
> AND THIRD, THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, YVETTE GAY, ACTING EITHER BY HERSELF OR ACTING TOGETHER WITH RENWICK GIBBS, INTENDED TO KILL THE VICTIM.
>
> . . . .
>
> AND, MEMBERS OF THE JURY, I AGAIN INSTRUCT YOU THAT YOU MAY CONSIDER THE EVIDENCE IN THIS CASE AS IT RELATES TO THE DEFENDANT, YVETTE GAY'S, MENTAL CONDITION AS IT BEARS ON THE QUESTION OF INTENT.

Defendant argues that the jury instructions given by the trial court on the principle of acting in concert, the offense of burglary, the offense of felony murder, and the offense of premeditated and

deliberate murder were fundamentally flawed.[1] She contends that the instructions as given did not require jurors to reach the question of whether the defendant herself intended to commit murder when she entered the Farris' home, or ever formed the specific intent to kill necessary to commit premeditated and deliberate murder, contrary to the requirements of *State v. Reese*, 319 N.C. 110, 141, 353 S.E.2d 352, 370 (1987). Thus, defendant argues, failure to give the requested instruction was error. We disagree.

In *Reese*, we observed that "[o]ne who is actually or constructively present, aids, abets, incites, or otherwise acts in concert with a perpetrator is held guilty as a principal as long as he has the requisite *mens rea.*" *Id.*[2] We believe the instructions reproduced above are in accord with this observation.

The instructions given by the trial court clearly required the jury to find that the defendant herself, acting either alone or with Gibbs, intended to kill the victims. Not only did the instructions require the jury to evaluate whether defendant possessed the requisite intent, they directed the jury further that it could consider the evidence of defendant's mental condition as it related to the question of intent. There was nothing contained in the instruction requested by the defendant which was not conveyed to the jury through the instructions given by the trial court. We reject defendant's argument since, assuming *arguendo* that defendant was entitled to the requested instruction, the instructions given by the trial court essentially complied with defendant's request. *See State v. Bonney*, 329 N.C. 61, 79, 405 S.E.2d 145, 155 (1991).

[5] By another assignment of error, defendant argues that the reliability of the verdicts of guilt was unconstitutionally impaired by the testimony of her expert witness and by the court's failure to prevent counsel on both sides from relying on this testimony in closing arguments. We reject this assignment of error.

The expert testimony now complained of was offered by defendant's own expert witness in regard to defendant's mental condi-

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1. As her argument in regard to the instructions for each offense is based on the same complaint and as the trial court incorporated the acting in concert instruction into each element of the crimes charged, we will address the assignment of error only as it relates to the offense of premeditated and deliberate murder for purposes of this discussion.

2. For a statement of the law of acting in concert, see this Court's recent opinion in *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993).

tion. The expert used the word "duress" at various times in his description of defendant's relationship with Gibbs. The core of defendant's complaint is that the expert testimony intermingled the separate defenses of duress and diminished capacity, which confused the jury and undermined both defenses. Defendant contends that the likelihood that the jury was confused by the misleading testimony was increased by incorporation of the expert's testimony into both the defendant's and prosecution's closing arguments. Defendant cites *State v. Silvers*, 323 N.C. 646, 655, 374 S.E.2d 858, 864 (1989), in support of her argument that this testimony should have been excluded. The State argues that this issue is not properly before us for review since defendant attributes no misstatement of law to the trial judge nor does she claim ineffective assistance of counsel.

We have held that "an expert's testimony that embraces legal terms of art, the definitions of which are not readily apparent to the expert, should be excluded because it tends to confuse rather than help the jury in understanding evidence and determining facts in issue." *Id.* at 656-57, 374 S.E.2d at 865 (citing *State v. Weeks*, 322 N.C. 152, 164, 367 S.E.2d 895, 903 (1988)). While we agree with defendant that the term "duress" may be a legal term of art, the definition of which was not readily apparent to defendant's expert witness, we nevertheless reject this assignment of error. Defendant herself introduced this testimony. She incorporated the testimony into her closing arguments and did not object to the State's incorporation of the testimony into its closing. A defendant may not complain of prejudice "resulting from [her] own conduct." N.C.G.S. § 15A-1443(c) (1988). Such "invited error" does not merit relief. *See State v. Rivers*, 324 N.C. 573, 575-76, 380 S.E.2d 359, 360 (1989); *State v. Greene*, 324 N.C. 1, 12, 376 S.E.2d 430, 438 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 329 N.C. 771, 408 S.E.2d 185 (1991). *See also Silvers*, 323 N.C. at 655, 374 S.E.2d at 864 (defendant did not object to improper expert testimony offered during cross-examination, thus error in its admission was not reversible).

[6] By another assignment of error, defendant complains about the trial court's failure to give the following requested instruction: "You may consider the Defendant's mental ability in connection with her ability to freely, voluntarily, and independently form the specific intent to commit burglary." We find no error.

At the charge conference the following exchange occurred concerning whether the trial court should give the requested instruction.

> COURT: WHY DOES THE DURESS INSTRUCTION NOT COVER THAT?
>
> MR. HARRELL [DEFENSE COUNSEL]: WELL I THINK ARGUABLY THAT THAT PROBABLY DOES. THIS JUST FOCUSES ON THE ACTUAL INTENT ITSELF, ON THE MENTAL ABILITY TO FORM THAT INTENT. I THINK ARGUABLY DURESS DOES AND COERCION DOES COVER THAT.

The requested instruction was not given.

Defendant argues that it was error for the trial court not to give this requested instruction since the instruction was legally correct and supported by the evidence. *See State v. Earnhardt*, 307 N.C. 62, 70, 296 S.E.2d 649, 654. The State argues that the trial court did not err in refusing to give the requested instruction since it was legally flawed. The State also argues that the request was effectively withdrawn by defense counsel's agreement that the duress instruction was sufficient. In addition, the State argues that the trial court's instruction that the jury could consider defendant's mental condition as to her ability to form the intent to commit murder was sufficient to provide the diminished capacity defense to burglary, since intent to commit murder was an element of the burglary charge.

We find no error in the trial court's failure to give the requested instruction. We begin by observing that defendant has waived her right to review of this issue by failing to object to the trial court's omission of the requested instruction. Rule 10(b)(2), N.C. R. App. P. 10(b)(2). *See also Earnhardt*, 307 N.C. at 70-71, 296 S.E.2d at 654-55.

In any event, the trial court was not required to give the requested instruction since it was not an accurate statement of the law. The requested instruction related to defendant's ability to form "the specific intent to commit burglary" while the specific intent element of burglary relates solely to the intent to commit a felony within the dwelling place. *See State v. Kyle*, 333 N.C. 687, 694, 430 S.E.2d 412, 416 (1993). Thus, it was not error for the trial court to refuse to give the requested instruction which was legally flawed.

[7] We observe however, contrary to the apparent agreement between the trial court and defense counsel, that an instruction

on the defense of duress will not normally encompass the diminished capacity defense. As separate defenses, they demand separate instructions. *See State v. Strickland*, 307 N.C. 274, 297, 298 S.E.2d 645, 660 (1983) (duress is an affirmative defense which defendant must prove to the satisfaction of the jury), *modified in part by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *State v. Shank*, 322 N.C. 243, 250, 367 S.E.2d 639, 644 (1988) (for diminished capacity defense, the jury need only have a reasonable doubt as to defendant's ability to form the requisite intent to commit the offense with which she is charged to negate an element of the offense).

However, failure of the trial court to instruct the jury on the separate defense of diminished capacity was not reversible error in this case. On the burglary charge, defendant was indicted for breaking and entering the named dwelling with the intent to commit the felony of first-degree murder. In order for the jury to convict defendant of burglary, it was necessary for the jury to find that defendant intended to commit the named felony—murder—at the time of the breaking and entering. Assuming that an instruction on diminished capacity as a defense to burglary would have been appropriate in light of the evidence presented, the trial court sufficiently instructed the jury on this defense since it gave a diminished capacity instruction in relation to the charge of first-degree murder. The jury did not accept that defense. However, had the jury accepted that defense, it would have been unable to convict defendant of burglary as well. Thus failure to charge on diminished capacity as a defense to the burglary charge could not have been prejudicial to defendant. We believe the trial court met its "obligation to fully instruct the jury on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Harris*, 306 N.C. 724, 727, 295 S.E.2d 391, 393 (1982). Thus we reject this assignment of error.

[8] Defendant next argues that the trial court erred by denying her motion to have her expert mental health witness view a portion of defendant's testimony. Because of a reciprocal sequestration order, the trial court refused defendant's request. Defendant objected. Defendant argues that the trial court's decision was made without reason and therefore was an abuse of discretion. We disagree.

A trial court has discretion in a criminal case to sequester witnesses. N.C.G.S. § 15A-1226 (1988). *See also State v. Stanley*, 310 N.C. 353, 357, 312 S.E.2d 482, 485 (1984). A ruling within the

trial court's discretion should be reversed only upon a showing that the ruling could not have been the result of a reasoned decision. *Stanley*, 310 N.C. at 357, 312 S.E.2d at 485.

In this case, the original sequestration motion was made by defendant to sequester the State's witnesses. The trial court advised defendant that if it were inclined to allow the motion, it would make the motion reciprocal and allow certain exceptions for each side. After some discussion, the State excepted three key law enforcement officials and members of the victim's family from the sequestration order. Defendant excepted defendant's mother, father and brother from the sequestration order. Defendant did not request to have her expert excepted from the ruling. At trial, defendant requested that her mental health expert be allowed to be present in the courtroom during cross-examination of defendant. The trial court denied defendant's motion, indicating its reluctance to change the prior sequestration order entered in the case.

This decision was not an abuse of discretion. The trial court heard arguments from both sides on the issue and observed that the motion to sequester witnesses was originally made by defendant. Defense counsel acknowledged during arguments that the presence of the expert in the courtroom during defendant's testimony could change the expert's opinion. While an expert may properly base his or her opinion upon facts observed at trial, *see* N.C.G.S. § 8C-703 (1992), the trial court did not abuse its discretion in sequestering the witness in accordance with its earlier ruling in this case. We reject this assignment of error.

[9] In another assignment of error, defendant contends that the trial court erred by failing to submit misdemeanor breaking or entering as a lesser included offense of first-degree burglary. Defendant argues that failure of the court to do so was error because there was evidence that defendant did not have a felonious intent at the time she and Gibbs broke into and entered the Farris residence. We find no error.

Defendant is correct that where "there is evidence from which the jury could find that the defendant committed a lesser included offense, the judge must charge on that lesser included offense." *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980).

> Common law burglary is defined as the breaking and entering of a dwelling house of another in the nighttime with the

> intent to commit a felony therein. *State v. Cooper*, 288 N.C. 496, 219 S.E.2d 45 (1975). Burglary in the first degree occurs when the crime is committed while the dwelling house or sleeping apartment is actually occupied by any person. N.C.G.S. § 14-51 (1981). If at the time of a breaking and entering a person does not possess the intent to commit a felony therein, he may only properly be convicted of misdemeanor breaking or entering. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

State v. Williams, 314 N.C. 337, 355, 333 S.E.2d 708, 720 (1985).

Failure to instruct on the lesser included offense of misdemeanor breaking or entering was not error in this case because there was no evidence to support the lesser charge. The evidence presented in this case showed that defendant and Gibbs entered the Farris' home with the intention to kill the family members. The question for the jury was whether defendant did so willingly. If so, she was guilty of burglary. If the jury found that she did not, she would have been entitled to a not guilty verdict. Thus, failure to instruct on the lesser included offense was not error.

[10] In addition, we observe that a defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error. N.C.G.S. § 15A-1443(c) (1988). *See also State v. Williams*, 333 N.C. 719, 728, 430 S.E.2d 888, 893 (1993). In this case the trial court specifically asked defense counsel if there were any lesser included offenses as to the first-degree burglary charge. Defense counsel responded, "[n]ot based on the evidence, I don't think so your honor." Thus, defendant foreclosed any inclination of the trial court to instruct on the lesser included offense and is not entitled to any relief on appeal. *Id.*

[11] Defendant next contends that the trial court erred by sustaining the prosecutor's objection to her testimony that she was "scared" and "frightened" when Gibbs told her to hold the Farris family at gunpoint. Defendant argues that this evidence, while inadmissible to establish duress as a defense to murder, was admissible as it related to defendant's intent at the time of the killing. She argues that evidence showing her fear of Gibbs would tend to make it less probable that she acted with a premeditated and deliberate intent to kill and thus should have been admitted.

On direct examination, defendant responded that she was "[s]cared, frightened" when Gibbs told her to hold the Farris family at gunpoint. The State objected and moved to strike this testimony. The trial court held a bench conference on the State's motion and the following exchange occurred:

> COURT: IS THIS BEING OFFERED TO ESTABLISH DURESS OR COERCION?
>
> DEFENSE COUNSEL: YES, SIR.
>
> COURT: IS IT BEING OFFERED FOR ANY OTHER REASON?
>
> DEFENSE COUNSEL: NO, SIR
>
> COURT: THEN THE MOTION TO STRIKE WILL BE ALLOWED.

As defendant acknowledges, duress is not a defense to murder. *See Strickland*, 307 N.C. at 295, 298 S.E.2d at 659. The transcript reveals that the testimony of defendant's fear was being offered solely for the purpose of proving duress or coercion. While the testimony may have been admissible for some other purpose at this juncture, it was not admissible to prove duress or coercion as a defense to murder. *See id.* Thus, the trial court did not err by granting the State's motion to strike the testimony after learning defendant's purpose in offering the testimony.

[12] By another assignment of error, defendant contends that submission of the offense of felony murder to the jury violated the constitutional prohibition against double jeopardy. Defendant argues that although the two theories of accomplice liability under which she was convicted of first-degree murder do not violate double jeopardy under the test set forth in *United States v. Blockburger*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932), this Court should find that they do violate the more flexible test announced in *Grady v. Corbin*, 495 U.S. 508, 510, 109 L. Ed. 2d 548, 557 (1990). We decline to do so since the test announced in *Grady* has been rejected by the United States Supreme Court. *U.S. v. Dixon*, --- U.S. ---, 125 L. Ed. 2d 556 (1993).

[13] In another assignment of error defendant contends that her conviction for conspiracy to commit burglary must be set aside for insufficiency of evidence. Defendant concedes that there is sufficient evidence for her conviction for conspiracy to commit murder to stand, however, she argues that the evidence does not show that defendant either explicitly or implicitly agreed to burglarize

the Farris' home. We disagree. A criminal conspiracy is an express or implied "agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful way." *State v. Bell*, 311 N.C. 131, 140, 316 S.E.2d 611, 617 (1984). The criminal act is complete upon agreement. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 831 (1991). In this case, the evidence when viewed in the light most favorable to the State shows that weeks before the murders defendant helped Gibbs construct the note left at the murder scene. This involvement evidenced the conspiracy to commit murder. At the time defendant entered into this conspiracy, it was a nonspecific plan. Nonetheless, the conspiracy to commit murder was complete weeks before the murders occurred. The evidence also shows a separate implied agreement to burglarize the Farris' home entered into on the morning of the murders. On the evening of 29 May 1990, Gibbs told defendant of his intent to kill Anne's family. On the morning of 30 May 1990 Gibbs woke defendant and asked her if she was ready to go. Defendant drove with Gibbs by the Farris house, counted how many lights were on inside, walked to the house with Gibbs, held the firearms while Gibbs cut the phone lines and as Gibbs broke in the door. We believe the evidence presented by the State was sufficient to show a separate conspiracy to commit burglary. Thus, we reject this assignment of error.

[14] Next defendant argues that the trial court committed plain error by failing to instruct the jury on duress as a defense to felony murder. She argues that since duress is a defense to burglary, the trial court should have instructed the jury that duress is also a defense to felony murder predicated upon burglary where defendant did not actually commit the murder and only participated in the underlying felony in order to save her own life. We find no plain error.

The jury was instructed in this case that duress is a defense to burglary.[3] The jury rejected this defense. The jury was also instructed that they must find defendant guilty of burglary in order to find her guilty of felony murder predicated upon burglary. The

3. The State contends that defendant was arguably not even entitled to an instruction on duress as a defense to burglary since duress is not a defense to murder and the intent to commit murder provided the felonious intent for the burglary conviction. The jury did not accept duress as a defense to burglary. Thus, we need not address the State's contentions as this issue is not before us.

jury could not have found defendant guilty of felony murder had they found her not guilty of burglary due to the defense of duress. We believe the jury was adequately instructed on the law in this regard. We therefore reject this assignment of error.

Defendant brings forward several additional issues "with the request that the Court grant relief on them and, if this Court declines to do so, to preserve them in the event of later review. *See Engle v. Isaac*, 456 U.S. 107, 71 L. Ed. 2d 783 (1982)." To the extent the arguments in these preservation issues relate to the guilt phase of defendant's trial, they are rejected without prejudice to any rights defendant may have to seek further relief in the United States Supreme Court.

SENTENCING PHASE

Defendant also contends that several errors occurred at the capital sentencing proceeding which require that she receive a new sentencing proceeding. We find merit in one of her assignments of error and order a new sentencing proceeding on that basis. Aside from one other sentencing issue, we need not address the other errors complained of as they may not be repeated at the new sentencing proceeding.

At sentencing, defendant submitted a written request for peremptory instructions on all mitigating circumstances. The trial court gave a peremptory instruction on the mitigating circumstance of the defendant's lack of criminal history but did not give a peremptory instruction on other mitigating circumstances which were supported by uncontroverted evidence. Defendant argues, and we agree, that the trial court erred in this regard. Because it is impossible for us to determine the effect of this error on the sentencing decision, defendant is entitled to a new sentencing proceeding for her convictions for the three first-degree murders.

"Where . . . all of the evidence in [a capital prosecution], if believed, tends to show that a particular mitigating circumstance does exist, the defendant is entitled to a peremptory instruction on that circumstance." *State v. Johnson*, 298 N.C. 47, 76, 257 S.E.2d 597, 618 (1979). Even if the jury is given a peremptory instruction in regard to a certain mitigating circumstance, the individual jurors may still reject that circumstance on the basis that the supporting evidence was not convincing. *Huff*, 325 N.C. at 59, 381 S.E.2d at 669. In addition, jurors may reject the nonstatutory mitigating circumstance if they do not deem it to have mitigating value. *Id.*;

State v. Fullwood, 323 N.C. 371, 396-97, 373 S.E.2d 518, 533-34 (1988) (jurors must determine whether nonstatutory mitigating circumstances have mitigating value), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 602 (1990), *on remand*, 329 N.C. 233, 404 S.E.2d 842 (1991). However, "[i]f so requested and if defendant is otherwise entitled to it, it will be error for the trial judge not to give [a peremptory instruction]." *Johnson*, 298 N.C. at 77, 257 S.E.2d at 619.

[15] While the particular mitigating circumstance at issue in *Johnson* was statutory, our decisions have not limited the scope of the rule requiring peremptory instructions only to statutory mitigating circumstances. *Huff*, 325 N.C. at 59-60, 381 S.E.2d at 669. The method by which a juror finds a statutory or nonstatutory mitigating circumstance differs. Nonetheless, statutory and nonstatutory mitigating circumstances should be presented to the jury in a comparable fashion so as not to denigrate the nonstatutory circumstance. A rule requiring peremptory instructions (where appropriate) only in regard to statutory mitigating circumstances could compromise the potential mitigating value of nonstatutory mitigating circumstances in contravention of the law of this State. *See State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (reversible error where nonstatutory mitigating circumstances were not presented to the jury in writing as were the statutory mitigating circumstances). Thus, a trial court should, if requested, give a peremptory instruction for any mitigating circumstance, whether statutory or nonstatutory, if it is supported by uncontroverted evidence. *See Johnson*, 298 N.C. at 77, 257 S.E.2d at 619.

[16] At the sentencing proceeding in this case, defendant presented uncontroverted evidence supporting several nonstatutory mitigating circumstances which were submitted to the jury.[4] Of those non-

4. The State does not challenge that the following nonstatutory mitigating circumstances were supported by uncontroverted evidence at the sentencing proceeding: defendant admitted her involvement at an early stage in the proceedings, and/or cooperated with law enforcement officers; defendant has no prior history of violent behavior; the initial idea for the plan that resulted in the death of the decedent was that of the codefendant, Renwick Gibbs; defendant has shown remorse since her arrest; defendant has demonstrated ability to get along well in the circumstance of incarceration as is evident by her good report from Beaufort County Jail; defendant has accepted Christ as her Lord and Saviour; defendant lived in a bus at the time of the crime; defendant completed high school; defendant aided her family financially while gainfully employed; defendant has provided counselling and witness to others while incarcerated; defendant experienced repeated violence in the form of verbal abuse, physical abuse, sexual abuse and emotional abuse.

statutory mitigating circumstances, some were not found by any juror while others were found by one or more jurors. It is possible that one or more of the nonstatutory mitigating circumstances found by none of the jurors would have been found by one or more of the jurors had the judge given a peremptory instruction as requested. In regard to the nonstatutory mitigating circumstances which were found by one or more jurors, we have no way of knowing whether or not they were unanimously found. If one was not unanimously found, it is possible that more jurors, or all the jurors, would have found the circumstance to exist and to have mitigating value had a peremptory instruction been given.

It is reasonably possible that the number of circumstances found by individual jurors in response to Issue Two at the sentencing proceeding could have had an effect on the balancing required for Issue Three. Therefore we are unable to say that the failure to peremptorily instruct the jury as to the nonstatutory mitigating circumstances which were supported by uncontroverted evidence did not impair the jury's consideration of such circumstances. Accordingly, we are unable to find the error harmless beyond a reasonable doubt. Therefore, defendant must receive a new sentencing proceeding.

[17] Defendant also contends that the trial court erred in submitting three aggravating circumstances which permitted the jury to double count evidence in aggravation. The aggravating circumstances submitted to the jury were: 1) the offense was especially heinous, atrocious, or cruel; 2) the offense was committed during a burglary; and, 3) the murder was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against other persons. Defendant contends that submission of the course of conduct aggravating circumstance was error because the evidence supporting it was duplicative of evidence supporting the burglary aggravating circumstance and the especially heinous, atrocious or cruel aggravating circumstance. Because we conclude there was separate evidence to support each of the aggravating circumstances, we do not find error in the trial court's submission of the three circumstances. *See State v. Jennings*, 333 N.C. 579, 627-28, 430 S.E.2d 188, 213-14 (1993).

We note, however, that the trial court did not instruct the jury that it could not use the same evidence to find any two of

the aggravating circumstances. Defendant did not object to the trial court's failure to instruct the jury accordingly, and no assignment of error relates specifically to this issue although defense counsel attempted to raise the issue at oral argument in this Court. Since the issue may arise at the new sentencing proceeding, we take this opportunity to address it in an effort to clarify the trial court's responsibility to properly instruct the jury regarding evidence it may consider in finding aggravating circumstances.

Defendant is correct that it is improper for the trial court to submit two aggravating circumstances supported by the same evidence. *See State v. Quesinberry*, 319 N.C. 228, 239, 354 S.E.2d 446, 453 (1987) (error to submit both the aggravating circumstances of murder committed for pecuniary gain and murder committed while defendant engaged in commission of a robbery), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), on remand, 328 N.C. 288, 401 S.E.2d 632 (1991); *State v. Goodman*, 298 N.C. 1, 29, 257 S.E.2d 569, 587 (1979) (error to submit both the aggravating circumstances of 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." *Id.* However, where there is separate evidence to support each aggravating circumstance, it is not improper for both of the circumstances to be submitted even though the evidence supporting each may overlap. *Jennings*, 333 N.C. at 628, 430 S.E.2d at 214. The trial court should nonetheless instruct the jury in such a way as to ensure that jurors will not use the same evidence to find more than one aggravating circumstance.

For the reasons stated above, we find no reversible error in the guilt phase of defendant's capital trial. Having found reversible error in the sentencing phase of the trial, we remand this case for a new capital sentencing proceeding in accordance with N.C.G.S. § 15A-2000.

GUILT PHASE, NO ERROR.

SENTENCING PHASE, NEW SENTENCING PROCEEDING.

THE COUNTY OF LANCASTER, SOUTH CAROLINA; THE COUNTY OF UNION, NORTH CAROLINA; ROSA POTTS OSBORNE; ROBERT BARR; SAM ARDREY AND WIFE, JANIE M. ARDREY; LAVINIA A. KELL; MARGIE K. BOYLSTON; TUCKER I. JOHNSON AND WIFE, ANGELUS R. JOHNSON v. MECKLENBURG COUNTY, NORTH CAROLINA; THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA, TO WIT: CARLA DUPUY, ROD AUTREY, BARBARA LOCKWOOD, ROBERT L. WALTON, PETER KEBER, JOHN G. BLACKMON, AND KENNETH L. ANDREWS; AND ROBERT L. BRANDON, ZONING ADMINISTRATOR OF MECKLENBURG COUNTY, NORTH CAROLINA

No. 293PA92

(Filed 10 September 1993)

1. Municipal Corporations § 30.6 (NCI3d)— sanitary landfill— summary judgment under prior ordinance—effect on action under amended ordinance

An unappealed summary judgment in 1988 declaring Mecklenburg County's 1985 landfill zoning ordinance unconstitutional was not dispositive of this case where Mecklenburg County sought and obtained a sanitary landfill special use permit; the 1988 judgment established, in effect, that plaintiffs were deprived of their due process rights because the Mecklenburg County Board of Commissioners could not be an impartial tribunal with regard to the special use permit application by Mecklenburg County and that Mecklenburg County had failed to offer competent, material, and substantial evidence to meet some of the required findings of the old ordinance; the 1985 special use permit was declared null and void and the judgment went on to say that the Commissioners would be required to amend the zoning ordinance before taking further action regarding the landfill; that judgment was not appealed; Mecklenburg County amended its zoning ordinance; and plaintiffs now contend that the unappealed 3 August 1988 judgment precludes the Mecklenburg County Board of Commissioners from obtaining a permit under the ordinance as amended. The 1988 judgment is binding only as to the procedure under the ordinance as it existed prior to the 1989 amendments, the amendments followed the directives of the 1988 judgment, and the fact that the 1988 judgment held that the County had failed to make a sufficient showing to support the findings of compliance with the then-effective state regulations has no bearing upon the 1990 permit application.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 386.

2. **Municipal Corporations § 30.1 (NCI3d)— zoning—sanitary landfill—administrative zoning decision**

A provision of the amended Mecklenburg landfill zoning ordinance concerning approval of permit applications by the Charlotte-Mecklenburg Zoning Administrator is facially constitutional because the conditions which must be met prior to issuance of a permit are objective standards which can reasonably be applied by the Zoning Administrator with the assistance of the Director of Engineering if necessary. Whether the decision to permit a sanitary landfill should be characterized as quasi-judicial or an administrative zoning decision was critical; since the decision was made by the Zoning Administrator alone, without following the mandate for a full evidentiary hearing, it cannot stand as a quasi-judicial decision but compliance with all fair trial standards is not required for administrative zoning decisions.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 361, 364, 386, 393; Zoning and Planning §§ 42, 59.

Motive of members of municipal authority approving or adopting zoning ordinance or regulation as affecting its validity. 71 ALR2d 568.

3. **Municipal Corporations § 30.1 (NCI3d)— zoning—sanitary landfill application by county—no impermissible conflict of interest**

There was no impermissible conflict of interest where Mecklenburg County applied for a landfill permit to the Charlotte-Mecklenburg Zoning Administrator. The applicant is Mecklenburg County alone while the zoning administrator is the Charlotte-Mecklenburg Zoning Administrator and is involved with administration of zoning for Mecklenburg County and six municipalities within the county. While due process requires an impartial decisionmaker and an elected official with a direct and substantial financial interest in a zoning decision may not participate in making legislative zoning decisions, these considerations are less likely to come into play when administrative zoning decisions are made since these involve the determination of objective facts without an ele-

ment of discretion. Further, the zoning enabling statutes provide for a *de novo* hearing before the board of adjustment. Absent a showing of undue influence, the fact that an application is made by an employing unit of government does not in and of itself constitute impermissible bias for administrative zoning decisions.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 393; Zoning and Planning § 59.

Motive of members of municipal authority approving or adopting zoning ordinance or regulation as affecting its validity. 71 ALR2d 568.

On discretionary review of a decision of the Court of Appeals, 106 N.C. App. 646, 417 S.E.2d 827 (1992), reversing the judgment entered by Fulton, J., in the Superior Court, Mecklenburg County, on 17 January 1991 and remanding the case for further proceedings. Heard in the Supreme Court 13 January 1993.

Waggoner Hamrick Hasty Monteith Kratt & McDonnell, by John H. Hasty and G. Bryan Adams, III, for all plaintiff-appellants other than Union County; and Sanford L. Steelman, Jr., for plaintiff-appellant Union County.

Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb, for all defendant-appellees other than Robert Brandon; and Smith Helms Mulliss & Moore, by H. Landis Wade, Jr., for defendant-appellee Robert Brandon.

MEYER, Justice.

Following the entry on 3 August 1988 of a judgment by Snepp, J., in the Superior Court, Mecklenburg County, that declared Mecklenburg County's 1985 landfill zoning ordinance unconstitutional, Mecklenburg County, on 1 May 1989, amended its zoning ordinance, which in effect adopted a new, 1989 landfill zoning ordinance. Mecklenburg County subsequently petitioned defendant Robert L. Brandon for a sanitary landfill permit under the 1989 landfill ordinance. Defendant Brandon is, and was at the time the petition was filed, the Charlotte-Mecklenburg Zoning Administrator.

Plaintiffs brought this action for declaratory judgment pursuant to N.C.G.S. §§ 1-253 to -267 and Rule 57 of the North Carolina Rules of Civil Procedure to determine the validity and constitu-

tionality of the 1989 ordinance. Answers were filed by the parties, and joint motions for summary judgment and judgment upon the pleadings were filed by all parties. These motions were heard before Fulton, J., Resident Superior Court Judge for Mecklenburg County, on 26 March 1990. Subsequently, on 20 December 1990, Judge Fulton issued a memorandum of judgment and thereafter, on 17 January 1991, entered judgment granting summary judgment in favor of plaintiffs and declaring the 1989 Mecklenburg County zoning ordinance unconstitutional. Defendants appealed to the Court of Appeals, and that court, on 7 July 1992, rendered its decision reversing the superior court.

Plaintiffs filed notice of appeal and petition for discretionary review with this Court, and we granted discretionary review of the Court of Appeals' decision on 30 September 1992.

The primary issue before this Court is the facial constitutionality of Section 3124, entitled "Sanitary Landfill," of the Mecklenburg County zoning regulations embodied in the County's zoning ordinance as it relates to a provision that allows the Charlotte-Mecklenburg Zoning Administrator to approve the County's zoning permit application for the siting of a landfill. There are two subsidiary issues: whether plaintiffs have standing to bring the declaratory judgment action and whether the 1988 decision of the superior court, which was not appealed, has any effect upon the present litigation. We find it unnecessary to address the issue of standing, conclude that the 1988 judgment has no effect on the present litigation, further conclude that the ordinance in question is not facially unconstitutional, and affirm the decision of the Court of Appeals.

Mecklenburg County is responsible for providing solid waste disposal facilities for the approximately 640,000 tons per year of solid waste that is generated in all areas of Mecklenburg County (both incorporated and unincorporated), except from within the Town of Matthews.

In April of 1985, the Mecklenburg County Board of Commissioners filed an application for a permit to site a sanitary landfill on county property adjoining Highway 521 in the southernmost tip of Mecklenburg County (the "Highway 521 site"). A portion of the boundaries of the proposed landfill are adjacent to Lancaster County, South Carolina, and Union County, North Carolina. The 1985 county landfill ordinance generally provided that sanitary land-

fills could be located, only upon the issuance of a special use permit, and only in certain, specified zoning districts. The 1985 landfill ordinance also provided that the Mecklenburg County Board of Commissions would sit in judgment of its own application for a permit.

After a public hearing, the Mecklenburg County Board of Commissioners issued to Mecklenburg County a special use permit to construct a landfill on the Highway 521 site. This decision was subsequently appealed by all of the plaintiffs herein (with the exception of Union County, which was not a party to that action) to the Superior Court, Mecklenburg County. On 3 August 1988, Judge Frank W. Snepp declared the 1985 landfill ordinance unconstitutional as being in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Judge Snepp also declared that Mecklenburg County's actions in obtaining the landfill site, and its actions in attempting to issue a permit to itself for such site, had in fact rendered the County biased and incapable of sitting in judgment of its own application for the Highway 521 site. Mecklenburg County did not appeal this judgment.

Mecklenburg County amended its zoning ordinance with respect to sanitary landfills on 1 May 1989. The 1 May 1989 amendments to the zoning ordinance did not change the zoning classification of the Highway 521 landfill site or of the surrounding property owned by some of the defendants. Moreover, the application under the amended ordinance for a zoning permit was directed to defendant Brandon, whose title is Charlotte-Mecklenburg Zoning Administrator and who administers zoning ordinances promulgated by Mecklenburg County for the unincorporated areas of the county and those promulgated by the Towns of Matthews, Huntersville, Cornelius, Mint Hill, and Pineville within the areas of their zoning limits. Mr. Brandon's employment is not at the pleasure of the Mecklenburg County Commissioners. Rather, his employment is protected by certain personnel policies and regulations, which would prohibit the termination or demotion of Mr. Brandon by his supervisors except for cause.

In Section 3301 of the ordinance, which was not changed by the 1 May 1989 amendments, the Mecklenburg County Commissioners, as legislators, have divided the zoning uses into three types as follows:

> This ordinance provides for certain uses to be located by right in certain districts where the uses are compatible with the purpose of the district[1] and with other uses to be located in certain districts only by complying with additional development standards to insure that same compatibility.[2] However, certain uses which are basically in keeping with the intent and purposes of the district may have substantial impacts on the surrounding area and should only be allowed after a review of the specific proposal. In order to insure that these uses would be compatible with surrounding development and be in keeping with the purposes of the district in which they are proposed to be placed, *they are not allowed to be established as a matter of right.* They may be established only after a review and approval of a special use permit as required by this chapter.[3]

(Emphasis added.)

Section 3124 of the ordinance as amended provides as follows:

> Sanitary landfills are permitted in all districts in Mecklenburg County subject to the development standards listed below. The establishment and operation of any landfill must comply with Solid Waste Management Rules of the State of North Carolina and the "Regulations Governing the Storage, Collection, Transporting and Disposal of Garbage and Refuse in Mecklenburg County" as adopted by the Mecklenburg County Board of Commissioners under authority granted by the General Statutes of North Carolina.

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1. The first category, "by right," is actually an inaccurate characterization because even single-family residences in single-family residential districts are subject to certain zoning requirements such as minimum lot areas, minimum lot widths, minimum side yards, minimum setbacks, etc.

2. The second category is those "uses by right under prescribed conditions." For these uses, the zoning ordinance speaks interchangeably of "uses by right subject to special requirements" and "uses under prescribed conditions."

3. The third category is those uses that are not allowed as a matter of right with or without special requirements or with or without prescribed conditions and that require a "special use permit" rather than a zoning permit. The emphasized language and its place in the ordinance establishes that uses "with additional development standards" (special requirements or under prescribed conditions) are by right and are distinct from uses requiring special use permits with the attendant special procedural elements.

Subsections 3124.1 through 3124.6 define "sanitary landfill," set out a procedure for reclamation of the proposed site, set forth yardage and screening requirements, specify permissible hours of operation, and regulate access. All documentation supporting the application must be submitted to the Zoning Administrator, who, with the assistance of the Mecklenburg County Director of Engineering, must assure that the application complies with the ordinance and regulations referred to in Section 3124.

Subsection 3124.7 provides that the Mecklenburg County Building Standards Department must notify all affected property owners, advising them of the proposed development and when and where the plans may be inspected. The Zoning Administrator is also required to post a notice at the site, stating that rezoning for the proposed use has been requested and stating where additional information may be obtained. After notices are mailed, the Zoning Administrator must wait at least fifteen days and consider all comments on the application before deciding whether to issue a permit for the proposed use. Once the Zoning Administrator makes a decision, he has five days to notify affected property owners and anyone who commented on the proposed use. Any person aggrieved by the Zoning Administrator's decision is entitled to an appeal *de novo* to the Board of Adjustment pursuant to N.C.G.S. § 153A-345(b).

Under the 1989 Mecklenburg County zoning ordinance, sanitary landfills are permitted in all zoning districts in Mecklenburg County so long as the establishment and operation of the landfill complies with the Solid Waste Management Rules of the State of North Carolina and the "Regulations Governing the Storage, Collection, Transporting and Disposal of Garbage and Refuse in Mecklenburg County" as adopted by the County's Board of Commissioners under authority granted by the General Statutes of North Carolina. The ordinance also requires that a reclamation and after-use plan detailing the after use be submitted; that the use not be inconsistent with a general overall county plan, referred to as the 2005 plan; that a special reserve fund in an amount to be determined by the Zoning Administrator be set aside for future use; as well as generally for setbacks and other objective guidelines and conditions.

The 1989 ordinance does not provide for a public hearing before the commissioners or the Zoning Board of Adjustment but rather provides that the Zoning Administrator will determine whether

the conditions were satisfied in order to issue such a zoning permit. It also requires the Zoning Administrator to receive and consider public comment on the application for permit in reaching his decision.

On 8 December 1989, Mecklenburg County again applied for a zoning permit on the Highway 521 site. Under the relevant amendment to the Mecklenburg County zoning ordinance, the application was directed to defendant Brandon, who is and was the Charlotte-Mecklenburg Zoning Administrator and who administers zoning ordinances promulgated by the City of Charlotte for the areas within its limits; promulgated by Mecklenburg County for the unincorporated areas of the County; and promulgated by the Towns of Matthews, Huntersville, Cornelius, Mint Hill, and Pineville within the areas of their zoning limits.

The plaintiffs filed this action for declaratory relief seeking to have the 1989 Mecklenburg County zoning ordinance declared unconstitutional as well as raising other issues. Judge Shirley L. Fulton, Resident Superior Court Judge for Mecklenburg County, North Carolina, acting on cross-motions for summary judgment, issued a memorandum of judgment declaring the new Mecklenburg County zoning ordinance unconstitutional in that it improperly delegated the authority of the County Commissioners to consider special use permits to the Zoning Administrator, in violation of N.C.G.S. § 153A-340, and in that the ordinance providing for the Zoning Administrator to hear and determine zoning applications was a denial of due process under the Fourteenth Amendment of the United States Constitution.

Defendants appealed to the Court of Appeals, which held that Mecklenburg County could delegate its authority to a zoning administrator to issue special use permits and that such procedure was not a denial of due process.

We first address the issue of standing.[4] In their respective briefs, the parties address at some length the question of whether

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4. Only those persons "who [have] a specific personal and legal interest in the subject matter affected by the zoning ordinance and who [are] directly and adversely affected thereby" have standing to challenge a legislative zoning decision. *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976); *see Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972); *Zopfi v. City of Wilmington*, 273 N.C. 430, 160 S.E.2d 325 (1968). *Davis v. City of Archdale*, 81 N.C. App. 505, 344 S.E.2d 369 (1986), alludes to a requirement for "special damages" distinct from those of the rest of the community to confer standing to challenge a rezoning.

the plaintiffs had standing to bring the declaratory judgment action that is the subject of this appeal.

Under the particular facts presented in this case, we find it unnecessary to address this issue and assume standing of the plaintiffs to bring this action *arguendo* in order to address the important issue of the facial constitutionality of the Mecklenburg County zoning ordinance as it relates to sanitary landfills.

[1] We next address the issue of the effect of the 1988 judgment. Plaintiffs argue that the 1988 unappealed judgment of Judge Snepp entered on 3 August 1988 declaring Mecklenburg County's 1985 landfill zoning ordinance unconstitutional is dispositive of the present case. We disagree.

Mecklenburg County initially sought and obtained a sanitary landfill special use permit under the pre-1 May 1989 zoning ordinance, which resulted in litigation between most of the plaintiffs in the instant case and Mecklenburg County.

The 3 August 1988 judgment established, in effect, that plaintiffs (then petitioners) were deprived of their due process right because the Mecklenburg County Board of Commissioners could not, as a matter of law, be an impartial tribunal with regard to the special use permit application by Mecklenburg County and, also, that Mecklenburg County failed to offer competent, material, and substantial evidence to meet some of the required findings of the old ordinance. The 1985 special use permit was declared null and void. The 3 August 1988 judgment went on to say that "the Mecklenburg Board of Commissioners will be required to amend its Zoning Ordinance in one or more respects, before further action may be taken with respect to this sanitary landfill site." The 3 August 1988 judgment was not appealed.

The use of the "special damages" test in *Davis* is taken from the cases on standing to challenge quasi-judicial zoning decisions. In these instances, the appellant must present evidence that he is the owner or optionee of the affected property. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974); *Pigford v. Bd. of Adjustment*, 49 N.C. App. 181, 270 S.E.2d 535 (1980), *disc. rev. denied & appeal dismissed*, 301 N.C. 722, 274 S.E.2d 230 (1981). Adjoining property owners must present evidence of a reduction in their property values. *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 300 S.E.2d 869 (1983). A neighborhood association has standing if its individual members have shown actual financial harm in order to be "aggrieved." *Concerned Citizens v. Bd. of Adjustment of Asheville*, 94 N.C. App. 364, 380 S.E.2d 130 (1989); *Piney Mt. Neighborhood Assoc. v. Town of Chapel Hill*, 63 N.C. App. 244, 304 S.E.2d 251 (1983).

As a result of the 1988 judgment, Mecklenburg County did amend its zoning ordinance. The 1 May 1989 amendment, *inter alia*, removed sanitary landfills from the special use permit section and placed them in Section 3141 as uses by right "subject to special requirements"/"under prescribed conditions" (the two phrases are used interchangeably). We hereafter refer to this type of use by right as a "use by right under prescribed conditions" or a "use under prescribed conditions."

The plaintiffs contend that the unappealed 3 August 1988 judgment precludes the Mecklenburg County Board of Commissioners from obtaining a permit under the ordinance as amended. We disagree. The effect of the 3 August 1988 judgment of the Mecklenburg County Superior Court must be analyzed in the context of what was before the court at the time.

Under the ordinance as it existed prior to the 1 May 1989 amendments, the Board of Commissioners sat as a quasi-judicial body to grant or to deny its own special use permit application (which was not a "use by right") with no *de novo* appeal available. The 1988 judgment is binding only as to that procedure. The 1 May 1989 amendments produced a totally different procedure that involves both a "by right" use and a *de novo* review by the Board of Adjustment.

The 1988 judgment provided that "the Mecklenburg Board of Commissioners will be required to amend its Zoning Ordinance in one or more respects, before further action may be taken with respect to this sanitary landfill site." The 1 May 1989 amendments followed the directives of the 1988 judgment, that is, the zoning ordinance was amended so that the initial determination would be made by the Charlotte-Mecklenburg Zoning Administrator and so that thereafter the Zoning Administrator's determination or determinations would be subject to complete *de novo* review by the Board of Adjustment.

The fact that the 1988 judgment held that the County had failed to make a sufficient showing to support the findings of compliance with the then-effective state regulations has no bearing upon the 1990 permit application, as that requirement of the earlier ordinance was eliminated by the 1 May 1989 amendments. Under the amended ordinance, only the state determines whether the application for the state permit meets the state's current rules.

If one compares the pre-1 May 1989 special use permit requirements for sanitary landfills with the uses under prescribed conditions in the 1 May 1989 amendments, it is obvious that the Board of Commissioners fundamentally changed and lessened the requirements for a sanitary landfill zoning permit as compared to the old requirements for a special use permit.

Unlike special use permits, zoning permits are issued by the Zoning Administrator without a public hearing and as an administrative matter of right if the objective criteria are met. Separate permits for site approval, construction, and operation of sanitary landfills are subject to the rigorous requirements of the North Carolina Solid Waste Management Rules. Before one may even apply to the state for a sanitary landfill permit or permits, the applicant must comply with state regulations, which provide that the applicant must furnish a letter from the unit of government having zoning jurisdiction over the site which states that the proposal meets all of the requirements of the local zoning ordinance.[5]

[2] We now address the important issue of the facial constitutionality of Section 3124, entitled "Sanitary Landfill," of the Mecklenburg County zoning ordinance as it relates to a provision that allows the Charlotte-Mecklenburg Zoning Administrator to approve the permit applications filed by the County.

Plaintiffs contend that the Mecklenburg County zoning ordinance violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because the person who determines whether the permit in question is issued is biased in favor of the applicant by reason of his employment. We disagree.

Due process requirements mandate that certain quasi-judicial zoning decisions comply with all fair trial standards when they are made. However, such compliance is not required for administra-

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5. The zoning permit issued by the Zoning Administrator that is included in the record on appeal was included by Mecklenburg County in its application for a state landfill permit. The effect of the ruling by the trial judge was to cancel the validity of the zoning permit and, accordingly, to make Mecklenburg County's application for a state landfill permit incomplete. The effect of the 7 July 1992 opinion of the North Carolina Court of Appeals is to make the County's application complete once again.

If an applicant is dissatisfied with the Zoning Administrator's decision, the applicant may appeal to the Board of Adjustment.

tive zoning decisions. We must, therefore, determine into which category the zoning decision called for here falls.

Zoning decisions are typically characterized as being in one of four different categories—legislative, advisory, quasi-judicial, and administrative. In this case, the question is whether the issuance of a permit for a landfill as a permitted use with prescribed conditions is properly characterized as a quasi-judicial decision or as an administrative zoning decision.

In making quasi-judicial decisions, the decisionmakers must "investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature." *Black's Law Dictionary* 1245 (6th ed. 1990). In the zoning context, these quasi-judicial decisions involve the application of zoning policies to individual situations, such as variances, special and conditional use permits, and appeals of administrative determinations. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974); *Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963). These decisions involve two key elements: the finding of facts regarding the specific proposal and the exercise of some discretion in applying the standards of the ordinance.

Administrative decisions are routine, nondiscretionary zoning ordinance implementation matters carried out by the staff, including issuance of permits for permitted uses. Phillip P. Green, Jr., *Legal Responsibilities of the Local Zoning Administrator in North Carolina* 30 (2d ed. 1987). In general, the zoning administrator is a purely administrative or ministerial agent following the literal provisions of the ordinance. *Lee v. Board of Adjustment*, 226 N.C. 107, 37 S.E.2d 128 (1946). The zoning administrator may well engage in some fact finding, as in making an initial determination as to whether a nonconforming use was in existence at the time a zoning provision was adopted. *Ornoff v. City of Durham*, 221 N.C. 457, 20 S.E.2d 380 (1942). But, in such instances, this involves determining objective facts that do not involve an element of discretion.

The distinction is important because due process requirements for quasi-judicial zoning decisions mandate that all fair trial standards be observed when these decisions are made. This includes an evidentiary hearing with the right of the parties to offer evidence; cross-examine adverse witnesses; inspect documents; have sworn testimony; and have written findings of fact supported by compe-

tent, substantial, and material evidence. *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. at 470, 202 S.E.2d at 137; *see generally* David W. Owens, *Zoning Hearings: Knowing Which Rules to Apply*, Popular Government, Spring 1993, at 26. By contrast, an administrative zoning decision is made without a hearing at all, with the staff member reviewing an application to determine if it is complete and whether it complies with objective standards set forth in the zoning ordinance.

Early zoning ordinances established districts in which specified land uses were either permitted or prohibited. However, it soon became apparent that additional uses might be appropriate within a particular zoning district under certain circumstances. These additional uses—variously termed "special uses," "conditional uses," or "special exceptions"—are specified in the zoning ordinance along with the standards for determining when they may be allowed. Robert M. Anderson, *American Law of Zoning* 3d § 21.01 (1986).

> A special exception within the meaning of a zoning ordinance is one which is expressly permitted in a given zone upon proof that certain facts and conditions detailed in the ordinance exist. It is granted by the board, after a public hearing, upon a finding that the specified conditions have been satisfied.

In re Ellis, 277 N.C. 419, 425, 178 S.E.2d 77, 80-81 (1971). If adequate guiding standards for the decision are set forth in the ordinance, this is not an unlawful delegation of legislative authority. *Woodhouse v. Board of Commissioners*, 299 N.C. 211, 261 S.E.2d 882 (1980); *Keiger v. Board of Adjustment*, 278 N.C. 17, 178 S.E.2d 616 (1971); *In re Ellis*, 277 N.C. 419, 178 S.E.2d 77; *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969); *Book Stores v. City of Raleigh*, 53 N.C. App. 753, 281 S.E.2d 761 (1981); *Kenan v. Board of Adjustment*, 13 N.C. App. 688, 187 S.E.2d 496, *cert. denied*, 281 N.C. 314, 188 S.E.2d 897 (1972).

Special and conditional use permit decisions are quasi-judicial zoning decisions. "When a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity." *Humble Oil & Refining Co. v. Board of Aldermen*, 284 N.C. at 469, 202 S.E.2d at 136-37.

Further, quasi-judicial special use permit decisions may not be assigned to the zoning administrator. The zoning enabling statutes allow special and conditional use permit decisions to be made by the board of adjustment or the governing board. N.C.G.S. §§ 153A-340 (1991), 160A-381 (1987). N.C.G.S. §§ 153A-345 and 160A-388 further allow the duties of the board of adjustment to be assigned to a "planning agency." A "planning agency" is defined by N.C.G.S. § 153A-321:

> An agency created or designated pursuant to this section may include but shall not be limited to one or more of the following, *with any staff* that the board of commissioners considers appropriate:
>
> (1) A planning board or commission of any size (*not less than three members*) or composition considered appropriate, organized in any manner considered appropriate;
>
> (2) A joint planning board . . . .

N.C.G.S. § 153A-321, para. 2 (emphasis added). (N.C.G.S. § 160A-361 defines "planning agency" in substantially similar language.) Thus, while N.C.G.S. § 153A-321 gives local government considerable latitude, that latitude does not extend far enough to allow the designation of the zoning administrator individually to constitute a "planning agency" for the purpose of making special and conditional use permit decisions. While N.C.G.S. §§ 153A-4 and 160A-4 mandate that grants of authority to local governments be broadly interpreted, zoning authority cannot be exercised in a manner contrary to the express provisions of the zoning enabling authority.[6]

Therefore, a critical question for this case is whether this decision to permit a sanitary landfill should be characterized as a quasi-judicial decision or as an administrative zoning decision. Since the decision was made by the Zoning Administrator alone,

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6. There is language in the *Jackson* case regarding delegation of special use permits: "The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist . . . ." 275 N.C. at 165, 166 S.E.2d at 85. In that case, however, the decision had been delegated to the board of adjustment, so a delegation to a staff member was not before the court. Also, in that case, the standards to be met were (with the exception of the one standard invalidated by the court) objective facts that involved no discretion.

without following the mandate for a full evidentiary hearing, it cannot stand as a quasi-judicial decision.

Some of the confusion in this case is semantic. The Mecklenburg County zoning ordinance at one point treated sanitary landfills as quasi-judicial special use permits. However, the 1 May 1989 amendment to the zoning ordinance purported to place these in an intermediate category between a standard "permitted use" and a standard "special use." Sanitary landfills, along with quarries and demolition landfills, were made permitted uses in all zoning districts subject to a series of "development standards." The language used to describe this intermediate situation—"uses by right subject to special requirements" and "uses under prescribed conditions"—is not to be confused with a special use permit and a conditional use permit. It is not the terms used by the ordinance to describe these permits that has legal significance; it is whether the nature of the decision to be made is, in fact, quasi-judicial or administrative.

The 1 May 1989 amendment to Section 3124 of the Mecklenburg County zoning ordinance established six conditions that must be met prior to issuance of a zoning permit for a sanitary landfill. Several of these are objective standards that can reasonably be applied by the Zoning Administrator, including the yard requirements, screening, hours of operation, access, and notification of adjoining property owners. A closer question is presented by Section 3124.2 regarding reclamation requirements. This includes an objective finding—whether the anticipated future use proposed by the applicant is consistent with the county's land use plan—as well as a determination that the cost estimates for reclamation are "reasonable." The County Board of Commissioners determined that this was an objective finding that could reasonably be made by the Zoning Administrator, with the assistance of the Director of Engineering if necessary.[7] Thus, it was not subjected to the evidentiary hearing requirement imposed for special use permit applications.

[3] Having determined that this is, in fact, an administrative zoning decision that the Zoning Administrator could properly make,

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7. A zoning ordinance is presumed valid, and the courts will defer to the governing board's legislative judgment unless it is clearly unreasonable or an abuse of discretion. *Marren v. Gamble*, 237 N.C. 680, 75 S.E.2d 880 (1953); *In re Appeal of Parker*, 214 N.C. 51, 197 S.E. 706, *appeal dismissed*, 305 U.S. 568 (1938); *see also Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L. Ed. 303 (1926).

we now address the question of whether an impermissible conflict of interest is raised because the applicant for the permit is Mecklenburg County. *See generally*, David W. Owens, *Conflicts of Interest in Land-Use Management Decisions* (1990).

At the outset, it is important to note that the applicant in this case is Mecklenburg County alone, and the zoning administrator is the Charlotte-Mecklenburg Zoning Administrator and as such is involved with administration of zoning for Mecklenburg County and six municipalities within the county.

Due process requires an impartial decisionmaker. With legislative zoning decisions, an elected official with a direct and substantial financial interest in a zoning decision may not participate in making that decision. N.C.G.S. §§ 153A-44 (1991), 160A-75 (1987).[8] Where there is a specific, substantial, and readily identifiable financial impact on a member, nonparticipation is required. Additional considerations beyond these financial interests require nonparticipation in quasi-judicial zoning decisions. A fixed opinion that is not susceptible to change may well constitute impermissible bias, as will undisclosed *ex parte* communication or a close familial or business relationship with an applicant. *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990); *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *disc. rev. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986).

These considerations are less likely to come into play when administrative zoning decisions are made since these involve the determination of objective facts without an element of discretion. Further, the zoning enabling statutes provide for a *de novo* hearing before the board of adjustment if an applicant or person aggrieved contests "any order, requirement, decision, or determination made by an administrative official" charged with zoning implementation. N.C.G.S. §§ 153A-345(b), 160A-388(b). Absent a showing of undue

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8. In *Kendall v. Stafford*, 178 N.C. 461, 101 S.E. 15 (1919), a case involving a pay raise for themselves voted on by a city council, the Court held, "The public policy of the State, found in the statutes and judicial decisions, has been pronounced against permitting one to sit in judgment on his own cause, or to act on a matter affecting the public when he has a direct pecuniary interest, and this is a principle of the common law which has existed for hundreds of years." *Id.* at 464, 101 S.E. at 16; *see generally* David W. Owens, *Conflicts of Interest in Land-Use Management Decisions* (1990).

influence,[9] the fact that an application is made by an employing unit of government does not in and of itself constitute impermissible bias for administrative zoning decisions.

This Court has previously held that:

> When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions do exist. The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist and may require a permit from such officer, or board, to be issued when he or it so determines, as a further condition precedent to the right to erect such structure in such area. Such permit is not one for a variance or departure from the statute or ordinance, but is the recognition of a right established by the statute or ordinance itself. Consequently, the delegation to such officer, or board, of authority to make such determination as to the existence or nonexistence of the specified conditions is not a delegation of the legislative power to make law.

Jackson v. Board of Adjustment, 275 N.C. 155, 165, 166 S.E.2d 78, 85 (1969).

The decision of the panel of the Court of Appeals below held that the same logic that permits the County Commissioners to delegate authority to the Zoning Administrator to issue special use permits also supports our decision that the Commissioners have authority to allow the Zoning Administrator to issue permits

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9. Examples of conduct that other courts have held to be undue influence in quasi-judicial zoning determinations include: *Jarrott v. Scrivener*, 225 F. Supp. 827 (D.C. 1964) (improper for high government officials to contact subordinate board members prior to decision); *Barkey v. Nick*, 11 Mich. App. 381, 161 N.W.2d 445 (1968) (improper for governing board member to appear before zoning board they appoint); *Place v. Board of Adjustment*, 42 N.J. 324, 200 A.2d 601 (1964) (improper for mayor who appointed board of adjustment to appear before board as attorney). A key element in this determination is the degree of discretion present in the decision, which is also a key factor in the characterization of a decision as quasi-judicial or administrative. "The greater the range of discretion in exercising that authority, the greater must be the concern that the person exercising it be free of conflicting personal interests . . . ." *McVoy v. Board of Adjustment of Montclair Tp.*, 213 N.J. Super. 109, 115, 516 A.2d 634, 637 (1986).

for "uses by right subject to special requirements." We agree. Like the panel below, we hold that County Commissioners have authority to allow the Zoning Administrator to issue permits for "uses by right subject to special requirements."

SUMMARY

We assume standing of the plaintiffs *arguendo*. We hold that the 3 August 1988 judgment in the earlier litigation has no effect on the present litigation. We further hold that the 1 May 1989 amendment to the zoning ordinance constitutes a valid legislative prerogative to change the sanitary landfill use from a "special use permit" category to a "use by right under prescribed conditions" category and that Section 3124 of the Mecklenburg County zoning ordinance, which allows the Zoning Administrator to approve the County's permit application for the siting of a landfill, is constitutional and lawful on its face. The decision of the Court of Appeals is affirmed.

AFFIRMED.

STATE OF NORTH CAROLINA v. JAMES TERRY OLIVER

No. 368A92

(Filed 10 September 1993)

1. Criminal Law § 775 (NCI4th)— murder—voluntary intoxication—instruction refused—no error

There was no error in a first-degree murder prosecution in the court's failure to give defendant's requested instruction on voluntary intoxication where defendant presented no evidence relating to his degree of intoxication and none of the State's witnesses specifically testified that defendant was intoxicated. This evidence is insufficient under *State v. Mash*, 323 N.C. 339, to require the trial court to instruct the jury on voluntary intoxication even when viewed in the light most favorable to defendant.

Am Jur 2d, Trial § 743.

2. Homicide § 556 (NCI4th)— first-degree murder—attempted armed robbery—failure to instruct on second-degree murder as lesser offense—no error

The trial court did not err in a prosecution for first-degree murder and attempted armed robbery by not instructing the jury on the lesser-included offense of second-degree murder. All the evidence in this case indicates that the murder was committed during an attempted armed robbery and, by statutory definition, a murder committed during the perpetration of an attempted armed robbery is first-degree murder. The jury returned a verdict that defendant was guilty of first-degree murder under the felony-murder rule and no evidence in the record warranted submission of an instruction on second-degree murder. N.C.G.S. § 14-17 (Supp. 1992).

Am Jur 2d, Homicide § 526.

3. Assault and Battery § 116 (NCI4th)— assault with a deadly weapon with intent to kill inflicting serious injury—failure to instruct on lesser offense—no error

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing on the lesser-included offense of assault with a deadly weapon inflicting serious injury where the evidence of intoxication was insufficient to negate the necessary intent for assault with a deadly weapon with intent to kill inflicting serious injury and all the evidence tended to show a shooting with a deadly weapon with the intent to kill.

Am Jur 2d, Trial §§ 876 et seq.

4. Burglary and Unlawful Breakings § 70 (NCI4th)— constructive breaking—evidence sufficient

There was sufficient evidence of burglary where defendant contended that the victim consented to defendant's entry into the apartment but testimony from the State's witnesses disclosed that defendant knocked on the door of the apartment while holding a loaded gun in his hand, gave his name when asked, entered when the door was opened, ordered Luis Ortega to "give it up" once inside, and then shot and killed Ortega. This evidence supports constructive breaking in that defend-

ant induced the occupant to open the door by knocking at the door under the pretense of business.

Am Jur 2d, Burglary § 50.

5. **Robbery § 4.4 (NCI3d)— attempted armed robbery—illegal drugs and money from drug sales—evidence sufficient**

There was sufficient evidence of attempted armed robbery where defendant and his accomplices went to the residence of Sheila Twiggs to rob Mexicans of money and drugs. Although defendant contended that illegal drugs and money from the sale of illegal drugs are not protected property and that the attempt to steal such property is not a crime, contraband may be the subject of armed robbery. The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the attempt to perpetrate the crime of robbery.

Am Jur 2d, Robbery §§ 5, 16.

6. **Evidence and Witnesses § 907 (NCI4th)— officer's conclusion—based on statement of unavailable witness—not hearsay**

Testimony from an officer that a witness who could not be located could not add anything was not hearsay in that the testimony did not repeat, summarize, or intimate any oral or written assertions made during the investigatory interview and merely contained the officer's conclusion based on his interview.

Am Jur 2d, Evidence § 498.

7. **Burglary and Unlawful Breakings § 99 (NCI4th)— burglary—instructions—consent**

There was no error in a prosecution for murder and burglary in the court's reinstructions on breaking and entering where defendant contended that the state failed to prove that the victim, as an occupant of the apartment, lacked authority to consent to entry by defendant. The circumstances under which defendant, armed with a pistol, gained entry at 2:30 in the morning were sufficient to negate any issue of whether the victim was authorized to or granted consent to defendant's entry.

Am Jur 2d, Burglary § 50.

8. **Burglary and Unlawful Breakings § 165 (NCI4th)— burglary—evidence sufficient—instruction on lesser-included offense not given**

The trial court did not err in a first-degree burglary prosecution by failing to submit the lesser-included offense of felonious breaking or entering where all of the evidence showed a "constructive" breaking and entering during the nighttime into an apartment with people sleeping inside with the intent "to rob the Mexicans."

Am Jur 2d, Burglary § 69.

9. **Criminal Law § 1158 (NCI4th)— aggravating factors—first-degree burglary—possession of weapon—not used for entry**

The trial court did not err when sentencing defendant for first-degree burglary by using the fact that defendant was armed with a deadly weapon at the time of the breaking and entering to aggravate the sentence. The North Carolina Supreme Court has consistently held that possession of a deadly weapon may be used to aggravate the sentence for a burglary conviction when the use of the same weapon constitutes a separate offense. Defendant here possessed but did not use a gun at the time he tricked the occupants into opening the apartment door; once inside, defendant used the gun to attempt to steal money and drugs and then to shoot and kill Luis Ortega. These subsequent actions formed the basis for attempted armed robbery and murder charges.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

10. **Criminal Law § 1193 (NCI4th)— sentencing—prior convictions—prior conviction on appeal**

The trial court did not err when sentencing defendant for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury by finding the aggravating factor of prior convictions where one of those convictions was on appeal. Having failed to object to the use of his previous conviction on the ground that it was on appeal and having stipulated to the validity of his prior conviction, defendant has waived his right to challenge on appeal the

use of the conviction as an aggravating factor. Furthermore, this conviction was only one of several convictions punishable by more than sixty days confinement.

Am Jur 2d, Criminal Law §§ 598, 599.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant. 96 ALR2d 768.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgment imposing sentence of life imprisonment entered by Greeson, J., at the 23 March 1992 Criminal Session of Superior Court, Forsyth County, upon a jury verdict of guilty of first-degree murder. Defendant's motion to bypass the Court of Appeals for this Court to review judgments entered on the other felony convictions was allowed by the Supreme Court on 22 October 1992. Heard in the Supreme Court 14 April 1993.

Michael F. Easley, Attorney General, by Ellen B. Scouten, Assistant Attorney General, for the State.

Nora Henry Hargrove for defendant-appellant.

PARKER, Justice.

Defendant was charged in indictments, proper in form, with first-degree murder, first-degree burglary, assault with a deadly weapon with intent to kill inflicting serious injury, and attempted armed robbery. The case was tried capitally on the theory of premeditated and deliberated murder and under the felony-murder rule. Defendant was convicted of first-degree murder under the felony-murder rule only and was found guilty as charged on the remaining offenses. Following a sentencing proceeding pursuant to N.C.G.S. § 15A-2000, the jury recommended life imprisonment. Upon this recommendation defendant was sentenced to life imprisonment for the murder conviction and was also sentenced to consecutive terms of twenty years for the aggravated assault conviction and fifty years for the burglary conviction. The trial court found that the attempted robbery charge merged with the first-degree murder conviction and arrested judgment thereon. For the reasons discussed herein, we conclude that defendant's trial was free from prejudicial error.

The State presented evidence at trial tending to show that in late August of 1991, Sheila Twiggs resided in Apartment #53 at 920 Delmonte Court in Winston-Salem, North Carolina, with her two small children, Nikita and Thomas. The victims, Luis "Mexico" Ortega and Robert Abreu, were staying with her temporarily. On the evening of 28 August 1991, Ms. Twiggs and Ortega ran into Robert Abreu with a friend, Cordie Armstrong, at a bar named Baby Shamu. Ortega, Abreu, and Ms. Armstrong left Baby Shamu at approximately 1:00 a.m. (29 August 1991) and returned to Ms. Twiggs' apartment. When they arrived, Ms. Twiggs, who had left the bar earlier with Michael Williams, was sitting in a parked car not far from the front door of the apartment. Ms. Armstrong fell asleep in the living room along with Ms. Twiggs' daughter, Nikita.

Ms. Armstrong was awakened later by gunshots. She sat up and saw defendant, standing inside the living room approximately seven feet away from her, repeatedly firing a gun into the apartment. After defendant left, she ran outside but did not see where he had gone or whether anyone else was with him. As she reentered the apartment, she saw Ortega lying in the doorway on the floor. When Abreu entered from outside the apartment, Ms. Armstrong noticed that his face and arm were covered with blood.

Joe Conrad, one of defendant's accomplices, was allowed pursuant to a plea arrangement to plead guilty to second-degree murder, second-degree burglary, and assault with a deadly weapon with intent to kill inflicting serious injury. He received an active sentence of forty years. Conrad testified that, on the evening of 28 August 1991, Boysie Cunningham, Daryle Simons, and defendant asked him to go to Delmonte Court with them "[t]o go over there and to rob the Mexican guys." Conrad agreed and they went by his apartment to pick up his gun. Defendant was already armed with a .22 caliber handgun. Riding in defendant's blue Hyundai, they drove to Delmonte Court where they found the apartment empty. The four men rode around, visited some friends including Sheila Bailey and Frankie Glenn, drank some beer and wine, and then returned to Sheila Twiggs' apartment. Defendant and Conrad walked to the front door while Cunningham and Simons headed toward the rear of the building. This time, when defendant knocked on the door, a voice responded. Defendant yelled, "Give it up. Give it up," and shot the Mexican who opened the door. Conrad saw another Mexican running from the apartment and shot him in the mouth. Conrad then ran from the premises where he later found defendant,

Cunningham, and Simons. In the car, Conrad recalled defendant stating "he believed that the Mexican was dead."

Testifying pursuant to grants of immunity, Boysie Cunningham and Daryle Simons each stated they went to Delmonte Court to rob the Mexicans of cocaine and money. When they arrived, Cunningham and Simons headed to the side of the apartment complex to relieve themselves. At that moment, both men recall hearing defendant's knock on the front door, a voice from inside ask, "Who is it?," defendant's reply, and then four or five gunshots. According to Cunningham, defendant said his name in Spanish. Simons noted that defendant had a little handgun while Conrad was carrying a 12-gauge, sawed-off shotgun which he had said was not loaded. Neither Cunningham nor Simons was armed and neither of the men took anything from the premises.

Sheila Twiggs testified that while she was sitting in the car in front of her apartment with Michael Williams, she noticed a blue car drive up with four men inside. After parking the car, the men headed for her apartment. Defendant, whom she recognized, went to the door which was opened by Ortega. Ms. Twiggs heard defendant say, "Give it up. Where is it at?" Then she heard gunshots. Ms. Armstrong started screaming, "Mexico, Mexico." Ms. Twiggs and Michael Williams drove to a nearby truck stop intending to call the police. They failed to do so, but the police were finally notified from a neighbor's telephone. On recross-examination, Ms. Twiggs admitted she did not actually see defendant with a gun. She had previously testified defendant walked to the front door with his hands under his shirt.

The State presented forensic evidence tending to show that Ortega was shot at close range with a small caliber handgun and that unconsciousness was instantaneous. Robert Abreu was treated at Baptist Hospital for a gunshot wound to the mouth and neck. The bullet (from a small caliber gun—.22 or .25) was lodged against his spinal column and surgery was deemed too risky. He was discharged on 31 August 1991. Abreu did not testify at the trial because the prosecution was unable to locate him. Defendant offered no evidence at the guilt phase of the trial.

[1] In his first assignment of error, defendant contends the trial court erred in failing to give the requested instruction on voluntary intoxication as a defense to first-degree murder. Defendant argues

that the failure to give the instruction lessened the State's burden of proving each essential element beyond a reasonable doubt.

The test for determining when the trial court should give the voluntary intoxication instruction was set forth by this Court in *State v. Mash*, 323 N.C. 339, 372 S.E.2d 532 (1988), *on remand*, 328 N.C. 61, 399 S.E.2d 307 (1991). In *Mash*, the Court stated:

> A defendant who wishes to raise an issue for the jury as to whether he was so intoxicated by the voluntary consumption of alcohol that he did not form a deliberate and premeditated intent to kill has the burden of producing evidence, or relying on evidence produced by the state, of his intoxication. Evidence of mere intoxication, however, is not enough to meet defendant's burden of production. He must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a deliberate and premeditated intent to kill.
>
> > The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill. *State v. Shelton*, 164 N.C. 513, 79 S.E. 883 (1913). In absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon. *State v. McLaughlin*, 286 N.C. 597, 213 S.E.2d 238 (1975).

323 N.C. at 346, 372 S.E.2d at 536 (quoting *State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987) (quoting *State v. Medley*, 295 N.C. 75, 79, 243 S.E.2d 374, 377 (1978))).

"When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to defendant." *Mash*, 323 N.C. at 348, 372 S.E.2d at 537. Since defendant presented no evidence relating to his degree of intoxication, we look solely to the evidence presented by the State.

None of the State's witnesses specifically testified that defendant was intoxicated on the evening of 28 August 1991 or the early morning hours of 29 August 1991. In fact, none of the State's witnesses specifically testified that defendant was drinking beer and wine or smoking cocaine on that evening. Boysie Cunningham testified that, while at the apartment of Sheila Bailey and Frankie

Glenn, everyone was "smoking reefer, some 'caine" and drinking wine and Budweiser. On the other hand, Joe Conrad recalled only Ms. Bailey and Ms. Glenn smoking the cocaine while everyone else sat around drinking beer and wine. Daryle Simons testified:

> Q. What did you do at these girls' house?
>
> A. We sat around, drunk [sic] beer and smoke[d] some cocaine.
>
> Q. Who did?
>
> A. Me, Boysie, and two girls.

Only Frankie Glenn specifically testified concerning defendant's consumption on the night in question. Her testimony was as follows:

> Q. And state whether or not the defendant ever came back.
>
> A. Yes. He went over there, he stayed for a while. And he came back. And the whole time he was there, the first time he came, he did not drink or he didn't do anything. So the second time he came back, when they had the wine, he did drank [sic] some wine and he turned it up like this and drunk [sic] it. And when he drunk [sic] it, his eyes got real big, like the devil was in him.

This evidence, even when viewed in the light most favorable to defendant, is insufficient under *Mash* to require the trial court to instruct the jury on voluntary intoxication. This assignment of error is without merit.

[2] Defendant next contends the trial court erred in failing to instruct on the lesser-included offense of second-degree murder. We find no merit in this contention.

"[W]hen the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Swift*, 290 N.C. 383, 407, 226 S.E.2d 652, 669 (1976). All the evidence in this case indicates that the murder was committed during an attempted robbery with a dangerous weapon. By statutory definition, a murder committed during the perpetration of an attempted armed robbery is first-degree murder. N.C.G.S. § 14-17 (Supp. 1992). The jury returned a verdict that defendant was guilty of first-degree murder under

the felony-murder rule and not of premeditated and deliberated murder. No evidence in the record before this Court warranted submission of an instruction on second-degree murder. This assignment of error is overruled.

[3] In his next assignment of error, defendant argues the trial court erred in failing to submit the lesser-included offense of assault with a deadly weapon inflicting serious injury, pursuant to N.C.G.S. § 14-32(b). In support of this argument, defendant contends that the evidence of intoxication affected his ability to form the specific intent necessary for the greater charge of assault with a deadly weapon with the intent to kill inflicting serious injury, *see* N.C.G.S. § 14-32(a) (1986), and that the jury should have been instructed it could find defendant guilty of the lesser-included offense.

As we have discussed in a previous assignment of error, the evidence of intoxication was insufficient to require the trial court to instruct on voluntary intoxication as a defense. Likewise, the evidence is insufficient to negate the necessary intent for assault with a deadly weapon with intent to kill inflicting serious injury.

The trial court instructed the jury as follows:

> Now, I charge for you to find the defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, the State must prove four things beyond a reasonable doubt:
>
> First, that the defendant or someone with whom he was acting in concert assaulted Robert Abreu by intentionally shooting him in the mouth.
>
> Second, that the defendant or someone with whom he was acting in concert used a deadly weapon. A firearm is a deadly weapon.
>
> And third, the State must prove that the defendant or someone with whom he was acting in concert had the specific intent to kill Robert Abreu.
>
> And fourth, that the defendant or someone with whom he was acting in concert inflicted serious injury upon Robert Abreu. Serious bodily injury may be defined as such physical injury as causes great pain and suffering.

So I charge if you find from the evidence and beyond a reasonable doubt that on or about August 29, 1991, James Terry Oliver, III, or someone with whom he was acting in concert assaulted Robert Abreu by intentionally shooting him in the mouth with a firearm and that James Terry Oliver, III, or someone with whom he was acting in concert intended to kill Robert Abreu thereby inflicting serious injury upon Robert Abreu, it would be your duty to return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

However, if you do not so find or you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The intent to kill "may be inferred from the nature of the assault, the manner in which it is made, the conduct of the parties, and other relevant circumstances." *State v. Revels*, 227 N.C. 34, 36, 40 S.E.2d 474, 475 (1946). In the present case, the evidence introduced at trial by the State tended to show that defendant, Joe Conrad, Daryle Simons, and Boysie Cunningham, acting in concert, went to the apartment of Sheila Twiggs during the early morning hours of 29 August 1991 to "rob the Mexican guys," that defendant and Conrad were armed, that defendant shot and killed Luis Ortega, and that Conrad shot Robert Abreu in the mouth from a distance of only a few feet. "A person who deliberately fires a pistol into the face of his victim at point-blank range must be held to intend the normal and natural results of his deliberate act." *State v. Jones*, 18 N.C. App. 531, 534, 197 S.E.2d 268, 270, *cert. denied*, 283 N.C. 756, 198 S.E.2d 726 (1973). All the evidence in this case tends to show a shooting with a deadly weapon with the intent to kill. Accordingly, the trial court did not err in refusing to submit the lesser offense of assault with a deadly weapon inflicting serious injury defined in N.C.G.S. § 14-32(b).

[4] Defendant next contends that the evidence was insufficient to persuade a rational trier of fact beyond a reasonable doubt of each essential element of burglary and attempted armed robbery. We find both of these arguments to be without merit and, therefore, overrule this assignment of error.

"To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit

a felony therein." *State v. Wilson*, 289 N.C. 531, 538, 223 S.E.2d 311, 315 (1976). Defendant contends the evidence shows the victim consented to his entry into the apartment and thus the necessary element of a "breaking" cannot be established. The law is, however, that a "breaking may be actual or constructive." *Id.* at 539, 223 S.E.2d at 316.

> "Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:
>
> "1. When entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.
>
> "2. When, in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.
>
> "3. When entrance is obtained by procuring the servants or some inmate to remove the fastening.
>
> "4. When some process of law is fraudulently resorted to for the purpose of obtaining an entrance.
>
> "5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters; as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters."

Id. at 539-40, 223 S.E.2d at 316 (quoting *State v. Henry*, 31 N.C. 463, 467-68 (1849)).

Testimony from the State's witnesses disclosed that, while holding a loaded gun in his hand, defendant knocked on the door of the apartment, that when asked "Who is it," defendant gave his name, and, that when the door was opened, defendant entered. Once inside the doorway, defendant ordered Luis Ortega to "give it up" and then shot and killed him. This evidence supports the fifth type of constructive breaking—inducement of the occupant to open the door by knocking at the door under pretense of business.

[5] Similarly, defendant argues there is insufficient evidence to support the verdict of guilty of attempted armed robbery. Following the jury verdict, the trial court found that the attempted armed

robbery conviction merged with the murder conviction under the felony-murder rule and arrested judgment on that conviction only.

The evidence presented at trial tended to show that defendant and his accomplices went to the residence of Sheila Twiggs to rob the Mexicans of money and drugs. Defendant contends that illegal drugs and money from the sale of illegal drugs are not protected property; therefore, the attempt to steal such property is not a crime. Without the underlying crime of attempted armed robbery, defendant argues he was improperly convicted of first-degree murder under the felony-murder rule. We do not find this argument persuasive.

" 'Any money or personal property, corporeal in nature or capable of appropriation by another than the owner, and which is recognized by law as property, may be the subject of larceny.' " *State v. Guffey*, 265 N.C. 331, 333, 144 S.E.2d 14, 16 (1965) (quoting 32 Am. Jur. *Larceny* § 74 at p. 983 (1941)). "To constitute the offense of robbery the property taken must be such as is the subject of larceny." *Guffey*, 265 N.C. at 333, 144 S.E.2d at 16. *See State v. Trexler*, 4 N.C. 188 (1815); 46 Am. Jur. *Robbery* § 8 at p. 142 (1943).

The indictment in the instant case describes the property as "drugs and United States currency." We have previously held that an indictment describing the property as "U.S. currency" was sufficient to support a conviction of attempted armed robbery, saying, "Money is recognized by law as property which may be the subject of larceny, and hence of robbery." *State v. Owens*, 277 N.C. 697, 701, 178 S.E.2d 442, 444 (1971), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987). Likewise, contraband may be the subject of armed robbery. As the California Supreme Court stated:

> 5. Defendant apparently concedes that robbery of contraband is subject to penal sanction. California was for some time the only jurisdiction to adhere to a contrary rule (*People v. Spencer* (1921) 54 Cal.App. 54, 201 P. 130), but our court has long since agreed to the overruling of this aberrant precedent. (*People v. Odenwald* (1930) 104 Cal.App. 203, 211-212, 285 P. 406, 286 P. 161 [opn. on den. of hg.].) Today the rule is universal that by prohibiting possession of an item, the government does not license criminals to take it by force or stealth from other criminals.

People v. Dillon, 34 Cal. 3d 441, 457 n.5, 668 P.2d 697, 704 n.5 (1983). *See Guy v. State*, 108 Nev. 770, 839 P.2d 578 (1992), *cert. denied*, 507 U.S. ---, 123 L. Ed. 2d 275 (1993). *See also State v. Dwyer*, 226 Neb. 340, 345, 411 N.W.2d 341, 344 (1987) ("The taking of contraband by force is subject to penal sanction."); *State v. Pokini*, 45 Haw. 295, 367 P.2d 499 (1961) (holding specifically that a thief could be robbed of stolen goods).

In an indictment for armed robbery, "the kind and value of the property taken is not material—the gist of the offense is not the taking, but a taking by force or putting in fear." *Guffey*, 265 N.C. at 333, 144 S.E.2d at 16. "The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery." *State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972). This assignment of error is overruled.

[6] In his next assignment of error, defendant contends the trial court erred in allowing Detective Young to testify to hearsay evidence from an absent witness, Michael Williams. The relevant testimony is as follows:

> Q. (By Mr. Saunders, continuing) Detective Young, did you also talk to Michael Williams in this case?
>
> A. Yes, sir, I did.
>
> Q. Who was Michael Williams?
>
> A. Michael Williams was—
>
> MR. CARLTON: Objection, Your Honor. He—
>
> THE COURT: Overruled.
>
> A. Michael Williams was the gentleman who Sheila Twiggs had rode [sic] home with to Delmonte Court the night of this incident.
>
> Q. Was he able to add anything to any of this?
>
> MR. CARLTON: Objection, Your Honor.
>
> THE COURT: Overruled.
>
> MR. CARLTON: He has not been here.
>
> THE COURT: Overruled at this time.

A. The statement he made was—

MR. CARLTON: Objection.

THE COURT: Sustained.

Q. Just answer, was he able to add anything?

A. No.

MR. CARLTON: Objection.

THE COURT: Overruled.

The statement which defendant alleges is inadmissible hearsay is the detective's negative response to the question, "Was he able to add anything?"

Hearsay is defined by statute as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (1992). Detective Young's testimony indicating that Mr. Williams was not able to add anything is not proscribed by the hearsay definition in that the testimony of Detective Young did not repeat, summarize, or intimate any oral or written assertions made by Michael Williams during the investigatory interview. The testimony merely contained the officer's conclusion based on his interview with Michael Williams. By definition, this testimony is not hearsay. We overrule this assignment of error.

[7] Defendant next argues that the trial court's reinstructions on breaking and entering were confusing, misleading, and inaccurate thus constituting error prejudicial to his defense. In essence, defendant contends that the State failed to prove that Ortega, as an occupant of the apartment, lacked authority to consent to entry by defendant, and, thus, the State failed to establish the requisite wrongful entry for a first-degree burglary conviction. We have carefully reviewed defendant's argument and find it to be without merit.

During their deliberations, the jurors requested clarification on two matters. In response to their request for a further definition of breaking and entering, the trial court informed them he could add no more than what appeared on the written copy of the jury instructions he had previously provided.

With respect to the second question, the court read the question as follows: "[T]he second question is that the fifth item says the tenant must give consent, comma; who is the tenant?" The court responded:

> First of all, I want to refer you to the fifth element. The fifth element—and I'm not just playing words with you—the fifth element does not say that the tenant must give consent. The fifth element says that the State must prove beyond a reasonable doubt that the tenant did not give consent.
>
> JURY FOREMAN: Right.
>
> THE COURT: When you say, comma, who is the tenant? I can only tell you that that is a matter of evidence and it is your duty to recall the evidence. Not this Court.

While the jury continued its deliberations, defense counsel requested the court to add "occupant" to the jury instructions so the fifth element would read that "the tenant or occupant did not consent to the breaking and entering." The trial court refused, based on the evidence, to make the requested change in the instructions on breaking and entering.

> "The constituent elements of burglary in the first degree are: (1) the breaking (2) and entering (3) in the nighttime (4) into a dwelling house or a room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony therein." *State v. Person*, 298 N.C. 765, 768, 259 S.E.2d 867, 868 (1979). The breaking and entering of the dwelling must be without the consent of anyone authorized to give consent. *State v. Boone*, 297 N.C. 652, 256 S.E.2d 683 (1979); *State v. Friddle*, 223 N.C. 258, 25 S.E.2d 751 (1943); *State v. Goffney*, 157 N.C. 624, 73 S.E. 162 (1911); *State v. Rowe*, 98 N.C. 629, 4 S.E. 506 (1887); *State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 691 (1976); Annot., *Burglary—Entry With Consent*, 93 A.L.R. 2d 531 (1964).

State v. Meadows, 306 N.C. 683, 689-90, 295 S.E.2d 394, 398 (1982), *overruled on other grounds by State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). The owner's consent, or consent by another authorized individual, may act to negate the requisite element of breaking necessary for a burglary conviction.

However, in light of the specific facts presented in this case, we do not reach the precise question posed by the parties—whether Ortega, a house guest, had the authority to consent to defendant's entry into the apartment. Rather, we find that the circumstances under which defendant, armed with a pistol, gained entry at 2:30 in the morning were sufficient to negate any issue of whether Ortega was authorized to or granted consent to defendant's entry. Nothing in the record suggests that the victims were expecting defendant and Conrad. Similarly, no evidence suggests that had Ortega known defendant and Conrad were standing with guns poised outside the door, he would have opened the door. Whether defendant's saying his name in Spanish when asked who was there connotes consent or trickery was for the jury to decide.

As we have previously discussed, the evidence in the case supported a "constructive" breaking—inducement of the occupant to open the door by means of knocking at the door under pretense of business. "Where 'consent' is obtained by fraud or trickery, however, the law treats defendant's action as a 'constructive breaking,' sufficient to sustain conviction under the statute." *State v. Wheeler*, 70 N.C. App. 191, 195, 319 S.E.2d 631, 634, *disc. rev. denied*, 312 N.C. 624, 323 S.E.2d 925 (1984), *cert. denied*, 316 N.C. 201, 341 S.E.2d 583 (1986). This assignment of error is overruled.

[8] Since we find no error in defendant's first-degree burglary conviction, defendant's argument that the trial court erred in failing to submit the lesser-included offense of felonious breaking or entering also fails. *See State v. Jolly*, 297 N.C. 121, 254 S.E.2d 1 (1979). "Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense." *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). All the evidence in this case shows a "constructive" breaking and entering during the nighttime into an apartment with people sleeping inside with the intent "to rob the Mexicans." This assignment of error is overruled.

[9] In his next assignment of error, defendant asserts that the trial court erred in using the fact that defendant was armed with a deadly weapon at the time of the breaking and entering to aggravate his sentence for first-degree burglary. The portion of the Fair Sentencing Act upon which defendant relies provides that "[e]vidence necessary to prove an element of the offense may

not be used to prove any factor in aggravation." N.C.G.S. § 15A-1340.4(a)(1) (1988). Defendant contends the same evidence, namely, the use of a deadly weapon, was used to prove the State's theory of entry for the burglary conviction. While urging us to reexamine our position, defendant concedes that his argument is contrary to previous holdings of this Court.

This Court has consistently held that possession of a deadly weapon may be used to aggravate the sentence for a burglary conviction when the use of the same weapon constitutes a separate offense. *State v. Taylor*, 322 N.C. 280, 367 S.E.2d 664 (1988); *State v. Toomer*, 311 N.C. 183, 316 S.E.2d 66 (1984); *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983). In *Taylor*, defendant possessed but did not use the deadly weapon—a hammer—at the time he illegally entered the victim's mobile home. He subsequently used the hammer to attack his victim thus forming the basis for the felonious assault charge. In *Toomer*, defendant possessed but did not use a handgun when he illegally entered the apartment but then used the weapon to threaten the victim during a sexual assault. Finally, in *Chatman*, a knife was used in committing the rape but was not used in the burglary. In each of these cases, defendant possessed but did not use a deadly weapon at the time he committed the burglary offense. As such, the trial court in each case properly found the fact that defendant was armed with a deadly weapon to be a factor in aggravation of defendants' sentences for first-degree burglary.

In the present case, defendant possessed but did not use a gun at the time he tricked the occupants into opening the apartment door. Once he entered, defendant used the gun to attempt to steal money and drugs and then to shoot and kill Luis Ortega. These subsequent actions formed the basis for the attempted armed robbery and the first-degree murder charges.

As in *Taylor*, *Toomer*, and *Chatman*, the trial court did not err by aggravating defendant's sentence on the first-degree burglary conviction with the fact that defendant was armed with a deadly weapon at the time he committed the initial crime of burglary. "The possession of a weapon is not an essential element of first-degree burglary and therefore the challenged aggravating factor does not violate the prohibition of G.S. 15A-1340.4(a)(1) . . . ." *Toomer*, 311 N.C. at 194, 316 S.E.2d at 72. This assignment of error is also without merit.

[10] Finally, defendant contends the trial court erred in aggravating his sentence based on a finding that defendant had prior convictions punishable by more than sixty days' confinement. Once the jury was excused, the district attorney presented evidence to the court of defendant's previous convictions for purposes of sentencing on the convictions for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury.

The State informed the court of defendant's previous convictions in North Carolina for misdemeanor larceny in 1986; carrying a concealed weapon in 1986 and, again, in 1991; possession of toxic vapors in 1991; and, assault with a deadly weapon inflicting serious injury in 1991. Furthermore, he was convicted in 1988 in the State of Georgia of giving a false name to law enforcement officers and for knowingly and willingly obstructing and hindering a law enforcement officer in the exercise of his duties. At the time of this trial, defendant's 1991 conviction for assault with a deadly weapon inflicting serious injury was on appeal to the North Carolina Court of Appeals and a final decision had yet to be rendered. Evidence of the assault was previously presented during the penalty phase of the trial through testimony of the victim and a certified copy of the judgment. Although at the pretrial hearing before Judge Greeson on 13 January 1992, defendant had argued his motion to exclude the prior conviction on appeal, defendant failed to object when the testimony was introduced into evidence before the jury during sentencing on the first-degree murder conviction and, again, when the State presented the evidence to the court for sentencing on the burglary and felonious assault convictions. As a matter of course, defendant stipulated to each conviction, except for the Georgia conviction of obstructing a law enforcement officer in the exercise of his duties.

For purposes of the Fair Sentencing Act, a prior conviction is defined as when one has pled guilty, pled no contest, or been adjudicated guilty, and judgment has been entered, the time for appeal has expired or the conviction has been finally upheld on direct appeal. N.C.G.S. § 15A-1340.2(4) (1988); *State v. Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 (1986). However, having failed to object to the use of his previous conviction on the ground that it was on appeal and having stipulated to the validity of his prior conviction, defendant has waived his right to challenge on appeal the use of the assault conviction as an aggravating factor. N.C. R. App. P. 10(b)(2). " 'It is well settled that with the exception

of evidence precluded by statute in furtherance of public policy [which exception does not apply in this case], the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent is not a proper basis for appeal.' " *State v. Hunter*, 297 N.C. 272, 278-79, 254 S.E.2d 521, 525 (1979). Furthermore, the evidence of defendant's assault conviction was only one of several convictions punishable by more than sixty days' confinement. Thus, the trial court properly found as an aggravating factor that defendant had prior convictions punishable by more than sixty days' confinement. This assignment of error is overruled.

For the foregoing reasons, defendant James Terry Oliver received a fair trial free of prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. L. H. YELVERTON, JR.

No. 485A91

(Filed 10 September 1993)

1. Criminal Law § 76 (NCI4th)— pretrial publicity—change of venue

When the trial court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either transfer the case to another county or order a special venire. A trial should be held in a county different from the one in which a crime was allegedly committed only in rare cases, however, because of the significant interest of county residents in seeing criminals who commit local crimes being brought to justice.

Am Jur 2d, Criminal Law § 378.

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

Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.

2. Criminal Law §§ 76, 77 (NCI4th)— pretrial publicity—change of venue—test and burden of proof

The test for determining whether venue should be changed is whether it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. Defendant has the burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried.

Am Jur 2d, Criminal Law § 378.

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

Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.

3. Criminal Law § 76 (NCI4th)— pretrial publicity—change of venue—discretion of court

The determination of whether a defendant has carried his burden of showing that pretrial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes, based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law.

Am Jur 2d, Criminal Law § 378.

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

Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.

4. Criminal Law § 79 (NCI4th)— word-of-mouth publicity—denial of change of venue

Defendant failed to carry his burden of showing any reasonable likelihood that pretrial, word-of-mouth publicity

might have affected the fairness of his trial for first-degree murder, rape, burglary, kidnapping and aggravated assault, and the trial court properly denied defendant's motion for a change of venue, where counsel for the State and for the defense scrupulously asked members of the venire whether they had read or heard about this case from any source; those who admitted to having any difficulty putting aside previously formed opinions were excused for cause; and those who remained and were impaneled stated without exception either that they had formed no opinion or that they could put what they had heard or read out of their minds and listen objectively to the evidence before them.

Am Jur 2d, Criminal Law § 378.

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

Pretrial publicity in criminal case as affecting defendant's right to fair trial—federal cases. 10 L. Ed. 2d 1243.

5. Jury §§ 142, 153 (NCI4th)— capital case—prospective jurors—voir dire—when death penalty appropriate—refusal to permit questions

The trial court did not abuse its discretion in refusing to permit defendant to ask prospective jurors in a capital trial questions regarding when in their opinion the death penalty would be appropriate, including questions as to whether they would find it impossible to vote for life imprisonment where torture or rape had been involved or whether their general approval of the death penalty would interfere with their ability to consider the existence of mitigating circumstances, where defendant was consistently permitted to ask jurors whether they would automatically vote for the death penalty upon conviction, and none of the rejected questions amounted to a proper inquiry as to whether the jury could follow the law.

Am Jur 2d, Jury § 202.

6. Jury § 203 (NCI4th)— prospective jurors—knowledge about case—denial of challenges for cause

The trial court did not err in the denial of defendant's challenges for cause of a prospective juror who knew the vic-

tims and had heard and read about the case and another prospective juror who owned a store near the crime scene, knew defendant's family, and had heard much discussion about the crimes, where these two potential jurors were thoroughly questioned with regard to whether their familiarity with the case might taint their ability to be fair and impartial in rendering a verdict, and their testimony demonstrated a conscientious and deliberate resolve to put familiarity and possible prejudice aside and to abide by the law and the trial court's instructions.

Am Jur 2d, Jury § 276.

7. **Jury § 227 (NCI4th)— death penalty views—equivocation—excusal for cause**

The trial court did not err in allowing the State's challenge for cause of a prospective juror because of his capital punishment views where the voir dire answers of the juror showed his unwavering reluctance to recommend the death penalty under any circumstances, and the record shows that any equivocation in the juror's answers resulted from his expressed, conscientious desire to do his duty as a juror and to follow the trial court's instructions in the face of recognizing his personal inability to impose the death penalty.

Am Jur 2d, Jury §§ 289, 290.

Comment note—beliefs regarding capital punishment as disqualifying juror in capital case—post-Witherspoon cases. 39 ALR3d 550.

8. **Homicide § 556 (NCI4th)— felony murder based on first-degree burglary—intent to rape—instructions on lesser offenses not required**

In a felony murder prosecution based on the felony of first-degree burglary wherein the State chose to rely upon rape for the felonious intent element of burglary, the State's evidence was positive and uncontradicted as to each element of burglary based on the intent to commit rape so that the trial court did not err by refusing to submit to the jury the lesser included offenses of second degree murder and involuntary manslaughter where the evidence tended to show that, although defendant first demanded money when he entered the victims' home, almost immediately afterwards he ordered the female victim to disrobe and raped her. This was ample

evidence from which the jury could infer that defendant entered the victims' home with the intent to commit rape, and evidence that defendant also intended to commit other offenses against the victims, including larceny, does not conflict with the evidence that he intended to commit rape.

Am Jur 2d, Homicide § 525.

9. Homicide § 199 (NCI4th)— felony murder—heart attack by victim—proximate cause of death

The State's evidence was sufficient to show that defendant's actions were the proximate cause of the victim's death so as to support his conviction of felony murder where it tended to show that defendant broke into and entered the victim's home, attacked the victim and his wife with a dust mop, and took a gun away from the wife; the seventy-one-year-old victim collapsed and died; the victim suffered from a badly diseased heart, emphysema, fibrosis of the lungs, a malignant lung tumor, and high blood pressure; and a pathologist opined that the cause of the victim's death was acute heart failure induced by multiple blunt impact injuries to the hands and arms, although such defensive wounds, which could have been caused by a mop handle, would not be fatal to a healthy person.

Am Jur 2d, Homicide §§ 74, 75.

10. Criminal Law § 775 (NCI4th)— voluntary intoxication—insufficient evidence to require instruction

The trial court did not err by refusing to instruct on voluntary intoxication where there was some evidence that defendant had drunk "a right smart amount" of beer and liquor at a party and had smoked crack cocaine with a companion on the evening of the crimes; the only evidence that defendant was in any way affected by his drinking and smoking of crack was defendant's statement to officers that he did not deny having committed the crimes but had no memory of having done so; and a victim and the man with whom defendant smoked crack both testified that defendant appeared to be rational and showed no other physical signs of intoxication.

Am Jur 2d, Homicide § 131.

11. Evidence and Witnesses § 315 (NCI4th)— defendant's rape of second victim—admissibility to show identity, motive and intent—probative value

Evidence of defendant's rape of a second victim a few hours after his rape of the victim in this case was admissible to show identity, motive and intent, and the probative value of such evidence was overwhelming and not outweighed by the danger of unfair prejudice, where defendant was identified by both victims; both victims identified the car in which each was kidnapped; both victims were forced to accompany defendant at gunpoint; both were raped in the back seat of the car; and both were forced out of the car and abandoned in a rural area. In addition, the second victim's testimony was probative as to defendant's defense of voluntary intoxication. N.C.G.S. § 8C-1, Rules 403, 404(b).

Am Jur 2d, Rape § 71.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix. 2 ALR4th 330.

12. Criminal Law § 1199 (NCI4th)— sentencing—non-capital felonies—"catchall" mitigating circumstance found by jury for capital crime—erroneous adoption by court

The trial court erred by adopting the "catchall" mitigating circumstance found by the jury for the capital crime of first-degree murder when imposing sentences for kidnapping, aggravated assault and armed robbery without indicating in the record its conclusion as to exactly what the circumstance denoted, since the trial court could not have known what mitigating evidence the jury considered in finding this circumstance in the capital case and thus could not have given the sentencing decision in the non-capital felony cases the individualized consideration to which defendant is entitled under the Fair Sentencing Act.

Am Jur 2d, Criminal Law § 599.

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Hudson, J., at the 14 January 1991 Criminal Session of Superior Court, Greene County, on a jury verdict finding defendant guilty of first-

degree murder. On 27 August 1992 this Court allowed defendant's motion to bypass the Court of Appeals on his appeals from additional judgments for first-degree rape (two counts), first-degree kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. Heard in the Supreme Court 12 April 1993.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Harry H. Harkins, Jr., for defendant-appellant.

WHICHARD, Justice.

The jury found defendant guilty of murder in the first degree under the felony murder rule, first-degree rape (two counts), first-degree burglary, first-degree kidnapping, armed robbery, and assault with a deadly weapon with intent to kill inflicting serious injury. We find no error in defendant's capital trial nor in any part of the trial relating to the rape charges. With regard to the kidnapping, armed robbery, and assault convictions, however, we conclude that defendant is entitled to have the charges remanded for resentencing.

Evidence presented by the State tended to show that in the early morning hours of 2 December 1989 defendant broke into the home of his neighbors, John and Edna Sutton. The Suttons were awakened by defendant's entry and confronted him in the hallway. Mrs. Sutton fired a warning shot with a pistol. According to her testimony, defendant then attacked the Suttons with a dust mop and seized the gun. Mr. Sutton, a seventy-one-year-old retired farmer with a diseased heart, collapsed and died from an apparent heart attack. Defendant then demanded money from Mrs. Sutton, took money from her purse, raped her at gunpoint, took her purse and her car keys, and forced her to leave with him in her car. Defendant drove to a remote area, raped Mrs. Sutton again, then forced her to get out of the car and crawl through a ditch into some briars, where he shot her in the back of the head. Mrs. Sutton then heard defendant drive off in her car. She walked to a nearby trailer where the occupant called the sheriff.

At approximately 5:30 a.m. the same day a man identified by the victim as defendant robbed, kidnapped, and raped the manager of a convenience store in Raleigh. The victim testified her assailant

was driving a car that matched a photograph of Mrs. Sutton's car.

Defendant surrendered to law enforcement authorities on 3 December 1989. In an interview with officers, he stated he did not deny that he committed the crimes, but that he could not remember having done so.

Following a capital sentencing proceeding the jury was unable unanimously to recommend punishment, and the trial court imposed a life sentence for the murder conviction pursuant to N.C.G.S. § 15A-2000(b) (1988). Defendant was sentenced, in addition, to life imprisonment for each of the two rape counts, forty years imprisonment each for the kidnapping and the armed robbery, and twenty years imprisonment for the assault, all to be served consecutively. Defendant received no separate sentence for the burglary, which was merged with the murder for judgment.

Defendant's first assignment of error concerns the trial court's denial of defendant's motion for a change of venue under N.C.G.S. § 15A-957. The trial court made extensive findings of fact, taking into account two newspaper articles covering the Sutton assaults and two television news videos covering the crime and defendant's arrest. It concluded that the media reports had been fact-based, neutral, and non-prejudicial towards defendant, and that neither descriptions of the alleged crimes nor depictions of defendant had been inflammatory. Defendant contends the trial court erred in failing to take into account excessive pre-trial word-of-mouth publicity.

[1] When "the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial," the trial court must either transfer the case to another county or order a special venire. N.C.G.S. § 15A-957 (1988). A trial should be held in a county different from the one in which a crime was allegedly committed only in rare cases, however, because of the significant interest of county residents in seeing criminals who commit local crimes being brought to justice. *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1983).

[2, 3] The test for determining whether venue should be changed is whether "it is reasonably likely that prospective jurors would base their decision in the case upon pre-trial information rather than the evidence presented at trial and would be unable to remove

from their minds any preconceived impressions they might have formed." *Id.* at 255, 307 S.E.2d at 347. The burden of proving the existence of a reasonable likelihood that he cannot receive a fair trial because of prejudice against him in the county in which he is to be tried rests upon the defendant. *State v. Madric*, 328 N.C. 223, 226, 400 S.E.2d 31, 33 (1991). "In deciding whether a defendant has met his burden of showing prejudice, it is relevant to consider that the chosen jurors stated that they could ignore their prior knowledge or earlier formed opinions and decide the case solely on the evidence presented at trial." *Jerrett*, 309 N.C. at 255, 307 S.E.2d at 348. The determination of whether a defendant has carried his burden of showing that pre-trial publicity precluded him from receiving a fair trial rests within the trial court's sound discretion. *Madric*, 328 N.C. at 226, 400 S.E.2d at 33. The trial court has discretion, however, only in exercising its sound judgment as to the weight and credibility of the information before it, including evidence of such publicity and jurors' averments that they were ignorant of it or could be objective in spite of it. When the trial court concludes, based upon its sound assessment of the information before it, that the defendant has made a sufficient showing of prejudice, it must grant defendant's motion as a matter of law. *See State v. Abbott*, 320 N.C. 475, 478, 358 S.E.2d 365, 368 (1987).

[4] Defendant argues the pre-trial atmosphere in his case, like that in *Jerrett*, prejudiced the jury against him and precluded a fair and impartial trial. In *Jerrett* this Court applied its recognition in *State v. Boykin*, 291 N.C. 264, 271, 229 S.E.2d 914, 918 (1976), that "there may be cases where widespread, word-of-mouth publicity may be as damaging to a defendant's right to an impartial trial as mass media publicity." There is no question that word-of-mouth publicity, like television, radio, and newspaper coverage of a crime, can infect public objectivity, particularly in a small community. *See Jerrett*, 309 N.C. at 256, 307 S.E.2d at 348. The record in this case reveals, however, that counsel for the State and for the defense scrupulously asked members of the venire whether they had read or heard about this case from any such source. Those who admitted to having any difficulty whatsoever putting aside previously formed opinions were excused for cause. Those who remained and were impaneled stated without exception either that they had formed no opinion or that they could put what they had heard or read out of their minds and listen objective-

ly to the evidence before them. Given that all the jurors who previously had heard about the case averred that their objectivity was unaffected by that exposure, and given that defendant was unable to identify a single juror who remained tainted by public opinion, we hold that defendant has failed to carry his burden of showing any reasonable likelihood that pre-trial, word-of-mouth publicity might have affected the fairness of his trial and that the trial court therefore properly denied defendant's motion for a change of venue.

[5] Defendant next contends the trial court erred in refusing to permit him to question prospective jurors regarding when in their opinion the death penalty would be appropriate. He asked, for example, whether they would find it impossible to vote for life imprisonment where torture or rape had been involved or whether their general approval of the death penalty would interfere with their ability to consider the existence of mitigating circumstances. Notably, defendant was consistently permitted to ask jurors specifically whether they would automatically vote for the death penalty upon conviction, the question to which the United States Supreme Court held capital defendants entitled under the Due Process Clause of the Fourteenth Amendment in *Morgan v. Illinois*, 504 U.S. ---, 119 L. Ed. 2d 492 (1992).

Defendant relies on general language about the importance of *voir dire* in *Morgan* in arguing he was constitutionally entitled to ask such broader questions. There is no denying that "part of the guaranty of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Id.* at ---, 119 L. Ed. 2d at 503. Within this broad principle, however, the trial court has broad discretion to see that a competent, fair, and impartial jury is impaneled; its rulings in this regard will not be reversed absent a showing of abuse of discretion. *E.g.*, *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980); *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979).

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. ---, 123 L. Ed. 2d 503 (1993), the trial court barred defense counsel from asking similar questions of members of the venire. We held that the trial court, in so doing, acted well within its discretion: "Counsel should not fish for answers to legal questions before the judge has instructed the juror on applicable legal principles by

which the juror should be guided. . . . Jurors should not be asked what kind of verdict they would render under certain named circumstances." *Id.* at 404, 417 S.E.2d at 772 (*quoting State v. Phillips*, 300 N.C. at 682, 268 S.E.2d at 455).

As in *Hill*, we hold here that defendant has shown no abuse of the trial court's discretion where "none of the rejected questions amounted to a proper inquiry as to whether the jury could follow the law." *Id.*

[6] Defendant's third assignment of error asserts that the trial court abused its discretion in not allowing defendant's challenge for cause of two members of the venire who, defendant alleges, had "formed or expressed an opinion as to the guilt or innocence of the defendant." N.C.G.S. § 15A-1212(6) (1988). Defendant was compelled to exercise peremptory challenges to excuse Mrs. Hill, who stated she had known Mrs. Sutton for twenty years and had supervised Mrs. Sutton for twelve years at the plant where they worked. Mrs. Hill had known Mr. Sutton through her association with Mrs. Sutton and because her brother was related to him through marriage. Although Mrs. Hill said she had heard and read about the case, she stated clearly that this familiarity would not affect her ability to be objective: "I don't think it would bother my judgment of the decision and I would go by the law."

Mr. Hill, the other juror whom defendant excused, stated that he owned a store located only two or three miles from the crime scene and knew defendant's mother, father, and brother. He stated that people came into the store and "talk[ed] about [the crime] all the time," and that he knew "all about it." Although Mr. Hill admitted that in the past he had formed and probably had expressed an opinion about the case, he stated unequivocally what he would do as a juror: "I would have to hear what was presented here in court in order for me to make a decision. . . . You've got a man's life at stake. . . . And I would have to be very fair. That's my own heart." Repeatedly asked whether his previous knowledge of the case might in some way enter into his decision regarding defendant's guilt, Mr. Hill responded:

> Not making the decision, no. I'll think about what had happened and what I've heard in court. But as far as reaching a decision myself, after I have heard the evidence and stuff; no, it wouldn't. . . . You know, you don't think about what's happened. I remember when it all happened. I'm sure I'm

going to think about it. But all I'm supposed to do, I think, as a juror and as a citizen of the state, is to hear what is presented in this case and that alone. Is that not true?

It is the trial court's duty "to supervise the examination of prospective jurors and to decide all questions relating to their competency." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (*quoting State v. Young*, 287 N.C. 377, 387, 214 S.E.2d 763, 771 (1975), *judgment vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)). The trial court has the opportunity to see and hear the juror on *voir dire* and, having observed the juror's demeanor and made findings as to his credibility, to determine whether the juror can be fair and impartial. *See State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987). For this reason, among others, it is within the trial court's discretion, based on its observation and sound judgment, to determine whether a juror can be fair and impartial. *Id.* at 28, 357 S.E.2d at 364.

The record reveals that these two potential jurors were thoroughly questioned with regard to whether their familiarity with the case might taint their ability to be fair and impartial in rendering a verdict. Their testimony demonstrated a conscientious and deliberate resolve to put familiarity and possible prejudice aside and to abide by the law and the trial court's instructions. Given the serious assurances of Mr. and Mrs. Hill that they would be able to assess the evidence objectively, we conclude that the trial court did not err in denying defendant's motion to excuse them for cause.

[7] Defendant similarly contends the trial court erred in permitting the State to challenge a prospective juror on "death qualification" grounds. A prospective juror may be excluded for cause because of his views on capital punishment if those views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Cummings*, 326 N.C. 298, 306, 389 S.E.2d 66, 70 (1990) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)). Excusal for cause is proper when a juror admits "a specific inability to impose the death penalty under any circumstances." *State v. Oliver*, 302 N.C. 28, 39, 274 S.E.2d 183, 191 (1981).

The State's *voir dire* of this prospective juror showed his unwavering reluctance to recommend the death penalty under any circumstances:

Q. How do you feel about a death sentence?

A. Well, in some cases I might feel like some people deserve it, but I wouldn't want to be the one that rendered the judg[ ]ment on that.

Q. I see. So you do not feel that under any facts and circumstances that you would be able to return such a verdict?

A. I think it would bother my conscience.

Q. Well, sir, again, I need for you to answer that question directly and tell me whether or not you feel that you would be able to return a death sentence under any facts and circumstances?

A. I don't think I could return a verdict.

Upon being questioned by defense counsel, the prospective juror repeated his position that some defendants might "deserve" the death penalty, but that he "wouldn't want to be the one that judged the person in that situation." Defense counsel then asked repeatedly whether the prospective juror could follow the court's instructions relating to the imposition of a possible death sentence or life imprisonment. Although he answered that he could follow such instructions, the prospective juror steadfastly indicated reluctance or uncertainty as to his ability to "carry out [his] duties as a juror in regard to those things," and subsequently affirmed he would be unable to "carry through and do those things as a juror even though it might be an unpleasant task."

The record demonstrates that any equivocation in the prospective juror's answers resulted from his expressed, conscientious desire to do his duty as a juror and to follow the trial court's instructions in the face of recognizing his personal inability to impose the death penalty. We hold excusal of this prospective juror for cause was proper under the standard articulated in *Oliver* and that the trial court did not err.

[8] Defendant next contends the trial court erred in refusing to submit lesser-included offenses to the murder charge. Involuntary manslaughter and second-degree murder are lesser-included offenses supported by an indictment charging murder in the first degree. *E.g., State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989). A defendant is entitled to a charge on a lesser-included offense when there is some evidence in the record supporting the lesser

offense. *Id.* at 593, 386 N.C. at 561. Conversely, "[w]here the State's evidence is positive as to each element of the offense charged and there is no contradictory evidence relating to any element, no instruction on a lesser included offense is required." *Id.* at 594, 386 S.E.2d at 561; *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). "[W]hen the law and evidence justify the use of the felony-murder rule, then the State is not required to prove premeditation and deliberation, and neither is the Court required to submit to the jury second-degree murder or manslaughter unless there is evidence to support it." *State v. Strickland*, 307 N.C. 274, 292, 298 S.E.2d 645, 657 (1983) (*quoting State v. Wall*, 304 N.C. 609, 613, 286 S.E.2d 68, 71 (1982)).

The State relied upon first-degree burglary to support its prosecution of the murder charge under the theory of felony murder. First-degree burglary is the breaking or entering of an occupied dwelling house in the nighttime with the intent to commit a felony therein. N.C.G.S. § 14-51 (1986); *State v. Cooper*, 288 N.C. 496, 499, 219 S.E.2d 45, 47 (1975). The indictment charged that defendant "broke and entered [the Sutton house] with the intent to commit felonies therein, to wit: larceny, armed robbery, rape, murder and kidnapping." The State elected to proceed on the intent to commit rape as the felony underlying the first-degree burglary charge. Defendant now contends the evidence on the burglary charge was conflicting insofar as there was evidence that he broke and entered the Sutton house with intent to commit larceny. Defendant argues that such conflicting evidence on the element of his intent to commit a felony is conflicting evidence on an element of the felony murder charge. If it was his intention to commit only larceny, defendant argues, then he was entitled to instructions on second-degree murder and involuntary manslaughter.

Intent is a mental attitude that ordinarily must be proved by circumstances from which it can be inferred. *State v. Little*, 278 N.C. 484, 487, 180 S.E.2d 17, 19 (1971). "The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974) (*quoting State v. Tippett*, 270 N.C. 588, 594, 155 S.E.2d 269, 274 (1967)). Although the felonies actually committed after the house was entered are not necessarily proof of the intent requisite for the crime of burglary, they are evidence from which such intent may be found. *Id.*

In choosing to rely upon rape as the felony underlying the burglary charge, the State elected to prove that it was defendant's intent to commit rape upon entry. It may have been defendant's intention to commit other felonies as well, including kidnapping and robbery, as charged in the indictment. The intent to commit one felony does not foreclose the simultaneous intent to commit others. The State need not prove one felonious intention *and* the exclusion of all others; it need only prove that defendant intended to commit at least one of the felonies cited in the indictment. *See State v. Joyner*, 301 N.C. 18, 30, 269 S.E.2d 125, 133 (1980) (error to instruct defendant intended to commit rape or larceny when indictment charged only larceny, but harmless because jury found defendant had committed both); *see also State v. McDougall*, 308 N.C. 1, 10-12, 301 S.E.2d 308, 315 (1983) (underlying felonies stated disjunctively; unanimous jury verdict, as instructed, presumed as to both).

With regard to the felonious intent to commit rape, the evidence tended to show that although defendant first demanded money, almost immediately afterwards he ordered Mrs. Sutton to disrobe and raped her. This is ample evidence from which the jury could infer that defendant entered the Suttons' house with the intent to commit rape. Evidence that defendant also intended to commit other offenses against the Suttons does not conflict with evidence that he intended to commit rape, but is, under these circumstances, irrelevant for purposes of proof of burglary and, it follows, of felony murder. We hold that the State's evidence was positive as to each element of burglary based on the intent to commit rape, and no evidence contradicted any element of this charge. *Cf. State v. Thomas*, 325 N.C. 583, 386 S.E.2d 555 (some evidence that, while defendant was driving, companion shot at street signs and not deliberately into residences could have supported alternative verdict of involuntary manslaughter). Thus the trial court did not err in refusing to submit the lesser-included offenses of second-degree murder and involuntary manslaughter to the jury.

[9] Defendant next contends the State failed to show his actions were the proximate cause of Mr. Sutton's death and that the trial court therefore erred in refusing to dismiss the felony murder charge. The pathologist who performed an autopsy on the decedent testified that at the time of his death Mr. Sutton suffered from a badly diseased heart, emphysema, fibrosis of the lungs, a malignant lung tumor, and high blood pressure. He opined that the

cause of Mr. Sutton's death was "acute heart failure induced or caused by multiple blunt impact injuries" to the hands and arms and that such defensive wounds, which could have been caused by a mop handle, would not be fatal to a healthy person.

Defendant concedes that the law on this question is clear: "one who inflicts an injury on another and thereby accelerates his death shall be held criminally responsible therefor." *State v. Luther*, 285 N.C. 570, 575, 206 S.E.2d 238, 241-42 (1974) (quoting 40 Am. Jur. 2d, *Homicide* § 16 (1968)). *See also State v. Atkinson*, 298 N.C. 673, 681-82, 259 S.E.2d 858, 863-64 (1979) (victim was a "walking bombshell" on account of preexisting heart disease); *State v. Cummings*, 46 N.C. App. 680, 685, 265 S.E.2d 923, 926, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980) (defendant must accept his victim in the condition that he finds him). The evidence was overwhelming that Mr. Sutton died as the result of trauma caused by defendant's entry and subsequent actions. We therefore hold that the trial court did not err in refusing to dismiss the murder charge.

[10] Defendant also contends the trial court erred in refusing to instruct the jury on voluntary intoxication. There was some evidence that defendant had drunk "a right smart amount" of beer and liquor at a party Friday evening and that he had smoked crack cocaine with a companion between 10:45 and 11:45 p.m. The companion testified defendant was not noticeably intoxicated either before or after smoking the "crack," and Mrs. Sutton testified that defendant talked and looked normal, walked and drove without difficulty, and appeared to be in his right mind.

To be entitled to an instruction on voluntary intoxication, a defendant "must produce substantial evidence which would support a conclusion by the judge that he was so intoxicated that he could not form a[n] . . . intent" to commit the offense. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). "The evidence must show that at the time of the killing the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill." *Id.* (*quoting State v. Strickland*, 321 N.C. 31, 41, 361 S.E.2d 882, 888 (1987)). Viewed in the light most favorable to defendant, the evidence tended to show only that defendant had indulged in intoxicating substances. Except for defendant's statement to officers that he did not deny having committed the crimes but had no memory of having done so, there was no evidence

that defendant was in any way affected by his drinking and smoking crack earlier in the evening. To the contrary, Mrs. Sutton and the man with whom defendant smoked the crack both testified that defendant appeared to be rational and showed no other physical signs of intoxication. We hold that defendant failed to produce *substantial* evidence that his mind and reason were so completely overthrown by intoxicating substances as to render him utterly incapable of forming an intent to rape. The trial court thus did not err in refusing to give this instruction.

[11] Defendant next contends the trial court erred in admitting the testimony of the woman he raped in Raleigh near dawn on 2 December 1989. The trial court held a *voir dire* of the victim's testimony and ruled it admissible under N.C.G.S. § 8C-1, Rule 404(b), to show a common scheme, defendant's state of mind, intent, and identity. Defendant does not contest the admissibility of this evidence under Rule 404(b), but argues "its probative value [was] substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403. We disagree.

The probative value of this testimony was overwhelming: defendant was identified by both victims; both victims identified the car in which each was kidnapped; both victims were forced to accompany defendant at gunpoint; both were raped in the back seat of the car; and both were forced out of the car and abandoned in a rural area. Evidence of the second rape strongly supported identity, motive, and intent in the rape of Mrs. Sutton. The two rapes occurred within a few hours of one another; this temporal proximity substantially enhanced the probative value of the evidence of the second rape. *See State v. Price*, 326 N.C. 56, 69, 388 S.E.2d 84, 91, *judgment vacated on other grounds and remanded*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990), *on remand*, 331 N.C. 620, 418 S.E.2d 169 (1992), *judgment vacated on other grounds and remanded*, --- U.S. ---, 122 L. Ed. 2d 113 (1993). In addition, the second victim's testimony was probative as to defendant's defense of voluntary intoxication. She testified that she, too, observed no signs of defendant's intoxication, and she stated that defendant admitted he had "been in trouble one time tonight already," and that "they" would put him in jail when "they" caught up with him.

Evidence of similar sex offenses by a defendant is admissible "unless the other offense[s] were not sufficiently similar or were too remote in time from the commission of the offense charged."

State v. Cotton, 318 N.C. 663, 666, 351 S.E.2d 277, 279 (1987). These offenses were neither dissimilar nor temporally remote, and the trial court did not err in admitting evidence of defendant's rape of the second victim.

[12] Finally, defendant contends the trial court failed to exercise its discretion and failed to give individualized consideration to mitigating factors under the Fair Sentencing Act, N.C.G.S. § 15A-1340.1 *et seq.*, in sentencing defendant for kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and armed robbery. The jury answered the issues of aggravating and mitigating circumstances in the capital trial, but was unable to agree on its recommendation as to punishment for the murder charge. The trial court imposed a life sentence for the murder in accord with N.C.G.S. § 15A-2000(b). In pronouncing sentence for the kidnapping, the trial court stated, "it appears to the Court that the defendant would have a right to each one of the mitigating factors that the jury has found in its verdict sheet." The trial court similarly stated with regard to the armed robbery and assault charges that defendant had proven each of the mitigating factors "that the jury has found in the issues and recommendation form as to punishment." The mitigating circumstances found by the jury were transcribed onto a sheet entitled "Mitigating Factors" and attached to the felony judgment forms for the robbery and kidnapping offenses. For the assault judgment, this sheet is absent from the record, but the judgment form itself, like those for robbery and kidnapping, indicates that "written findings [are] set forth on the attached Findings of Factors in Aggravation and Mitigation of Punishment." The trial court's colloquy with the clerk indicates its intention to rely on the jury's recommendations for all three felonies. Among the factors listed was the "catchall" mitigating circumstance in capital cases: "Any other circumstances arising from the evidence which the Jury deems to have mitigating value."

The trial court is given "wide latitude in arriving at the truth as to the existence of aggravating and mitigating [factors]." *State v. Vandiver*, 326 N.C. 348, 354, 389 S.E.2d 30, 33 (1990) (*quoting State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983)). "The [F]air [S]entencing [A]ct did not remove, nor did it intend to remove, all discretion from the sentencing judge." *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697 (*quoting State v. Davis*, 58 N.C. App. 330, 333-34, 293 S.E.2d 658, 661 (1982)). "[I]n every case in which the sentencing judge is required to make findings in ag-

gravation and mitigation to support a sentence which varies from the presumptive term, each offense . . . must be treated separately, and separately supported by findings *tailored to the individual offense and applicable only to that offense.*" *Ahearn*, 307 N.C. at 598, 300 S.E.2d at 698 (emphasis added). The trial court may exercise its discretion by agreeing with the findings of the jury in the capital case, and it may within its discretion find mitigating factors that differ from the mitigating circumstances found by the jury. *See State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985). When, as here, however, it adopts such jury findings as the "catchall" circumstance, without indicating its personal consideration and comprehension of that factor, it abdicates its discretion and its duty under the Fair Sentencing Act. The trial court cannot have known what mitigating evidence the jury considered in finding this circumstance in the capital case; therefore, it cannot have given the sentencing decision in these non-capital felony cases the individualized consideration to which defendant is entitled under the Fair Sentencing Act. *Ahearn*, 307 N.C. at 598, 300 S.E.2d at 698.

We thus hold that the trial court erred in adopting this circumstance without indicating in the record its conclusion as to exactly what the circumstance denoted. Because defendant was sentenced in excess of the presumptive terms for each of these three felonies, we cannot say that the error was harmless. We therefore remand the kidnapping, robbery, and assault cases for resentencing.

No. 89-CRS-1734 (First-Degree Murder): No Error.

No. 89-CRS-1738 (First-Degree Rape, two counts): No Error.

No. 89-CRS-1737 (First-Degree Kidnapping): Remanded for Resentencing.

No. 89-CRS-1736 (Assault With a Deadly Weapon With Intent To Kill Inflicting Serious Injury): Remanded for Resentencing.

No. 89-CRS-1736 (Robbery with a Firearm): Remanded for Resentencing.

STATE OF NORTH CAROLINA v. JOSEPH KEITH REID

No. 527PA91

(Filed 10 September 1993)

1. **Criminal Law § 427 (NCI4th)— breaking or entering— defendant's failure to testify—prosecutor's comment**

The trial court erred in a prosecution for breaking or entering by overruling defendant's objection to the prosecution's closing comments about defendant's decision not to testify. The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State, but a prosecution's argument which clearly suggests that a defendant has failed to testify is error. It is of no relevance that the prosecution's reference to defendant's failure to testify parroted the pattern jury instructions. The trial court did not sustain defendant's objection to the prosecution's direct reference to defendant's failure to testify or give the jury a curative instruction. While the prosecution advised the jury not to hold defendant's failure to testify against him, this did not negate the trial court's duty to advise the jury of the prosecution's improper reference and offer a curative instruction. The error was prejudicial because the evidence against defendant in this case was not so overwhelming as to render any error on the part of the prosecution harmless beyond a reasonable doubt.

Am Jur 2d, Trial §§ 237-243.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

Violation of federal constitutional rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

2. **District Attorneys § 4 (NCI4th)— breaking and entering— defense attorney becoming assistant prosecutor—potential conflict of interest**

Where a breaking or entering conviction was reversed on other grounds, the trial court was cautioned on remand

to insure that there is no conflict of interest, as defined in *State v. Camacho*, 329 N.C. 589, on the part of the prosecution and no participation in the case against defendant on the part of a former defense attorney now employed as an assistant prosecutor.

Am Jur 2d, Prosecuting Attorneys §§ 19-32.

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

Justice MEYER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of the Court of Appeals, 104 N.C. App. 334, 410 S.E.2d 67 (1991), affirming a judgment entered by Owens, J., in Caldwell County Superior Court. Heard in the Supreme Court on 10 September 1992.

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

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

EXUM, Chief Justice.

Defendant was indicted on 13 June 1988 for felonious breaking or entering in violation of N.C.G.S. § 14-54 (1986). He was convicted on 29 March 1990 and sentenced by the trial court to ten years' imprisonment. At trial defendant objected to a portion of the State's closing argument concerning defendant's failure to testify. The trial court overruled the objection and the Court of Appeals affirmed. We now reverse the Court of Appeals and grant defendant a new trial on the grounds that the State impermissibly commented on defendant's failure to testify.

The State's evidence tends to show the following:

On 1 February 1988 Charlotte McCorcle, pharmacist and assistant manager of Revco Drug Store at Pinewood Shopping Center in Granite Falls, received notice of an activated security alarm at the store. Upon entering the store with a sheriff's deputy, McCorcle noticed pharmaceutical drugs on the shelves in disarray. Both the floor and shelves were covered with muddy fingerprints and the meter box on the back of the building had been forcibly

removed. McCorcle noticed a hole in the back wall which had not been there when she locked the store on the previous evening.

While on patrol, Sergeant Paul Brittain and Officer Sandra Brown learned of the activated security alarm around 2:25 a.m. on 1 February. Upon approaching Pinewood Shopping Center, the officers observed a Ford parked approximately 100 yards from the shopping center facing away from the store. The officers noticed the lights were off in the Revco store and no other cars or persons were in the shopping center parking lot. The officers also noticed the missing meter box in the rear of the building.

After this initial investigation, the officers drove to the location of the parked Ford to obtain license tag numbers and discovered that the automobile was gone. Within two minutes, they observed that car travelling north on Highway 321 at a high speed with its headlights off. Brown observed a person later identified as defendant driving the car. The officers briefly pursued the automobile at speeds reaching between 70 and 90 miles per hour before defendant pulled over onto the side of the road. When defendant stopped, the officers noticed both the driver and passenger windows of the car were down and defendant was the only occupant of the car. Defendant told Brittain he was in the area of the shopping center because his car had run out of gas. When the officers asked why the car was running at that time, defendant said it had started unexpectedly. Defendant returned to the Revco store with the officers. Upon their arrival, another officer, Deputy David Seagle, observed defendant's hair was sprinkled with foam pellet insulation like that which leaked from the hole in the store's back wall. The same foam bead insulation was found on footwear impressions matching defendant's shoes and inside defendant's car. Subsequent police investigation uncovered other evidence linking defendant to the crime scene, including a sledgehammer found near the location where defendant stopped his car after the police pursuit.

Defendant was tried in the Caldwell County Superior Court on the charge of breaking or entering with intent to commit the felony of larceny. At defendant's trial Officer Keith Powers of the Winston-Salem Police Department testified that he was on duty in Winston-Salem at about 3:49 a.m. on 3 January 1988 when he responded to an activated security alarm at Pleasants Hardware in Winston-Salem. Powers discovered a hole that had been knocked

through the back wall of the building and found defendant inside the building.

Defendant presented no evidence at trial.

I.

[1] Defendant contends he is entitled to a new trial because the trial court erroneously overruled his objection to the prosecution's closing comments about defendant's decision not to testify. We agree.

During the prosecution's closing argument to the jury, the following transpired:

> [THE STATE]: Now defendant hasn't taken the stand in this case—
>
> [DEFENSE COUNSEL]: Objection to his remarks about that, Your Honor.
>
> THE COURT: Overruled.
>
> [DEFENSE COUNSEL]: Exception.
>
> [THE STATE]: The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to look at intent in this case. . . .

On appeal, the Court of Appeals held that the statements made by the prosecution did not rise to the level of reference proscribed by the law of this State, but instead permissibly mirrored the North Carolina Pattern Jury Instructions regarding a criminal defendant's right not to testify. We reverse and hold that any direct reference to defendant's failure to testify is error and requires curative measures be taken by the trial court.

Article I, Section 23 of the North Carolina Constitution states that a defendant in a criminal prosecution cannot "be compelled to give self-incriminating evidence." N.C. Const. art. I, § 23. Similarly North Carolina General Statutes section 8-54 provides that no person charged with commission of a crime shall be compelled to testify or "answer any question tending to criminate himself." N.C.G.S. § 8-54 (1986).

> A criminal defendant cannot be compelled to testify, and any reference by the State regarding his failure to do so violates an accused's constitutional right to remain silent. Griffin v.

> California, 380 U.S. 609, 85 S.Ct. 1229, 14 L. Ed. 2d 106, *reh. denied*, 381 U.S. 957, 85 S.Ct. 1797, 14 L. Ed. 2d 730 (1965). Well before Griffin, N.C.G.S. 8-54 provided that the failure of a defendant to testify creates no presumption against him. We have interpreted this statute as prohibiting the prosecution, the defense, or the trial judge from commenting upon the defendant's failure to testify. See, e.g., State v. Bovender, 233 N.C. 683, 65 S.E.2d 323 (1951); State v. Humphrey, 186 N.C. 533, 120 S.E. 85 (1923).

State v. Randolph, 312 N.C. 198, 205-06, 321 S.E.2d 864, 869 (1984). "[T]he purpose behind the rule prohibiting comment on the failure to testify is that extended reference by the court or counsel concerning this would nullify the policy that failure to testify should not create a presumption against the defendant." *Id.* at 206, 321 S.E.2d at 869.

The prosecution may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State. *State v. Mason*, 315 N.C. 724, 732, 340 S.E.2d 430, 436 (1986); *State v. Jordan*, 305 N.C. 274, 280, 287 S.E.2d 827, 831 (1982); *State v. Smith*, 290 N.C. 148, 168, 226 S.E.2d 10, 22, *cert. denied*, 429 U.S. 932, 50 L. Ed. 2d 301 (1976). However, a prosecution's argument which clearly suggests that a defendant has failed to testify is error. *State v. Monk*, 286 N.C. 509, 516, 212 S.E.2d 125, 131 (1975). That the prosecution's reference to defendant's failure to testify parroted the pattern jury instructions is of no relevance since N.C.G.S. § 8-54 prohibits the State "from making any reference to or comment on defendant's failure to testify." *State v. McCall*, 286 N.C. 472, 486, 212 S.E.2d 132, 141 (1975) (emphasis added). *See, e.g., State v. Roberts*, 243 N.C. 619, 621, 91 S.E.2d 589, 591 (1956) (statement of the prosecution in his argument that he had not said a word about defendant not testifying violated N.C.G.S. § 8-54); *State v. McLamb*, 235 N.C. 251, 257-58, 69 S.E.2d 537, 541 (1952) (argument by the State that defendant was "hiding behind his wife's coattail" was equivalent to comment on defendant's failure to testify on his own behalf, and upon the court's overruling of objections thereto, must be held prejudicial error); *State v. Monk*, 286 N.C. at 516, 212 S.E.2d at 131 (statement by prosecution that criminal record of defendant could not be shown to jury unless defendant took witness stand held to violate prohibition against comment upon failure of defendant to testify). *Cf. State v. Banks*, 322 N.C. 753, 370 S.E.2d

398 (1988) (The mere reading of [authoritative legal texts such as the Fifth Amendment], which, if they are material to the case, ought to be permitted, is not the same as 'comment or explanation,' which, in the case of a defendant's election not to testify, is prohibited.")

When the State directly comments on a defendant's failure to testify, the improper comment is not cured by subsequent inclusion in the jury charge of an instruction on a defendant's right not to testify. *Monk*, 286 N.C. at 516-17, 212 S.E.2d at 131-32; *State v. Billings*, 104 N.C. App. 362, 374, 409 S.E.2d 707, 714 (1991). Rather,

> this Court has held the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness.

McCall, 286 N.C. at 487, 212 S.E.2d at 141. *Accord State v. Monk*, 286 N.C. at 516, 212 S.E.2d at 131; *State v. Lindsay*, 278 N.C. 293, 295, 179 S.E.2d 364, 365 (1971); *State v. Clayton*, 272 N.C. 377, 385, 158 S.E.2d 557, 562-63 (1968). We consistently have held that when the trial court fails to give a curative instruction to the jury concerning the prosecution's improper comment on a defendant's failure to testify, the prejudicial effect of such an uncured, improper reference mandates the granting of a new trial. *State v. McCall*, 286 N.C. at 487, 212 S.E.2d at 141; *State v. Monk*, 286 N.C. at 518, 212 S.E.2d at 132; *State v. Roberts*, 243 N.C. at 621, 91 S.E.2d at 591; *State v. McLamb*, 235 N.C. at 258, 69 S.E.2d at 542. In *McCall*, the prosecution stated the following in his closing argument:

> If a man was ever called upon in this world to deny something, he was called upon when they said, "You are charged with murder in the first degree of the Hices." He didn't say a word. Didn't say a word. He hasn't denied it up to this minute, according to what I've heard from the evidence.

McCall, 286 N.C. at 485, 212 S.E.2d at 140. The trial court sustained the defendant's objection to the above argument but failed to give a curative instruction to the jury. *Id.* at 485-86, 212 S.E.2d at 140. In ordering a new trial pursuant to § 8-54, this Court stated that although the trial judge did instruct the jury that the defendants had no burden and were not required to produce evidence,

testimony or witnesses, such an instruction was insufficiently curative because it was an incomplete statement of the pertinent rule of law in that it neglected to advise the jury that a defendant's failure to testify created no presumption against him. *Id.* at 487, 212 S.E.2d at 141. The Court concluded the trial court had the duty to give the jury proper instructions and failure of the trial court to remedy the statutory violation constituted prejudicial error. *Id.*

In the case at bar, the trial court did not sustain defendant's objection to the prosecution's direct reference to defendant's failure to testify. Nor did the trial court give the jury a curative instruction. While the prosecution advised the jury not to hold defendant's failure to testify against him, this did not negate the trial court's duty to advise the jury of the prosecution's improper reference and offer a curative instruction. By simply overruling defendant's objection to the prosecution's argument, the trial court impliedly sanctioned a clear violation of N.C.G.S. § 8-54. As in *McCall*, we find in the instant case that the trial court's failure to take the requisite curative measures at the time of the prosecution's improper comments or anytime thereafter constituted error violating defendant's constitutional and statutory rights.

Having concluded that failure to take such remedial measures was error, we now address whether such error was prejudicial, requiring a new trial. Comment on an accused's failure to testify does not call for an automatic reversal but requires the court to determine if the error is harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988); *United States v. Hasting*, 461 U.S. 499, 76 L. Ed. 2d 96 (1983); *State v. McCall*, 286 N.C. 472, 212 S.E.2d 132; *State v. Oates*, 65 N.C. App. 112, 308 S.E.2d 507 (1983). Assuming *arguendo* error exists, the State contends it is harmless beyond a reasonable doubt because of the overwhelming evidence against defendant in this case.

Notwithstanding the State's contentions, we do not find the evidence against defendant in this case so overwhelming as to render any error on the part of the prosecution harmless beyond a reasonable doubt. Defendant was charged with and convicted of felonious breaking or entering into another's building with the intent to commit larceny in violation of N.C.G.S. § 14-54. Such a conviction requires that the jury find beyond a reasonable doubt that at the time of the breaking or entering, defendant intended to commit larceny. *State v. Brown*, 266 N.C. 55, 61, 145 S.E.2d

297, 302 (1965), *overruled on other grounds, State v. Jones*, 275 N.C. 432, 168 S.E.2d 380 (1969); *State v. Litchford*, 78 N.C. App. 722, 724, 338 S.E.2d 575, 577 (1986). Pursuant to N.C.G.S. § 14-72, larceny requires proof beyond a reasonable doubt that the defendant "(1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently." *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). In the instant case, there was no direct evidence that any property had been removed from inside the store. Therefore, as the prosecution pointed out in closing argument and the trial court instructed in its jury charge, the jury was required to infer an intent to commit larceny from circumstantial evidence. Because we cannot conclude that the prosecution's erroneous reference to defendant's failure to testify had no bearing on the jury's inference of the requisite intent for the felony of larceny, we cannot hold the trial court's error was harmless beyond a reasonable doubt. Had improper reference to defendant's failure to testify been properly cured and the jury failed to infer an intent to commit larceny, defendant could have been convicted of the lesser offense of nonfelonious, or misdemeanor, breaking or entering. For these reasons, we conclude that the error here was not harmless beyond a reasonable doubt and that defendant is entitled to a new trial.

The State contends that resolution of this case should be controlled by our decision in *Randolph*. We find *Randolph* to be distinguishable. In *Randolph*, the defendants were tried on indictments for first-degree rape, first-degree sexual offense, first-degree kidnapping, armed robbery and felonious larceny. *Randolph*, 312 N.C. at 199, 321 S.E.2d at 865. Neither defendant presented evidence at trial. *Id.* at 202, 321 S.E.2d at 867. During his closing argument, the prosecution stated:

> The Judge is going to instruct you in the meaning of flight and what it signifies about a person's state of mind. It suggests, ladies and gentlemen, a guilty state of mind. This is why people run and hide, because they're guilty.
>
> Sanders and Randolph have not said much more about these affairs, but that was enough. They have spoken elegantly through their flight, or luckily through their attempted flight from the scene.

Id. at 205, 321 S.E.2d at 869. On direct appeal, this Court held that "[i]f the statement here was a reference to the defendants' failure to testify, it was not an 'extended reference.'" *Id.* at 206, 321 S.E.2d at 869. We stated that the thrust of the prosecution's statement concerned the issue of flight and the accompanying state of mind, and reference to the defendants' failure to testify was too indirect and brief for the jury to infer guilt from the defendants' silence. *Id.*

Unlike *Randolph*, the statement made by the prosecution in the present case was not indirect. Rather, it was a specific reference to defendant's failure to take the stand coupled with a request to the jury not to consider it against defendant. As we consistently have held, any reference by the State to a defendant's failure to testify is prohibited.

Another distinction between *Randolph* and the case at bar is that the defendants in *Randolph* made no objection and also decided against requesting a curative instruction when it was suggested by the trial court. In the present case, defendant specifically objected to the prosecution's reference to defendant's failure to testify. In overruling the objection and declining to offer a curative instruction, the trial court allowed the jury to determine what weight should be given to defendant's silence. Under these circumstances, it was the responsibility of the trial court to properly instruct the jury. *See State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967); *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971), and cases cited therein. Failure to do so was prejudicial error and was not harmless beyond a reasonable doubt.

II.

[2] In an additional assignment of error defendant contends he is entitled to a new trial because of the prosecution's conflict of interest and defendant's former attorney's participation in his prosecution. Because we grant a new trial on other grounds, we do not address this issue definitively. We address it merely for the purpose of giving guidance to the trial court on remand.

In February 1988 defendant retained Mr. Jason R. Parker to represent him in this criminal action. Mr. Parker represented defendant for approximately six months until 9 August 1988 when he filed a motion to withdraw on the grounds that he had obtained a job in the office of the District Attorney prosecuting this case.

Mr. Parker's motion was allowed and he subsequently became an Assistant District Attorney in the Twenty-Fifth Prosecutorial District Attorney's Office. On 21 December 1988 Twenty-Fifth Prosecutorial District Attorney Robert Thomas informed the Attorney General by letter that "a potential conflict of interest problem" existed in defendant's case and sought advice as to whether his office should continue with the prosecution. On 22 December 1988 James J. Coman of the Special Prosecution Division of the Attorney General's Office responded with the following:

> In light of the conflict existing because of [Mr. Parker's] prior representation of [defendant], we will accept responsibility for the prosecution of these matters with the following understanding: . . . That we will be provided copies of all prosecution summaries and/or police reports now in the possession of your office or the appropriate law enforcement agencies. I . . . have decided to assign [defendant's case] to Assistant Attorney General John Watters.

Mr. Watters subsequently subpoenaed Mr. Parker to appear as a witness for the State at a pretrial hearing on defendant's motion to dismiss under the then existing Speedy Trial Act. N.C.G.S. ch. 15A, subch. VII, art. 35 (repealed 1983). At this hearing Mr. Parker was not asked about, nor did he testify regarding, any confidences obtained from, or substantive communications with, defendant. He testified only to the date on which he filed a request for voluntary discovery; the date on which he thereafter examined, at the prosecution's invitation, the prosecution's files concerning defendant; the file numbers involved in his examination; and that he thereafter telephoned his client to set up an appointment for the next day. On cross-examination Mr. Parker testified to certain conversations he had with the District Attorney's office concerning a convenient time for reviewing the prosecution's files.

Rule 5.1(D) of the Rules of Professional Conduct states: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same . . . matter in which that person's interests are materially adverse to the interests of the former client . . . ." *Rules of Professional Conduct* Canon V, Rule 5.1(D) (1985). Rule 9.1(C)(1) states: "[A] lawyer serving as a public officer shall not . . . [p]articipate in a matter in which the lawyer participated . . . while in private practice . . . ." *Rules of Professional Conduct* Canon V, Rule 9(C)(1) (1985). The comment

to Rule 9.1(C)(1) provides: "Paragraph (C) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." The American Bar Association's Formal Opinion 342, 62 A.B.A.J. 517 (1976), provides that where an attorney who formerly represented a defendant being prosecuted joins the prosecution's office, it is not necessary to disqualify the entire governmental office; however, "the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the [prosecution]. . . ." *See also State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868 (1991).

In *Camacho*, we held a prosecutor may be disqualified upon a showing of actual conflict of interests. An actual conflict of interests exists where the prosecutor "previously represented the defendant with regard to the charges to be prosecuted and" obtained as a result confidential information detrimental to defendant at trial. *Id.* at 601, 406 S.E.2d at 875. Where a trial court finds an actual conflict of interests, "the trial court may disqualify the prosecutor having the conflict from participating in the prosecution of a defendant's case and order the prosecutor not to reveal information which might be harmful to the defendant." *Id.* at 602, 406 S.E.2d at 876.

We caution the trial court on remand for a new trial to insure that there is no conflict of interest, as defined in *Camacho*, on the part of the prosecution and no participation in the case against defendant on the part of Mr. Parker.

The result is that the decision of the Court of Appeals finding no error in the prosecutor's comment on defendant's failure to testify is reversed and the case is remanded for a new trial.

REVERSED and REMANDED.

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

Justice MEYER dissenting.

The context of incident that the majority finds to be reversible error was as follows. During his closing argument, the prosecutor discussed the intent element of larceny, and the following exchange occurred:

[THE STATE]: And the final element of the crime of felonious breaking or entering is that the breaking or entering was done with the intent to commit larceny. Now ladies and gentlemen, intent, as Judge Owens is going to tell you in a little while, is a process of the mind. It's right up here. It's not susceptible to direct proof. What must come from circumstantial evidence and things that can be inferred.

Now the defendant hasn't taken the stand in this case—

MR. BURKHEIMER: Objection to his remarks about that, Your Honor.

THE COURT: Overruled.

MR. BURKHEIMER: Exception.

[THE STATE]: The defendant hasn't taken the stand in this case. He has that right. You're not to hold that against him. But ladies and gentlemen, we have to look at the other evidence to look at intent in this case. What do we have? Well, we've got a hole in the back wall. Why would anybody do that? Just for the heck of it? Is this vandalism? The State contends that it's not. We've got an entry into the building. Just wanted to go in there, do something, take a look around? State contends that's preposterous. But the most damning of all evidence is that set of shoe tracks going right to the drug counter.

Assuming, *arguendo*, that the prosecutor's reference, to the effect that defendant had not taken the stand was error, I believe that the error was harmless beyond a reasonable doubt. I am unpersuaded by the majority's contention that the evidence against defendant was insufficient to justify such a finding.

The uncontradicted evidence of defendant's guilt of the crime charged was overwhelming. A man meeting the general description of defendant was noticed near the back door of the Revco where the break-in took place just days before the crime. On 1 February 1988, Charlotte McCorcle, pharmacist assistant manager at Revco, was called to the store by an activated alarm. Upon entering the store with a sheriff's deputy, she noticed that drugs on the shelves were in disarray, there were muddy shoe prints and fingerprints on the floor and the shelves, and the meter box at the back of the store had been pulled off the wall and was missing. There

was also a hole in the back wall that had not been there when Ms. McCorcle had closed and locked the store the night before.

The activated alarm also notified patrol officers Sergeant Paul Brittain and Officer Sandra Brown of a possible break-in at Revco. The officers received the call at 2:25 a.m. on 1 February 1988 and proceeded north on Highway 321 toward Pinewood Shopping Center. As they approached the shopping center, the only automobile they observed was a parked Ford facing in the opposite direction. This automobile was located approximately one hundred yards from the shopping center through the woods. As the officers approached the parking lot of the shopping center, they observed no other cars or persons. They noticed that the lights were out at Revco. They drove to the back of the building and noticed that the meter box was missing from the back of Revco. They drove to where the Ford had been parked to try to obtain its license number and discovered that the car was gone. Less than two minutes later, they saw the car on Highway 321, traveling in a northerly direction. Officer Brown observed a person later identified as defendant driving the car.

Officer Brown testified that the vehicle was traveling at an accelerated speed without its headlights on. Sergeant Brittain activated his siren and blue lights and chased defendant's car, reaching speeds between seventy and ninety miles per hour. Defendant did not stop immediately but did finally pull over and slowly moved down the right side of the road. The only occupant of the car was defendant. Both passenger and driver windows were rolled down on a cold, wet night.

Defendant told Sergeant Brittain that he had run out of gas, although he gave no explanation for the car starting after the officers first observed him. Sergeant Brittain also observed cloth gloves on the back floorboard of the car. Defendant voluntarily returned to Revco with the officers.

When defendant returned to Revco, another officer (Officer Seagle) observed white foam pellet insulation (which was consistent with the insulation in the hole in Revco's back wall) in defendant's hair. Additional evidence collected at the scene of the crime included, *inter alia*, footwear impressions containing foam bead insulation which matched defendant's footwear, foam bead insulation from defendant's clothes which matched the insulation at Revco, foam bead insulation from the floorboard of defendant's car and brown

cotton gloves found in the car, and fibers taken from the point of entry which matched the fibers in the toboggan defendant was wearing that night. The officers located a sledgehammer by the side of the road where defendant had slowed down before he stopped his car. The sledgehammer was dry, although it was a cold, wet night. The missing meter box was later found in a dumpster.

At trial, Officer Keith Powers of the Winston-Salem Police Department testified to a separate incident that occurred on 3 January 1989 when he responded to an activated alarm call at Pleasant's Hardware in Winston-Salem at approximately 3:49 a.m. When he checked the store for signs of a break-in, he noted a hole knocked in the back of the building and then discovered defendant inside the building. The evidence indicated that this hole was consistent in size and shape to the hole in the back of Revco found during the break-in of February 1988.

Unlike the majority, I conclude that the prosecutor's reference to defendant's failure to take the stand had no bearing on the jury's inference that defendant entered the store with the intent to commit larceny. I find the evidence adequate to support a determination that the error in question was harmless beyond a reasonable doubt.

STATE OF NORTH CAROLINA v. FREDERICK ORLANDO COOK AND TIMOTHY DEVON SMITH

No. 262A92

(Filed 10 September 1993)

1. **Homicide § 280 (NCI4th) — felony murder — discharging firearm into occupied property — evidence sufficient**

The trial court did not err when it denied defendants' motions to dismiss charges of first-degree murder and discharging a firearm into occupied property for insufficient evidence where, viewed in the light most favorable to the State, there was ample evidence from which a jury could find that defendants Cook and Smith fired weapons into the vehicle driven by the victim; that a bullet from defendant Cook's weapon struck the victim causing his death; and that defendants were

acting in concert when they engaged the victim in conversation and fired shots at his automobile as he drove away.

Am Jur 2d, Homicide §§ 94, 442.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine. 50 ALR3d 397.

2. **Evidence and Witnesses § 351 (NCI4th)— murder—evidence of drug sales by defendant—admissible**

The trial court did not err in a murder prosecution by admitting evidence that defendant Cook sold cocaine on the night of the shooting. There was evidence tending to show that the victim had a drug problem and evidence about drug sales by defendant Cook and his friends on the night of the murder was relevant to show the motive for the shooting and to put the crime in context. N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Homicide § 311.

Admissibility, under Rule 404(b) of Federal Rules of Evidence, of evidence of other crimes, wrongs, or acts not similar to offense charged. 41 ALR Fed. 497.

3. **Homicide § 41 (NCI4th)— murder—acting in concert—victim dead when defendant's shots fired**

The trial court did not err by denying defendant Smith's requested instruction in a prosecution for murder and for firing into occupied property where defendant Smith contended that, if the evidence supported the theory argued to the jury by the prosecutor, he could not have acted in concert in the killing of the victim because it is not criminal homicide to shoot a dead body. Given that the victim was mortally wounded during a volley of gunfire from defendants' firearms, the temporal order of the fatal shot by defendant Cook and other shots fired by defendant Smith, acting in concert with Cook, is immaterial; the underlying felony and the murder occurred in a time frame that can be perceived as a single transaction.

Am Jur 2d, Homicide §§ 46, 71 et seq.

Defendants appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of life imprisonment entered by Brooks, J., at the 30 June 1992 Criminal Session of Superior

Court, Cumberland County. On 22 July 1992, this Court allowed defendant Cook's motion to by-pass the Court of Appeals as to an additional conviction for discharging a firearm into occupied property. Heard in the Supreme Court 11 May 1993.

Michael F. Easley, Attorney General, by Thomas F. Moffitt, Special Deputy Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Gordon Widenhouse, Assistant Appellate Defender, for defendant Frederick Orlando Cook.

Walter T. Johnson, Jr., for defendant Timothy Devon Smith.

FRYE, Justice.

Defendants, Frederick Orlando Cook and Timothy Devon Smith, were indicted on 27 January 1992 for first-degree murder and discharging a firearm into occupied property. An order for joinder was filed on 4 March 1992. Defendants were tried non-capitally and found guilty. As to each defendant, a sentence of life imprisonment was imposed for the first-degree murder, and judgment on the underlying felony was arrested.

Each defendant brings forth two issues on appeal. After a summary of the evidence, we will address the one issue raised by both defendants, and then we will address the additional issue raised by each individual defendant.

The evidence at trial tended to show the following facts and circumstances. Shortly after midnight on 28 September 1991, Officer William Saunders of the Fayetteville Police Department heard a rapid succession of gun shots in the vicinity of the Groveview Terrace public housing development. Within minutes, Officer Saunders arrived at an Etna gasoline station located across the street from the entrance to Groveview Terrace. At the gasoline station, Officer Saunders discovered a Chevrolet El Camino which had crashed into a utility pole. Wallace G. Thomas, Jr., [the victim] was in the driver's seat of the El Camino with a bullet wound to his chest.

Linwood Brisbane, a police crime scene technician, gathered physical evidence from the crime scene including the victim's automobile. Marks on the driver's side doorpost and rubber molding indicated that a bullet had passed through them. There was a

bullet hole in the driver's seat belt, and a mark on the edge of the headrest indicating that it had been grazed by a bullet. A spent 10mm bullet was found in the back of the driver's seat. A second spent 10mm bullet was also found on the floorboard under the driver's seat. No weapon or spent shell casings were found in the victim's automobile. The victim's automobile was dusted for fingerprints, and defendants' fingerprints were not found on or in the vehicle.

Brisbane retraced the route the victim's vehicle had taken prior to hitting the utility pole. While retracing the route, Brisbane found several groupings of spent shell casings including a group of six spent 10mm shell casings near vehicle "scratch-off" or skid marks on the pavement.

Dr. Jerald Wolford, a forensic pathologist, performed an autopsy on the victim and concluded that the cause of death was a gunshot wound to the chest. The fatal bullet entered the victim's chest under the left arm, passed through his lung and heart, and exited from the right side of his chest. Dr. Wolford found abrasions on the knuckles of the victim's right hand, abrasions on the bridge of his nose between his eyes, and needle marks on his left arm. According to Dr. Wolford, the nonfatal wounds to the bridge of the nose were consistent with an individual being involved in a violent automobile crash, and the wounds to the hand were nonspecific.

Esther Sanford, the victim's mother, testified that her son had been a painter, carpenter, and roofer since he was sixteen years old. She also testified that on the night of the murder her son was at her house until approximately 8:30 p.m., when he borrowed his step-father's El Camino and left. Sanford testified that her son had a cocaine problem, but he had "straightened himself up."

Michael Hardison testified that on the night of the murder he saw defendants standing near a parked car driven by a white man in Groveview Terrace. Hardison testified that the street lights were on and he could see defendants' faces. Hardison also testified that no one else was near the car. Hardison heard a portion of a conversation between the driver of the car and defendants, then he saw the car rapidly pull away from the curb. Hardison heard approximately five gunshots, and saw muzzle flashes. Due to the distance between Hardison and the incident, he could not tell whether only defendant Cook, only defendant Smith, or both were shooting.

However, he did not see anyone else fire a weapon. Hardison testified that when the incident occurred he was armed with a loaded .38 caliber revolver, but he did not fire it, and later threw it in the Cape Fear River.

Hardison admitted that he had been charged with murder and shooting into an occupied vehicle in this case. He was allowed to plead guilty to assault with a deadly weapon, a misdemeanor charge with a two-year maximum sentence, in exchange for his testimony.

Genorval McKethan testified that on the night of the murder he saw defendants, Hardison, Rico McNeill and others selling drugs at Groveview Terrace. At approximately midnight, McKethan and several others were walking towards the entrance of the housing development when he heard someone yell. McKethan and the others ran towards the sound. McKethan testified that he saw defendant Smith approximately fifteen feet behind a car, and a second person in the background behind Smith. According to McKethan, both persons were shooting at the car. McKethan could not see well enough to identify the shooter behind defendant Smith.

McKethan admitted that he had also been charged with first-degree murder and shooting into an occupied vehicle in this case. As a result of a plea bargain, McKethan plead guilty to assault with a deadly weapon and received a two-year sentence.

Defendant Cook did not call any witnesses. However, defendant Smith called four witnesses in an attempt to establish an alibi defense. Doris Culbreth testified that at approximately 10:30 p.m. on the evening of the murder, she saw defendant Smith with a bicycle at the Suburban Market. According to Culbreth, she remained at the market for approximately ten minutes and when she left defendant Smith was still there. Culbreth testified that the market was about ten minutes from Groveview Terrace by car and thirty or forty minutes away by bicycle. Culbreth acknowledged that she had known defendant Smith for ten years and that he was a good friend.

Lashonda Whitlock, defendant Smith's girlfriend and the mother of three of his children, testified that on the evening of the murder, defendant Smith had been to her apartment in Groveview Terrace and left before the shooting. After the shooting, Whitlock heard over a police radio scanner that a homicide unit had been requested

to come to Grove Street and Groveview Terrace. According to Whitlock, the police broadcasted the victim's name and said that they had found a 9mm pistol. After listening to the broadcast, Whitlock left her apartment and ran towards the entrance of Groveview Terrace. Genorval McKethan was sitting on a bench and Whitlock asked him if he had seen defendant Smith. He replied, "Nah, I haven't seen Tuck [defendant Smith]."

Evette Bonner, a Groveview Terrace resident, testified that during the late night hours of 27 September and the early morning hours of 28 September 1991, she saw defendant Smith at "Charlie's" nightclub. According to Bonner, she arrived at the club at approximately 11:30 p.m., and left thirty minutes to an hour later.

Jennifer Troutman also testified that during the late night hours of 27 September or the early morning hours of 28 September 1991, she arrived at "Charlie's" nightclub at approximately 12:30 a.m. and stayed until the nightclub closed around 2:30 a.m. According to Troutman, as she was leaving the nightclub, defendant Smith asked her for a ride, she gave him a ride, and they went to a party on Mary Street with another couple. At trial, Troutman was unable to remember who the other couple was, and she could not remember at what house the party took place.

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

[1] Both defendants first assign as error the trial court's denial of their motions to dismiss. Defendants argue that the evidence was insufficient to convince a rational trier of fact of their guilt beyond a reasonable doubt.

When ruling on a motion to dismiss, the court must consider the evidence 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. Sweatt*, 333 N.C. 407, 414, 427 S.E.2d 112, 116 (1993). The trial court must determine whether there is substantial evidence—either direct, circumstantial, or both—to support a finding that the crime charged has been committed and that defendant is the perpetrator of the crime. *Id.* "Substantial evidence" means "the evidence must be existing and real, not just seeming and imaginary." *State v. Clark*, 325 N.C. 677, 682, 386 S.E.2d 191, 194 (1989). If there is substantial evidence of each element of the

crime charged and that the defendant was the perpetrator, then a motion to dismiss should be denied. *Id.*

Murder in the first degree is the 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). Felony murder is a murder committed in the perpetration or attempted perpetration of certain felonies including those committed or attempted with the use of a deadly weapon. N.C.G.S. § 14-17 (1986). Discharging a firearm into occupied property is a felony defined by statute as willfully or wantonly discharging or attempting to discharge a firearm into any building, structure, vehicle, aircraft, watercraft or other conveyance, device, equipment, erection, or enclosure while it is occupied. N.C.G.S. § 14-34.1 (1986). "Under the doctrine of acting in concert, if two or more persons are acting together in pursuit of a common plan or purpose, each of them, if actually or constructively present, is guilty of any crime committed by any of the others in pursuit of the common plan." *State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573, *cert. denied*, --- U.S. ---, 116 L. Ed. 2d 174 (1991).

The evidence taken in the light most favorable to the State showed that the victim was fatally shot by a bullet that passed through his chest. Two 10mm bullets were retrieved from his car—one from the back of the driver's seat and one from under the driver's seat. The victim was a drug abuser. Drugs were being sold in Groveview Terrace on the night of the murder. Defendants Cook and Smith were seen participating in the sale of drugs in Groveview Terrace.

Michael Hardison testified that shortly before midnight he saw defendants Cook and Smith across the street from the administration building talking to a man in a parked car. At some point the car rapidly pulled away from the curb, after which Hardison heard gun shots and saw muzzle flashes. Hardison placed both defendants near the area where the spent 10mm shell casings and tire "scratch off" marks were found. Hardison was unable to tell whether one or both defendants were shooting in the direction of the car. Genorval McKethan also placed defendant Cook next to the area where the 10mm casings were found, and placed defendant Smith close to the area where a group of spent .45 caliber

shell casings were found. McKethan saw Smith approximately fifteen feet behind the car. A second person was seen in the background behind Smith and both were shooting at the car. Hardison testified that shortly after the shooting occurred, he saw defendant Cook at "Charlie's" nightclub with a 9mm or 10mm pistol sticking out of his coat pocket.

From the evidence produced at trial, the jury could reasonably infer that the victim went to Groveview Terrace to buy drugs. Defendants Cook and Smith were selling drugs when the victim arrived. The victim encountered defendants and the three of them discussed the purchasing of drugs. During the conversation something went awry, and the victim sped away. As he drove away, both defendants fired shots at his automobile. Defendant Cook was armed with a 10mm pistol, and one of the bullets fired from his gun was the fatal bullet that killed the victim. Defendant Smith was armed with a .45 caliber pistol, but none of the bullets fired from his gun hit the victim.

Viewing the evidence in the light most favorable to the State, we find that there is ample evidence from which a jury could find that defendants Cook and Smith fired weapons into the vehicle driven by the victim and that a bullet from defendant Cook's weapon struck the victim causing his death. There is also ample evidence that the defendants were acting in concert when they engaged the victim in conversation and fired shots at his automobile as he drove away. The evidence supports the finding that both defendants are guilty of the felony of discharging a firearm into occupied property and that the murder occurred in the perpetration or attempt to perpetrate that felony. Thus, the evidence supports the finding that both defendants are guilty of first-degree murder under the felony murder rule. The trial court did not err when it denied defendants' motions to dismiss for insufficiency of the evidence.

DEFENDANT COOK'S SECOND ISSUE

[2] Defendant Cook next contends that "the trial court committed reversible error in overruling defendant's objections to testimony that he sold cocaine on the night of the shooting as this evidence was minimally probative yet highly prejudicial, thereby denying him basic constitutional rights to a fair trial and due process of law." Defendant contends that the evidence, if relevant, would be inadmissible evidence of prior bad acts under Rule 404(b). Defend-

ant Cook argues that he is entitled to a new trial because even assuming he sold drugs, Genorval McKethan's testimony bore no relevance to any material issue, and tended exclusively to show his character in an unfavorable way through wholly inadmissible evidence. We disagree.

McKethan testified that defendant Cook, defendant Smith, and others were selling drugs at Groveview Terrace on the night of the murder. Defense counsel objected on the ground that the prosecutor was leading the witness. The trial judge sustained the objection. The question was rephrased and defense counsel made a general objection. This objection was overruled. Defense counsel did not request a limiting or cautionary instruction. Testimony continued about drug sales at Groveview Terrace on the night of the murder without objection as follows:

> Q. Who were some of the people you saw selling drugs down there that night?
>
> A. Saw Frog selling drugs that day.
>
> Q. Who else?
>
> A. Saw Tim. I saw Hook; I saw Worm [McNeill], and a couple of older boys? [sic]
>
> Q. And where were these drug sales taking place?
>
> A. On the corner, like the middle of the neighborhood.
>
> Q. Okay. When you say Hook, who are you talking about?
>
> A. Michael Hardison.
>
> Q. When you say Tim, who are you talking about?
>
> A. Timothy Smith.
>
> Q. And when you say Frog, who are you talking about?
>
> A. Frederick Cook.

McKethan then identified defendants Cook and Smith, without objection, as the men to whom he was referring during his testimony.

Rule 404(b) of the North Carolina Rules of Evidence 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, absence of mistake, entrapment or accident.

N.C.G.S. § 8C-1, Rule 404(b) (1992). In recent cases this Court has stated that Rule 404(b) provides

> a clear general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54-55 (1990). In the instant case, there was evidence tending to show that the victim had a drug problem. Evidence about drug sales by defendant Cook and his friends on the night of the murder was relevant to show the motive for the shooting and to put the crime in context. Thus, the testimony was admissible under Rule 404(b) and the trial court did not err in admitting it.

DEFENDANT SMITH'S SECOND ISSUE

[3] In defendant Smith's second assignment of error, he contends that the trial court erred by denying his request for a jury instruction on the issue raised during the prosecutor's argument wherein the prosecutor indicated that the victim was killed during the first volley of shots. Defendant Smith argues that if the evidence supported the theory argued to the jury by the prosecutor, he could not have acted in concert in the killing of the victim because it is not criminal homicide to shoot a dead body. Defendant Smith also contends that since the argument was made to the jury, and he requested a curative instruction at the appropriate time, the trial court committed reversible error by not giving the instruction and this action was clearly prejudicial.

The portions of the prosecutor's argument at issue are as follows:

> And I submit to you, probably the first shot was Number 14 here, that was kicked back away from the other line of five, and the shooter then steps over as the car is pulling away and shoots again and again and again and again. There is a projectile that's found on the ground that you looked at, Number 8. The expert could not say, and candidly would

not say that it was a 10mm, because he didn't have the opportunity to look at it under his laboratory conditions.

. . . .

I submit to you that this projectile right here, Number 8, was fired from this 10mm gun as the car was speeding away. And yes, indeed, it did strike something, either the street or the bumper or the undercarriage. The bumper and the undercarriage all of which, from your own common experience and sense you know, it's very, very hard metal, not like a door frame, and not like the back of a truck bed behind the seat that can be pierced. This is where the fatal bullet was fired from right here. These marks on the pavement, I submit to you, are the scratch marks where the car sped away at or after the first shot that struck Mr. Thomas [the victim] while he was like this.

The doctor said it would not be unusual for someone to be able to live and function two or three minutes after being struck in such manner.

. . . .

What they did not know, I submit to you, is that the first bullet was the one that did the damage. And their attempt to either run Mr. Wallace out of the neighborhood—or Mr. Thomas [the victim] out of the neighborhood, whatever the motivation, they acted together. It's almost like running with the pack. Mr. Thomas was struck. He drove the car out. He crashed out here. And the case starts to unwind and develop at that point.

Defendant Smith's argument that he could not have acted in concert in the killing of the victim because it is not criminal homicide to shoot a dead body is fatally flawed. His conviction was not based on his having "acted in concert in the killing of the victim," but rather was based on his having acted in concert in the perpetration of a felony which resulted in the death of the victim. Therefore, whether the victim was dead or alive at the exact moment bullets from defendant Smith's gun entered the automobile is not necessarily determinative on a felony murder conviction.

This Court has held that to support convictions for a felony offense and related felony murder, all that is required is that the

elements of the underlying offense and the murder occur in a time frame that can be perceived as a single transaction. *State v. Thomas*, 329 N.C. 423, 434, 407 S.E.2d 141, 149 (1991). In the instant case, the murder and the underlying felony of discharging a firearm into occupied property were so connected and inextricably intertwined as to form a continuous chain of events that began when the victim was alive. The evidence showed that the victim first encountered defendants near the administration building at Groveview Terrace. They engaged in a conversation, both defendants shot at the victim as he sped away in his car, and the victim lived for a few moments before he crashed his car into a utility pole. Dr. Wolford testified that the victim could have lived several minutes before dying from the gunshot wound to the ventricle of his heart. Given that the victim was mortally wounded during a volley of gunfire from defendants' firearms, the temporal order of the fatal shot by defendant Cook and other shots fired by defendant Smith, acting in concert with Cook, is immaterial. The underlying felony and the murder occurred in a time frame that can be perceived as a single transaction. Thus, the trial judge properly refused to give defendant Smith's proposed jury instruction.

NO ERROR.

STATE OF NORTH CAROLINA v. CHARLES ROBERT POTTS

No. 326A92

(Filed 10 September 1993)

1. **Homicide § 83 (NCI4th)— first-degree murder—self-defense—deadly force reasonable to repel attack but then continued unnecessarily—instructions**

The trial court did not err in its instructions on self-defense in a first-degree murder prosecution where defendant contended that *State v. Robinson*, 188 N.C. 784, provides for a finding of guilty of manslaughter when the defendant reasonably uses deadly force to repel an attack but continues to use it when it is no longer necessary. *Robinson* should not be read to hold that once a defendant can no longer reasonably believe he is in danger that he may continue to

use deadly force and be found guilty of no more than manslaughter; in such a case, the defendant would be guilty of murder.

Am Jur 2d, Homicide § 139.

Standard for determination of reasonableness of criminal defendant's belief, for purposes of self-defense claim, that physical force is necessary—modern cases. 73 ALR4th 993.

2. **Homicide § 86 (NCI4th)— first-degree murder—instructions on result of defendant's aggression—no error**

The trial court did not err in a first-degree murder prosecution by instructing the jury that the defendant would not be entitled to a verdict of not guilty if he was the aggressor in the fight where there was evidence from which the jury could believe the defendant was the aggressor.

Am Jur 2d, Homicide §§ 145 et seq.

3. **Homicide § 596 (NCI4th)— first-degree murder—self-defense—instructions**

The trial court did not err in a first-degree murder prosecution in its instructions on self-defense where defendant contended that the jury instructions on self-defense were disorganized, impossible to understand, conceptually confusing, and contained logical inconsistencies. The court at one place in the charge explained self-defense with its several facets and at other places referred to self-defense as necessary to explain how to apply it; it was not necessary to label or to compare the different types of self-defense so long as they were correctly explained; and the statements that the State had disproved self-defense if it proved that defendant acted unreasonably and that the defendant would have a partial defense and would be guilty only of voluntary manslaughter if defendant used more force than was reasonable were not inconsistent and were correct statements of the law.

Am Jur 2d, Homicide § 519.

4. **Homicide § 484 (NCI4th)— first-degree murder—instructions—definition of malice**

The trial court did not err in a first-degree murder prosecution by instructing the jury that it should find that defendant acted with malice if he killed without just cause, excuse

or justification. Although defendant contended that this instruction could result in an inconsistency, this has been the definition for many years in North Carolina and the Supreme Court did not believe the instruction could have been misinterpreted by the jury.

Am Jur 2d, Homicide § 500.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 656.

Modern status of rules requiring malice "aforethought," "deliberation," or "premeditation," as elements of murder in the first degree. 18 ALR4th 961.

5. Evidence and Witnesses § 668 (NCI4th)— first-degree murder—expert testimony—no objection at trial—no plain error

There was no plain error in a first-degree murder prosecution where defendant did not object at trial to the admission of certain testimony by an expert in fiber identification and comparison. If the admission of this testimony was error, it was not a fundamental error.

Am Jur 2d, Trial § 412.

6. Constitutional Law § 248 (NCI4th)— first-degree murder—evidence withheld by State—hearsay that someone else committed crime—motion for appropriate relief denied

The trial court did not err by denying defendant's motion for a mistrial, properly denominated a motion for appropriate relief, in a prosecution for first-degree murder, but erred by ordering that no one but SBI agents contact a potential witness, where defendant produced testimony concerning a handwritten, unsigned note which alleged that someone other than defendant committed the crime; the note allegedly came from Chrisandra Hunt; the court continued entry of judgment and the term of court, ordered that no one involved in the case have any contact with Chrisandra Hunt, and requested an SBI investigation; after hearing the testimony of the SBI agent, the court found that the results of the investigation showed that no one had any personal knowledge of the matters recited in the note and that the note would not be admissible; and the court concluded that the note was not exculpatory and denied the defendant's motion. The court did not err by contin-

uing the hearing and ordering a further investigation because, although the testimony about the note was inadmissible, it might have led to evidence that was admissible; the court did not err by denying defendant's motion based on the evidence before it after the investigation because the investigation yielded evidence which hardly rose to the level of suspicion or conjecture; and the court erred by ordering that no one other than the SBI agents contact Chrisandra Hunt. The defendant should not have been restricted in his right to gather evidence for the hearing.

Am Jur 2d, Criminal Law § 774.

Prosecutor's duty to disclose evidence favorable to accused under due process clause of Federal Constitution—Supreme Court cases. 87 L. Ed. 2d 802.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Johnson (E. Lynn), J., at the 8 May 1992 Criminal Session of Superior Court, Robeson County, upon a jury verdict of guilty of first degree murder. Heard in the Supreme Court 12 May 1993.

The defendant was tried for first degree murder. The State did not seek the death penalty. The State's evidence showed that on 7 September 1991 the body of Vonda Demery was found under an abandoned automobile.

Burnise Wilkins, the chief detective with the Robeson County Sheriff's Department, interviewed the defendant on 7 September 1991. Mr. Wilkins advised the defendant of his constitutional rights and the defendant made a statement to him. The defendant said that Vonda Demery and Lisa Demery had been living with him. The night before her death, the defendant had told Vonda she would have to move. The next evening, the defendant was sleeping on his couch when he was awakened because Vonda was cutting him on the arm with a knife. He then "reached out and grabbed the two by four off the floor, and hit her in the head[.]" Vonda fell to the floor and started making a "gurgling sound" which irritated the defendant. He then cut a piece of electric wire from the wall and held it to Vonda's throat until she died. The defendant then wrapped Vonda's body in a carpet and carried it to a wooded area where he left it. Mr. Wilkins testified that he did not see any marks on the defendant's arm.

After the defendant made the statement to Mr. Wilkins, he was carried to the Sheriff's office at which time he made another statement. This statement was substantially the same as the statement he had made to Mr. Wilkins, except he said he was awakened by the bumping of a table at which time he saw Vonda with a knife which she swung at him, cutting his arm. Robert Ivey, a detective with the Robeson County Sheriff's Department, testified that the defendant made a statement to him on 9 September 1991 which was consistent with his two previous statements.

On 29 October 1991, Mr. Ivey was informed by a jailer that the defendant wanted to talk to him. Mr. Ivey had the defendant brought to his office and the defendant told Mr. Ivey that he did not kill Vonda Demery. He said he had gone for a walk and when he returned Vonda was dead. He disposed of her body. The defendant said he thought Lisa Demery and Rodney Jacobs had killed Vonda.

The jury found the defendant guilty as charged. Immediately following the verdict, the defendant made a motion for a mistrial. This motion was based on what the defendant contended was a violation of the rule of *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), which requires the State to deliver to the defendant any exculpatory material evidence in its possession.

The court held a hearing on this motion. As a result of this hearing, two agents of the State Bureau of Investigation (SBI) were sent to South Carolina to investigate certain matters which had been revealed at the hearing. After the SBI agents had made their report, the court denied the defendant's motion and sentenced the defendant to life in prison.

The defendant appealed.

Michael F. Easley, Attorney General, by Jeffrey P. Gray, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Appellate Defender, by Janine M. Crawley, Assistant Appellate Defender, for the defendant-appellant.

WEBB, Justice.

[1] We shall consider first the defendant's contention that the court erred in charging on self-defense. This contention is based

on his reading of *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924), in which this Court held that it was error not to submit voluntary manslaughter to the jury when the evidence showed the deceased had fired one shot at the defendant and the defendant fired four shots at the deceased. This Court said the jury could have found that the defendant fired the first shot in self-defense but continued to fire unnecessarily which would make the defendant guilty of voluntary manslaughter.

The defendant says *Robinson* provides for a finding of guilty of manslaughter when the defendant reasonably uses deadly force to repel an attack but continues to use it when it is no longer necessary. He says that is what the evidence shows in this case.

The defendant says that the rule as formulated in recent cases such as *State v. McAvoy*, 331 N.C. 583, 417 S.E.2d 489 (1992) and *State v. Mize*, 316 N.C. 48, 340 S.E.2d 439 (1986), is inconsistent with *Robinson*. He says the court in this case charged the jury that unless the defendant acted reasonably throughout the incident he did not act in self-defense which is inconsistent with *Robinson*.

We do not agree with the defendant's reading of *Robinson*. In that case, the court charged the jury that the continued firing by the defendant could be found by the jury to be the use of excessive force. We do not believe *Robinson* should be read to hold that once a defendant can no longer reasonably believe he is in danger that he may continue to use deadly force and be found guilty of no more than manslaughter. In such a case, the defendant would be guilty of murder. This assignment of error is overruled.

[2] The defendant next contends that the court committed error by instructing the jury that the defendant would not be entitled to a verdict of not guilty if he was the aggressor in the fight. He says there was no evidence that he was the aggressor. He bases this contention on his statements to the officers which were introduced by the State in which he said the fight started when Vonda Demery cut him on the arm. He argues that this was the only evidence of how the altercation was commenced and the State is bound by this uncontradicted evidence which it introduced.

The State could introduce evidence which showed the killing did not happen as the defendant told the officers. *State v. Cooper*, 273 N.C. 51, 159 S.E.2d 305 (1968). It did this by the testimony

of Mr. Wilkins which was that he did not see a scratch at the place defendant told him he had been cut by Vonda Demery. This would tend to show Vonda was not the aggressor in the fight. The jury did not have to believe all that the defendant said. It could believe a part and reject another part. *Brown v. Brown*, 264 N.C. 485, 14 S.E.2d 875 (1965). It could believe the defendant was the aggressor. This assignment of error is overruled.

[3] The defendant next contends that the jury instructions on self-defense were impossible to understand. He says first that the instructions on self-defense were disorganized. He argues that there was no one place in the charge at which self-defense was fully explained but references to self-defense were scattered throughout the charge. We do not so read the charge. It appears to us that the court at one place explained self-defense with its several facets and at other places in the charge referred to self-defense as necessary to explain how to apply it.

The defendant also contends the instructions on self-defense were conceptually confusing. He says the term "self-defense" was used in four different contexts. He concedes all of these instructions were legally correct but they gave no guidance as to how to connect them in a "coherent whole." As we read the instructions they are correct. The only example the defendant cites as to the failure to connect the charge is that perfect and imperfect self-defense were not separately labeled and compared. So long as the different types of self-defense were correctly explained, it was not necessary to label them or compare them.

Finally, the defendant says the charge contained "logical inconsistencies." The defendant says the jury was told that the State had disproved self-defense if it proved that the defendant acted unreasonably in killing the victim, and that the defendant would have a partial defense and would be guilty only of voluntary manslaughter if the defendant used excessive force which would be more force than was reasonable under the circumstances. The two statements are not inconsistent and they are correct statements of the law. *State v. Norris*, 303 N.C. 526, 279 S.E.2d 570 (1981); *State v. Deck*, 285 N.C. 209, 203 S.E.2d 830 (1974).

[4] The defendant also contends it was error to charge the jury that they should find the defendant acted with malice if he killed without just cause, excuse or justification. The defendant says if the jury interpreted the phrase "without just cause, excuse or

justification" to mean a full or complete excuse another inconsistency would result. He says this is so because under the interpretation the jury used it would have been directed both to find the defendant acted with malice unless he was fully excused and that it should return a verdict of voluntary manslaughter defined as killing without malice, even if the defendant was not fully excused on the ground of self-defense. The definition of malice, which was used in the charge in this case, is a definition we have had for many years in this state. *See State v. Fleming*, 296 N.C. 559, 251 S.E.2d 430 (1979). We do not believe it could have been misinterpreted by the jury.

[5] The defendant next assigns error to the admission of certain testimony by John Bendure, an expert in fiber identification and comparison. An expert in this field examines fibrous materials such as clothing, carpet samples, ropes, string and tapes to determine if there is an association of any such material with a similar material found in another place. He testified that John Massey, who works with him and is also an expert in fiber identification and comparison, had conducted tests on fibers taken from the area in which the body was found and from the defendant's truck and home. Mr. Bendure testified from Mr. Massey's written report as to the conclusions Mr. Massey had made from the examination. The defendant says this was hearsay testimony and should have been excluded.

The defendant did not object to the admission of this testimony and it is not reviewable on appeal. N.C. R. App. P. 10(b). *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983). The defendant objected to a question as to whether Mr. Massey had received the materials for analysis but did not object to his testimony as to what the report showed in regard to the materials. At another point, the defendant objected to testimony by Mr. Bendure that a shoe string among the materials had been taken from the victim's neck but did not object to testimony as to how the sample of shoe string compared with a sample of shoe string found in the defendant's yard. The defendant's objections did not alert the judge to infirmities in a specified line of questions which would not require further objections. N.C.G.S. § 15A-1446(d)(10) (1988); *State v. Hunter*, 290 N.C. 556, 572, 227 S.E.2d 535, 545 (1976).

We do not believe we should apply the plain error rule to grant relief under this assignment of error. If the admission of

this testimony was error, it was not a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), *quoting*, *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original).

This assignment of error is overruled.

[6] We next address the defendant's assignment of error in regard to the post verdict hearings on the defendant's *Brady* motion. The defendant denominated the motion as one for mistrial. It should have been called a motion for appropriate relief. N.C.G.S. § 15A-1411 (1988). We shall treat it as a motion for appropriate relief. At the first hearing on the motion, Angela Lenhart testified that she lived in Dillon, South Carolina, and was the sister of Lisa and Vonda Demery. She testified that on one occasion she brought her thirteen year old sister Shannon Demery home from school. When her sister entered the automobile she handed Mrs. Lenhart a handwritten unsigned note that said "Lisa and Rodney [had] murdered Vonda." Mrs. Lenhart testified that Shannon told her she had received the note from a classmate named Cheryl who had received it from Chrisandra Hunt. Chrisandra Hunt is Mrs. Lenhart's cousin.

Mrs. Lenhart testified that she told Robert Ivey, a detective who was investigating the case, about the note but Mr. Ivey "said nothing about it" and her husband had destroyed the note. She testified further to certain things Lisa had told her which raised a suspicion that Lisa knew more about the killing than she had told.

Mr. Ivey testified that he had talked to Mrs. Lenhart on several occasions. He remembered that Mrs. Lenhart had told him that a cousin had told her that Lisa Demery and Rodney Jacobs had killed Vonda Demery and the cousin had overheard them discussing the killing.

On the basis of the above testimony, the court entered orders continuing the entry of judgment and continuing the term of court. The court ordered that no one involved in the case have any contact with Chrisandra Hunt. The court requested the regional supervisor of the State Bureau of Investigation to conduct an investigation. Pursuant to this request two SBI agents were sent to investigate the matter. The two agents were directed to investigate "a note that Angela Lenhart received from her sister, Shannon Demery,

which stated, 'Lisa and Rodney murdered Vonda' " and to determine whether the existence of such a note had been brought to the attention of investigators before trial.

After the two SBI agents had completed this investigation, they testified at a second hearing that they went to Dillon, South Carolina, and interviewed several persons in regard to the note.

Several people told them they had seen the note which said Lisa and Rodney had killed Vonda. The note had apparently been destroyed and no one was able to say who had written it. The agents interviewed Betty Morris, who was Vonda's aunt. Mrs. Morris told them that Rodney Jacobs and Lisa Demery had stayed with her for a few weeks after Vonda Demery's funeral. She recalled that Jacobs told her that it would have taken more than one person to carry Vonda's body into the woods, and that the section of carpet in which the body was wrapped came from the defendant's mobile home. Mrs. Morris told the agents that Jacobs told her he had persuaded his mother to create an alibi for Lisa by falsely stating that Lisa was staying with her the night of the murder. Mrs. Morris told the agents that she asked Rodney and Lisa whether they were involved with the murder and both of them "dropped [their] head[s] and laughed."

After hearing the testimony of the SBI agent, the court entered an order in which it found that the results of the investigation showed that no one had any personal knowledge of the matters recited in the note and the note would not be admissible under our rules of evidence. The court concluded that the note was not exculpatory and denied the defendant's motion. The court made no findings as to the testimony of the SBI agents as to their other investigations.

The withholding by the State of material evidence favorable to the defense has been divided by the United States Supreme Court into three categories, which are (1) the knowing use of perjured testimony or the failure to correct what the State knows is perjured testimony, (2) the withholding of evidence which is specifically requested by the defendant during discovery, and (3) exculpatory evidence in the possession of the State for which no request was made by the defendant. *United States v. Bagley*, 473 U.S. 667, 87 L. Ed. 2d 481 (1985); *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976); *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215; *State v. Craven*, 312 N.C. 580, 324 S.E.2d

599 (1985). The test for determining whether the withheld evidence is material and thus requires a new trial is different for each category. *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984). In *Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991), the United States Court of Appeals held that the exculpatory matter withheld by the State does not have to be admissible in evidence if it would lead to admissible exculpatory evidence. *Id.* at 418.

In this case, the defendant filed a motion requesting the State to disclose any exculpatory information in its possession including "[a]ny and all statements, oral or written, . . . which tend to . . . implicate others who may have committed the offense(s) for which defendant [was] charged." We believe this was a request for specific evidence in the possession of the State. In *Bagley*, the United States Supreme Court said such "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. at 682, 87 L. Ed. 2d at 494.

In this case, the testimony of Mrs. Lenhart as to the note and the other matters would not have been admissible. It was largely hearsay. In addition, evidence that another person committed the crime for which the defendant is charged must point directly to the guilt of the other party to be admissible. It must do more than create an inference or conjecture in this regard. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987); *State v. Hamlette*, 302 N.C. 490, 276 S.E.2d 338 (1981). This rule would have excluded the testimony of Mrs. Lenhart. The evidence which was withheld was not material.

We cannot say it was error for the court to continue the hearing and order a further investigation of the matter. Although the testimony of Mrs. Lenhart would not have been admissible, it might have led to evidence that was admissible. The investigation of the SBI agents did not produce anything helpful to the defendant. It yielded evidence which hardly rose to the level of suspicion or conjecture that someone other than the defendant committed the crime. It was not error for the court to deny the defendant's motion based on the evidence before it.

It was error for the court to order that no one other than the SBI agents contact Chrisandra Hunt. The defendant should

not have been restricted in his right to gather evidence for the hearing. This error may be corrected by having a new hearing and allowing the defendant the right to make whatever investigation before the hearing he feels is appropriate, including interviewing any person whom he desires. The court may appoint an investigator to aid the defendant upon a proper showing. N.C.G.S. § 15A-1421 (1988); N.C.G.S. § 15A-450(b) (1988); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

For the reasons stated in this opinion, we find no error in the trial and sentencing but we remand for a new hearing on the defendant's motion for appropriate relief.

NO ERROR IN TRIAL AND SENTENCING; REMANDED FOR NEW HEARING ON MOTION FOR APPROPRIATE RELIEF.

JIMMY CLAY HARRINGTON v. BARBARA J. STEVENS, ADMINISTRATOR OF THE ESTATE OF ROBERT STEVEN STEVENS, A.K.A ROBERT STEVEN BANNER, JOSEPH MARION HENSON, AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 398A92

(Filed 10 September 1993)

1. **Insurance §§ 509, 527— underinsured and uninsured motorist coverage—stacking—principles**

Several principles have evolved from the interpretation of N.C.G.S. § 20-279.21(b)(3) and N.C.G.S. § 20-279.21(b)(4). One is that the purpose of uninsured and underinsured coverage is different from liability coverage in that the statutory scheme for liability coverage is essentially vehicle oriented while uninsured and underinsured coverage is essentially person oriented. Another is that N.C.G.S. § 20-279.21(b)(3) provides for two classes of insureds: the first consists of the named insured and, while resident of the same household, the spouse of the named insured and relatives of either; and the second consists of any persons who use an insured vehicle with the consent of the owner and guests in the vehicle. Insureds of the first class are covered whether or not they are injured while in

the insured vehicle. Insureds of the second class are insured only when in the vehicle and only for coverage provided for persons in that vehicle.

Am Jur 2d, Automobile Insurance §§ 293 et seq.

Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

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.

2. Insurance § 528 (NCI4th)— underinsured motorist coverage—stacking—adult child in same household with father and brother

A plaintiff was allowed to stack underinsured motorist coverage both interpolicy and intrapolicy where plaintiff was injured in an automobile accident with an underinsured motorist; plaintiff's automobile insurance policy with defendant Nationwide provided underinsured coverage on two vehicles in the amounts of $50,000 per person and $100,000 per accident; Nationwide had also issued policies to the plaintiff's father and brother with whom plaintiff was residing; each provided UIM coverage for two vehicles in the amounts of $50,000 per person and $100,000 per accident; plaintiff brought this action seeking a determination of whether he was entitled to stack the policies; and the trial court granted plaintiff's motion for summary judgment. Although defendant contended that the owner must share some benefit before an insured of the first class may be covered, N.C.G.S. § 20-279.21(b)(3) says that a relative living in the same household with the owner of the policy is a "person insured" and, if a person is a "person insured" under a policy, then he or she should have all the rights of a person insured by the policy.

Am Jur 2d, Automobile Insurance § 322.

3. Insurance § 530 (NCI4th)— underinsured motorist coverage—stacking—reduction clause—not effective as to plaintiff's policy

Defendant Nationwide may not reduce its payments arising from an automobile accident for anything paid under the underinsured motorist coverage on the policy owned by the plaintiff where plaintiff was allowed to stack the coverages owned by his father and brother, with whom he lived, and

Nationwide contended that whatever plaintiff receives through those coverages must be reduced by what he received from the tortfeasor's liability coverage and from the underinsured motorist coverage on his own vehicles. The reduction for which this clause provides is for payments made for those legally responsible to the plaintiff, which would be the tortfeasor.

Am Jur 2d, Automobile Insurance § 322.

4. **Insurance § 528 (NCI4th) — underinsured motorist coverage — stacking — six vehicles — not a fleet policy**

Plaintiff was not prevented from stacking underinsured motorist coverage from his brother's and father's policies by the fleet policy provision of N.C.G.S. § 20-279.21(b)(4). Although defendant Nationwide contended that stacking in this case would be contrary to the purpose of the statute because policies covering six vehicles would be stacked and a fleet policy is defined as a policy covering five or more vehicles, Nationwide does not contend that any policy in this case was a fleet policy.

Am Jur 2d, Automobile Insurance § 322.

Justice MEYER dissenting.

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

Appeal as of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 107 N.C. App. 730, 421 S.E.2d 605 (1992), which reversed judgment for the plaintiff entered by Martin (Lester P., Jr.), J., at the 20 May 1991 Civil Session of Superior Court, Alexander County. Heard in the Supreme Court 14 April 1993.

The facts giving rise to this action are not in dispute. On 24 July 1988, the plaintiff Jimmy Clay Harrington was injured in an automobile accident caused by the negligence of Robert Steven Stevens. As to the injuries sustained by the plaintiff, Stevens' automobile was underinsured.

An automobile insurance policy issued to the plaintiff by the defendant Nationwide was in effect at the time of the accident. The policy provided the plaintiff with underinsured motorist (UIM) coverage on two vehicles in the amounts of $50,000 per person and $100,000 per accident. In addition, Nationwide had issued

automobile insurance policies to the plaintiff's father and brother with whom the plaintiff was residing. Both of these policies were in effect at the time of the accident and each provided UIM coverage for two vehicles in the amounts of $50,000 per person and $100,000 per accident.

Nationwide tendered $100,000 in UIM benefits to the plaintiff which amount represented $50,000 of "stacked" coverage for the two vehicles covered by the policy issued to the plaintiff. The plaintiff, who was living in the same residence as his father and brother at the time of the accident, filed a claim with Nationwide for $200,000 in UIM benefits under his father's and brother's policies. Nationwide denied the claim and the plaintiff instituted this action seeking a determination of whether he was entitled to interpolicy stacking of his father's and brother's policies and, whether he was entitled to intrapolicy stacking of the coverages provided within each of those policies. Both parties filed motions for summary judgment. The trial court granted the plaintiff's motion. Nationwide appealed and the Court of Appeals reversed. The plaintiff appealed to this Court based on the dissenting opinion.

Joel C. Harbison for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellee Nationwide Mutual Insurance Company.

WEBB, Justice.

[1] This case brings to the Court a question involving aggregating or stacking underinsured motorist coverages in several automobile policies. The question of stacking uninsured and underinsured motorist coverages has been a fruitful source of litigation. *See Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992); *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992); *Bass v. N.C. Farm Bureau Mut. Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992); *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. 139, 400 S.E.2d 44 (1991); *Sutton v. Aetna Casualty and Surety Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989).

The stacking litigation has arisen in large part from questions involving the interpretation of two parts of N.C.G.S. § 20-279.21, which was a part of the Motor Vehicle Safety and Financial Respon-

sibility Act in effect at the time the accident in this case occurred. N.C.G.S. § 20-279.21(b)(3) provided in part:

> For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in such motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of such motor vehicle.

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

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. 58-40-15(9) and (10).

Several principles have evolved from the interpretation of these two sections. One principle is that the purpose of uninsured and underinsured coverage is different from liability coverage. The statutory scheme for liability coverage is essentially vehicle oriented while uninsured and underinsured coverage is essentially person oriented. *Smith v. Nationwide Mutual Ins. Co.*, 328 N.C. at 148, 400 S.E.2d at 50. Another principle which has been developed is that N.C.G.S. § 20-279.21(b)(3) provides for two classes of persons insured. The first class consists of the named insured and, while resident of the same household, the spouse of the named insured and relatives of either. The second class consists of any persons who use an insured vehicle with the consent of the owner, and guests in the vehicle. Insureds of the first class are covered whether or not they are injured while in the insured vehicle. Insureds of the second class are insured only when in the vehicle and only for coverage provided for persons in that vehicle. *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127,

disc. rev. denied, 316 N.C. 731, 345 S.E.2d 387 (1986). The plaintiff in this case was an insured of the first class.

[2] It seems from the principles discussed above that the plaintiff, being an insured of the first class under the policies of his father and his brother, is covered by those policies and should be allowed to stack them with his own policy. In several cases, it has been held that an insured of the first class who is not an owner of the policy is covered by the policy and entitled to stack the coverages. *See Grain Dealers Mutual Ins. Co. v. Long*, 332 N.C. 477, 421 S.E.2d 142 (1992); *N.C. Farm Bureau Mut. Ins. Co. v. Hilliard*, 90 N.C. App. 507, 369 S.E.2d 386 (1988); *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387. The question raised in this case, that the owner must share some benefit before an insured of the first class may be covered, was not raised in any of those cases.

In this case, the Court of Appeals held that although the plaintiff was an insured of the first class under the policies of his father and his brother, he could not stack the coverages of those two policies with his own policy. The Court of Appeals based its holding on the language of *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124. In *Harris*, we held that a minor child living in the household with her parents was covered by the underinsured motorist coverages in her parents' policy.

In *Harris*, the insurer argued that the references to the owner in N.C.G.S. § 20-279.21(b)(4) showed that only the owner of the policy could stack the coverages. The insurer pointed specifically to that part of the subsection which said "it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage[.]" In answer to this argument, we left open the question of whether there must be benefit to the owner for the policy to cover other first class insureds and said it was clear that there was a benefit to the owner in that case. This benefit was the protection for his minor child whom he was obligated to support. The Court of Appeals in this case interpreted our opinion in *Harris* to mean that there must be some benefit to the owner for an insured of the first class to be covered by the owner's policy.

We believe the sections of the statute, as we have interpreted them, require that the plaintiff be allowed to stack, both interpolicy

and intrapolicy, the underinsured motorist coverages of the policies of his brother and his father. Subsection (b)(3) says a relative living in the same household with the owner of the policy is a "person insured." We have said this makes him or her an insured of the first class. If a person is a "person insured" under a policy then he or she should have all the rights of a person insured by the policy. We believe this specific language should govern over more general language as to how the owner should be benefitted. The plaintiff may stack because he is a person insured under each policy.

[3] Nationwide next contends that if the plaintiff is covered by the underinsured motorist coverages of his father and brother, whatever he receives through those coverages must be reduced by what he received from the tortfeasor's liability coverage and from the underinsured motorist coverage on his own vehicles. It bases this contention on a clause found in the policies of the plaintiff's father and brother which says:

> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.

Nationwide contends this is a reduction clause which reduces what it must pay. Assuming that if we interpreted this clause according to Nationwide's contention it would not violate N.C.G.S. § 20-279.21, we do not read this clause as does Nationwide. The reduction for which this clause provides is for payments made for those legally responsible to the plaintiff. This would be the tortfeasor. Nationwide may not reduce its payments for anything paid by the underinsured motorist coverage on the policy owned by the plaintiff. *Dungee v. Nationwide Mutual Insurance Co.*, 108 N.C. App. 599, 424 S.E.2d 234 (1993).

[4] Finally, Nationwide contends that the "fleet policy" provision of N.C.G.S. § 20-279.21(b)(4) prevents the plaintiff from stacking in this case. It says that allowing stacking in this case means that policies covering six vehicles will be stacked. It says this is contrary to the purpose of the statute because a fleet policy is defined as a policy covering five or more vehicles. Nationwide does not contend that any policy involved in this case is a fleet policy. The fleet policy provision does not apply.

We hold that the plaintiff is entitled to stack with his own policy the policies of his father and brother, both interpolicy and intrapolicy. Any amount he receives under these policies will be reduced by the amount he receives from the tortfeasor's exhausted liability policy.

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

REVERSED.

Justice MEYER dissenting.

I dissent from the majority opinion.

Plaintiff in this case, Jimmy Harrington, is an adult who has children of his own. Neither his father nor his brother, with whom plaintiff is staying temporarily, had any legal obligation to support him or to pay his medical expenses. Following his separation from his wife barely a month before he was injured, he had moved into his father's home, which was immediately next door, but during that entire time, he was "temporarily" living with his girlfriend and, in fact, had spent only a few nights in his father's house. His brother Ricky was also separated from his wife and had been living with his father for about seven months.

In *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), in which I and others dissented, this Court held that the class one insured minor daughter of the policy owners was entitled to receive stacked benefits. Michelle Harris was entitled to intrapolicy stacking not just because she was a class one insured person, not solely because she was the daughter of the policy owners, and not because she was a minor. The nonowner minor plaintiff in *Harris* was entitled to stack UIM benefits under her parents' policy because her receipt of such benefits provided a direct, identifiable, cognizable, and real benefit to her parents, the policy owners. Thus, *Harris* holds that nonowner class one insureds are entitled to stack when such stacking provides benefit to the policy owner.

The majority in *Harris* declined to decide whether the insured was "correct in interpreting the statute to mean that only 'owners' are intended to benefit from the stacking of UIM coverages" but held that the plaintiff, a nonowner class one insured person, was entitled to stack because, the policy owners did, in fact, benefit

by allowing the nonowner plaintiff to stack. *Id.* at 193, 420 S.E.2d at 129-30. The *Harris* opinion goes no further than to say that stacking is allowed for nonowner class one insureds when it benefits the policy owner.

In *Harris*, the minor plaintiff was dependent on her parents, the policy owners, for her support. The policy owners had a legal duty to support their child to the best of their abilities, and purchasing insurance to cover their daughter fulfilled part of their support duties. Moreover, purchasing insurance for their daughter served to reduce their potential personal financial obligation should their minor daughter be injured in an automobile accident.

Even as a nonowner class one insured, plaintiff here should not be allowed to interpolicy or intrapolicy stack because neither his father nor his brother will receive a real, cognizable benefit by allowing plaintiff to recover and stack the coverages on their policies along with the coverage he has already received pursuant to his own policy. Plaintiff was in no way dependent on either his father or his brother for support. The facts show that neither was providing support for the plaintiff. Plaintiff had moved his belongings to his father's house for storage and perhaps had spent a few nights in his father's household at his new permanent address. During the four weeks and four days that passed from the time plaintiff separated from his wife until the date of the accident, he had spent "several weeks" living, not in his father's house, but in another county with his girlfriend. Neither his father nor his brother had any legal obligation to provide for plaintiff's support. Therefore, there is no real and direct benefit to those policy owners, when plaintiff is allowed to recover and stack benefits under their policies.

Chief Justice Exum and Justice Parker join in this dissenting opinion.

PIEDMONT PUBLISHING COMPANY, INC. D/B/A THE *WINSTON-SALEM JOURNAL*, JOE GOODMAN, JOE STINEBAKER AND LAURA KNIGHT v. CITY OF WINSTON-SALEM AND GEORGE L. SWEAT

No. 352PA92

(Filed 10 September 1993)

State § 1.2 (NCI3d)— police communications or reports—part of criminal investigation—not public records

The trial court did not err by denying plaintiff's motion to compel the release of communications or reports by two officers during a disturbance in which one of the officers was killed. Although it appears that the Public Record Act provides that the recordings at issue in this case are public records which should be subject to inspection and copying by the plaintiff, Article 48 of Chapter 15A of the General Statutes, which provides specifically for discovery in criminal actions, governs in this case because the copies of recordings the plaintiff seeks to obtain were unquestionably gathered by the Winston-Salem Police Department in the course of a criminal investigation and are part of the State's file in a pending criminal action. When one statute deals with a particular subject in detail, and another in general and comprehensive terms, the more specific statute will be controlling. N.C.G.S. § 132-1.

Am Jur 2d, Depositions and Discovery § 81.

Privilege of custodian, apart from statute or rule, from disclosure, in civil action, of official police records and reports. 36 ALR2d 1318.

Chief Justice EXUM dissenting.

Justice MITCHELL dissenting.

Chief Justice EXUM and Justice FRYE join this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 prior to determination by the Court of Appeals of a judgment entered for the defendants on 5 August 1992 by Barefoot, J., in Superior Court, Forsyth County. Heard in the Supreme Court 12 May 1993.

The facts giving rise to this case are not in dispute. In the early morning hours of 26 June 1992, Winston-Salem police officers

responded to reports of unauthorized operation of heavy road-working equipment by several unknown individuals in the city's Lakeside neighborhood. Lieutenant Aaron G. Tise, Jr. was among the officers who investigated the disturbance. During his investigation, Lt. Tise was killed when the police cruiser he was driving was run over by a motor grader operated by one of the suspects. Another Winston-Salem police officer, Dan Dodder, was injured during the incident. Four teenaged residents of the city were charged with murder in connection with Lt. Tise's death.

Nearly all radio and telephone communications relating to the incident were recorded on magnetic tapes by the Winston-Salem Police Communications Center. The recordings included telephone communications between private citizens and police, and radio communications between the police officers who were on the scene, and between those officers and the police dispatcher. The recordings were subsequently transcribed and retained by the Winston-Salem Police Department at the behest of the Honorable Thomas J. Keith, District Attorney for the Twenty-First Prosecutorial District.

The plaintiff, the *Winston-Salem Journal*, thereafter sought to inspect, examine and obtain copies of the recorded communications pursuant to the Public Records Act, N.C.G.S. § 132-1, *et seq.* The defendant, through the chief of police, initially denied the plaintiff's request. However, the majority of the recordings were subsequently released to the plaintiff. The only recordings which were not released contained communications or reports by Lt. Tise and Officer Dodder to the Police Communications Center.

The plaintiff filed this action pursuant to N.C.G.S. § 132-9, seeking a declaration that the recordings are "public records" and subject to inspection and copying. The court denied the plaintiff's motion to compel the release of the material and dismissed the action. The plaintiff appealed.

This Court allowed the plaintiff's petition for discretionary review prior to determination by the Court of Appeals.

Everett, Gaskins, Hancock & Stevens, by Hugh Stevens and Katherine R. White, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell; City of Winston-Salem, by Ronald G. Seeber; and Winston-Salem Police Department, by Mary Claire McNaught, for defendant-appellees.

North Carolina League of Municipalities, by S. Ellis Hankins, General Counsel, and Kimberly L. Smith, Assistant General Counsel, amicus curiae.

WEBB, Justice.

The copies of recordings the plaintiff seeks to obtain in this case were unquestionably gathered by the Winston-Salem Police Department in the course of a criminal investigation and are part of the State's file in a pending criminal action. Article 48 of Chapter 15A of the General Statutes provides for discovery, only by the defendant, of materials in the possession of the State for use in a criminal action.

The plaintiff contends it is entitled to copies of the recordings under Chapter 132 of the General Statutes, the Public Records Act. N.C.G.S. § 132-1 provides in part:

> "Public record" or "public records" shall mean all documents, . . . sound recordings, magnetic or other tapes, . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

N.C.G.S. § 132-6 provides that any person may examine public records and have copies made of them. It does seem that with nothing else appearing, N.C.G.S. § 132-1 provides that the recordings at issue in this case are public records which should be subject to inspection and copying by the plaintiff. *See News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

In this case something else does appear. Article 48 of Chapter 15A of the General Statutes provides for discovery in criminal actions. If the Public Records Act applies to information the State procures for use in a criminal action, there would be no need for Article 48. A criminal defendant could obtain much more extensive discovery under the Public Records Act. It is illogical to assume that the General Assembly would preclude a criminal defendant from obtaining certain investigatory information pursuant to the criminal discovery statutes while at the same time mandating the

release of this information to the defendant, as well as the media and general public, under the Public Records Act.

If we were to adopt the position advocated by the plaintiffs, that Chapter 132 applies in this case, the files of every district attorney in the state could be subject to release to the public. Among the matters that would have to be released would be the names of confidential informants, the names of undercover agents, and the names of people who had been investigated for the crime but were not charged. We do not believe the General Assembly intended this result. *See News and Observer v. State*, 312 N.C. 276, 322 S.E.2d 133 (1984).

One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E.2d 582 (1966). Article 48 deals specifically with the disclosure of criminal investigative files as opposed to the more general provisions of Chapter 132. We hold that it governs in this case and there is no provision in it for discovery by anyone other than the State or the defendant.

The judgment of the superior court is affirmed.

AFFIRMED.

Chief Justice EXUM dissenting.

I agree with the dissenting opinion of Justice Mitchell and join in it. I write separately to say why I think the majority's reliance on our criminal discovery statutes is misplaced, a point not dealt with in Justice Mitchell's dissent.

To me, the criminal discovery statutes have nothing to do with the issue in this case. They deal with the narrow subject of what materials a criminal defendant is entitled to see and the procedures which the defendant and the State must follow in making these materials available to the defendant, who is in an adversarial relationship with the State.

The Public Records Act, on the other hand, specifically addresses the issue before us, i.e., the right of the public to have access to certain materials in the hands of public officials. The

public is not in an adversarial relationship with these officials. Indeed, these officials are, in every sense, the public's agents. I am confident the legislature did not intend to limit the public's right to have access to these materials, granted in the Public Records Act, when it later passed statutes addressing the criminal defendant's right to discover materials in the hands of his adversary.

The fallacy of relying on the criminal discovery statutes to resolve this case is made clearer if one considers how the case would be decided if the criminal discovery statutes had never been passed. As I read the majority opinion, in the absence of our criminal discovery statutes, it would hold that the Public Records Act requires disclosure of the materials at issue in this case. Thus had the criminal discovery statutes not been passed, the majority would hold that the Public Records Act controls in favor of plaintiffs' position. The criminal discovery statutes, of course, were passed to expand the discovery rights of criminal defendants, which were practically nonexistent at common law. It makes no sense to me to hold that statutes designed to expand the discovery rights of criminal defendants somehow diminish the public's access to public records under the Public Records Act.

Justice MITCHELL dissenting.

Under the common law, citizens had limited rights to the disclosure of public documents. *News and Observer Publishing Co. v. State*, 312 N.C. 276, 280, 322 S.E.2d 133, 136 (1984). However, citizens had no right of access to information possessed by the government concerning alleged violations of criminal law. *Id.* Although sound and perhaps compelling reasons of public policy supported such common law rules, they no longer control; access to public records is now specifically controlled in this State by the Public Records Act, N.C.G.S. §§ 132-1 to -9. "When the General Assembly as the policy-making agency of our government legislates with respect to the subject matter of any common law rule, the statute supplants the common law and becomes the law of the State." *News and Observer v. State*, 312 N.C. at 281, 322 S.E.2d at 137. Thereafter, neither common law principles *nor this Court's public policy preferences* control.

As the majority acknowledges, the records sought by the plaintiffs are records of a type included within the term "public records" as that term is defined in N.C.G.S. § 132-1. The General Assembly,

as the policy-making agency of this State, has specifically and expressly directed by statute that custodians of such public records "shall permit them to be inspected and examined at reasonable times" and "furnish certified copies thereof on payment of fees as prescribed by law." N.C.G.S. § 132-6 (1991). The issue for this Court to decide, then, is whether any exception to the Public Records Act applies in this case.

In *News and Observer v. State*, the plaintiffs sought access under the Public Records Act to certain investigative files of the North Carolina State Bureau of Investigations (SBI). We concluded in that case that the legislature had adopted the Public Records Act in order "to provide that, as a general rule, the public would have liberal access to public records." *News and Observer v. State*, 312 N.C. at 281, 322 S.E.2d at 137. We further concluded that the plaintiffs in that case were not entitled to access to SBI records *but only because* in another statute, N.C.G.S. § 114-15, the General Assembly by the clearest and most specific language possible had provided that SBI records "shall not be considered public records" within the meaning of the Public Records Act. *Id.* at 281-82, 322 S.E.2d at 137 (quoting N.C.G.S. § 114-15). Similarly, when the General Assembly has decided for "public policy" reasons to except any other records whatsoever from the disclosure requirements of the Public Records Act, it has done so by equally narrow and specific exemptions. *E.g.*, N.C.G.S. § 132-1.1 (1991) (confidential communications by legal counsel to public board or agency); N.C.G.S. § 132-1.2 (1991) ("trade secrets" and other confidential information provided by private parties to government for limited purposes); N.C.G.S. § 132-6 (1991) (proposed expansion or location of specific business or industrial projects in the State). Neither the defendants in this case nor the majority of this Court have identified any such statute specifically excepting records maintained by city police departments from the mandate of the Public Records Act that such records be made available for inspection and copying. This omission is quite understandable; *no such statute exists*. Therefore, the public's right of access to the records at issue in the present case is controlled solely by the terms of the Public Records Act as enacted by the General Assembly, rather than by this Court's view of what constitutes sound public policy. *News and Observer v. State*, 312 N.C. at 281, 322 S.E.2d at 137.

In defending the holding in the present case, the opinion of the majority advances the quite reasonable public policy concern

that disclosure of records such as those at issue here could lead in other cases to the disclosure of names of confidential informants, undercover agents, or individuals who have been investigated for crimes but not charged. This Court has previously recognized the validity of such public policy concerns. In fact, in holding that SBI records were not subject to disclosure under the Public Records Act, we expressly stated that we assumed that *the General Assembly* had considered such valid "reasons for denying access to police records, as well as the common law and statutory history concerning such access, when it enacted *the statute* declaring S.B.I. records not to be public and, thereby, exempted them from disclosure under the Public Records Act." *Id.* at 283, 322 S.E.2d at 138 (emphasis added). In the nine years since we rendered that opinion highlighting the public policy reasons for denying access to police records, however, the General Assembly has not seen fit to adopt a statute exempting records of police departments from the Public Records Act like the specific exemption it enacted for SBI records.

The General Assembly has clearly demonstrated by enacting N.C.G.S. § 114-15 and other statutes that it knows how to create a specific exemption from the requirements of the Public Records Act for police department records if it desires to do so. Until the General Assembly enacts such an exception, however, it is the duty of this Court to apply the Public Records Act as written. Accordingly, we are required to resist all temptations to exceed our legitimate authority by adding public policy exceptions to the Public Records Act which have not been placed there by the General Assembly. *News and Observer Publishing Co. v. Poole*, 330 N.C. 465, 483-84, 412 S.E.2d 7, 18 (1992); *Advance Publications, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70-71 (1981). If we are to fulfill our duty as judges to apply the Public Records Act as written by the legislature, we are left with no choice in this case but to hold that the defendants must allow the plaintiffs access to the documents they seek.

For the foregoing reasons, I respectfully dissent from the decision of the majority which denies the plaintiffs access to public records.

Chief Justice Exum and Justice Frye join in this dissenting opinion.

STATE OF NORTH CAROLINA v. WILLIE HOWARD AKA JAMES SMITH

No. 525A91

(Filed 10 September 1993)

1. **Criminal Law § 98 (NCI4th)— murder documents under seal—State allowed to discover—no showing of prejudice**

An assignment of error in a murder prosecution to the State's discovery of documents previously sealed was rejected where defendant conceded that ultimately he was not prejudiced by the entry of this order.

Am Jur 2d, Criminal Law §§ 598 et seq.

2. **Constitutional Law § 248 (NCI4th)— murder—discovery—failure of witness to identify defendant not disclosed—no violation of due process**

The failure of a prosecutor in a murder trial to disclose a witness's inability to positively identify defendant did not violate defendant's right to due process because there is not a reasonable probability that disclosure would have affected the outcome of defendant's trial. Furthermore, defendant filed a general motion for exculpatory information which did not specifically request information relating to the witness's ability to identify defendant as the assailant, the State allowed defendant open access to its entire file throughout the case, and, after hearing evidence and reviewing the record, the trial judge remained convinced of defendant's guilt beyond a reasonable doubt.

Am Jur 2d, Criminal Law § 774.

3. **Criminal Law § 951 (NCI4th)— first-degree murder—motions for appropriate relief, mistrial, and dismissal—refusal to rule before sentencing hearing—not prejudicial**

A first-degree murder defendant was not prejudiced by the court's refusal to rule on his motions for appropriate relief, mistrial and dismissal prior to sentencing where defendant contended that the ruling would have allowed him to decide whether to take the stand during the sentencing phase of his trial but the jury recommended that defendant be sentenced to life imprisonment, the least severe sentence defendant could have received.

Am Jur 2d, Coram Nobis and Allied Statutory Remedies § 59.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Wright, J., at the 22 April 1991 Criminal Session of Superior Court, Wayne County, upon a jury verdict of guilty of murder in the first degree. Heard in the Supreme Court 15 April 1993.

Michael F. Easley, Attorney General, by Clarence J. DelForge, III, Assistant Attorney General, for the State.

R. Michael Bruce and Jean P. Hollowell for defendant-appellant.

FRYE, Justice.

On 30 April 1990, defendant Willie (Willis) Howard was indicted for attempted robbery with a dangerous weapon and first-degree murder of Jerry Durham. In a capital trial the jury found defendant guilty of first-degree murder under the felony murder rule and guilty of attempted robbery with a dangerous weapon. Following a capital sentencing proceeding the jury recommended, and the trial court imposed, a sentence of life imprisonment for the first-degree murder conviction.

On direct appeal to this Court, from the imposition of his sentence of life imprisonment for the crime of murder in the first degree, defendant makes three assignments of error. After a thorough review of the record and consideration of the briefs and arguments of counsel, we conclude that defendant received a fair trial, free from prejudicial error. Thus, his conviction of first-degree murder must stand.

Evidence introduced at trial showed that late in the evening of 29 January 1990, the victim, Jerry Durham, was shot and killed in front of the Gemini West Club in Goldsboro. In addition to investigating officers, the victim's mother, and a forensic pathologist, the State presented the testimony of four eyewitnesses to the events of the evening.

Rodney Bernard Perry testified that he was at the Gemini West Club on the night Jerry Durham was shot. Perry was walking to the club when he saw two men approach the victim. The men began to scuffle and a gun fell to the ground in front of Perry. Perry quickly turned and walked back to his truck when he heard

the words "shoot him, Scatter, shoot him" and then he heard a gunshot. Perry sat in his truck and watched as the assailants drove away in a car.

Bernard Travis Gross testified that he was also present during the shooting. He knew both the victim and defendant and testified that defendant was known by the nickname "Scatter." Gross testified that the victim was attempting to sell drugs outside the club when defendant and another man approached the victim. When defendant pointed a gun at the victim, Gross entered the club but continued to watch from inside the doorway. Gross testified that the victim also had a gun but dropped it. Defendant picked up the gun and hit the victim in the face with it several times. Gross then saw an outstretched arm and heard a shot. The victim ran into the club and said, "man, he got me. He got me."

Donna Boykin testified that the victim was standing near the corner of the club when defendant and another man approached him. Defendant had a gun and told the victim this was a "stick-up." A scuffle ensued and defendant hit the victim in the face with a gun. The gun went off before it dropped to the ground. The victim then entered the club where he died.

Donald Stewart was the last eyewitness for the State. He testified to substantially the same events as Ms. Boykin and testified that defendant was the person he saw shoot the victim.

The State rested and defendant did not present any evidence. Following return of the jury verdicts a capital sentencing proceeding was held pursuant to N.C.G.S. § 15A-2000. During the capital sentencing proceeding defense counsel learned that Carla Denise Hinnant, an additional eyewitness for the State who did not testify, had failed to positively identify defendant as the assailant. On 23 May 1991 defendant filed motions for appropriate relief and for mistrial and dismissal based on the failure of the State to disclose exculpatory evidence. Defendant alleged in his motions that the State's failure to disclose Ms. Hinnant's inability to identify defendant violated defendant's right to due process. In response, the trial judge allowed defendant to call Ms. Hinnant to the stand to introduce her testimony on voir dire. In addition, after sentencing defendant to life imprisonment pursuant to the recommendation of the jury, the trial court held a lengthy hearing on defendant's motions for appropriate relief and for mistrial and dismissal. After

making findings of fact and conclusions of law, the trial court denied both motions.

[1] In his first assignment of error, defendant argues that the trial court's order of 11 January 1991 allowing the State to discover documents previously placed under seal was erroneously entered. However, defendant concedes that ultimately he was not prejudiced by the entry of this order. Because defendant cannot show prejudice as required by N.C.G.S. §§ 15A-1442 and -1443, we reject this assignment of error.

[2] By another assignment of error, defendant argues that the trial court erred in denying his motions for appropriate relief and for mistrial and dismissal. Defendant argues that he is entitled to a new trial because his right to due process was violated by the State's failure to disclose Ms. Hinnant's inability to positively identify defendant as the assailant in this case. Defendant relies on *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963), for this proposition. We conclude that the prosecutor's failure to inform defendant about Ms. Hinnant's inability or unwillingness to identify defendant as the assailant did not deprive defendant of a fair trial.

In *Brady v. Maryland*, 373 U.S. at 87, 10 L. Ed. 2d at 218, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Court elaborated on the prosecutor's duty to disclose exculpatory evidence to a defendant at trial in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342. In *Agurs*, the Supreme Court rejected the idea that every nondisclosure should be regarded as automatic error. *Id.* at 108, 49 L. Ed. 2d at 354. Rather, the Court held that prejudicial error must be determined by examining the materiality of the evidence. *Id.; see also State v. Alston*, 307 N.C. 321, 336-337, 298 S.E.2d 631, 642 (1983).

Such evaluation must be made "in the context of the entire record." *Agurs*, 427 U.S. at 112, 49 L. Ed. 2d at 355. In defining the standard for determining materiality, the Court held that "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Id.; see also United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985) (holding that "evidence is material only if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

In *Agurs*, the Supreme Court did not find the prosecutor's failure to disclose the victim's arrest record to defendant to be constitutional error. Defendant argued that the evidence was material because it supported his theory of self-defense by providing evidence of the victim's violent character. *Id.* After reviewing the trial court's findings in response to the defendant's motion for a new trial, the Supreme Court held that

> [s]ince the arrest record was not requested and did not even arguably give rise to any inference of perjury, since after considering it in the context of the entire record the trial judge remained convinced of [defendant's] guilt beyond a reasonable doubt, and since we are satisfied that his firsthand appraisal of the record was thorough and entirely reasonable, we hold that the prosecutor's failure to tender [the victim's] record to the defense did not deprive [defendant] of a fair trial as guaranteed by the Due Process Clause of the Fifth Amendment.

Agurs, 427 U.S. at 114, 49 L. Ed. 2d at 355-56. For similar reasons, we conclude that Ms. Hinnant's inability to positively identify defendant was not material because there is not a reasonable probability that disclosure would have affected the outcome of defendant's trial. Therefore, the prosecutor's failure to disclose Ms. Hinnant's statements to defendant did not violate defendant's right to due process.

Like the Court in *Agurs*, we note that defendant in this case did not specifically request information relating to Ms. Hinnant's ability to identify defendant as the assailant. Defendant filed a request for voluntary discovery on 9 October 1990. On 22 April 1991, defendant filed a general motion for exculpatory information, which included a specific request not relevant here. However, as the Court stated in *Agurs*, a motion asking "for 'all Brady material' or for 'anything exculpatory' . . . really gives the prosecutor no better notice than if no request is made." *Id.* at 106, 49 L. Ed. 2d at 351.

Even so, in response to defendant's request for voluntary discovery, the State allowed defendant open access to its entire file throughout the case. Such access was not constitutionally or

statutorily required. *See Agurs*, 427 U.S. at 111, 49 L. Ed. 2d at 354 (rejecting "the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel"). *See also* N.C.G.S. § 15A-903 (1988). Further, after hearing evidence and reviewing the record, the trial judge remained convinced of defendant's guilt beyond a reasonable doubt. This is demonstrated by the findings and conclusions, elaborated below, in the trial court's order denying defendant's motions.

After conducting evidentiary hearings, the trial court found, *inter alia*, the following facts. Carla Denise Hinnant was a subpoenaed witness for the State in defendant's capital trial. Ms. Hinnant was present at the Gemini West Club on the night of the murder. Although she did not actually witness the murder, Ms. Hinnant saw the man who was in the altercation with the deceased from an angle. Ms. Hinnant had poor vision (approaching blindness in her left eye) and had consumed two alcoholic drinks prior to witnessing the altercation. Within twenty-four hours of the shooting Ms. Hinnant signed her name to a photographic lineup control sheet indicating her selection of a photograph of the defendant as the person who was the gunman in the altercation with the deceased. After the passage of some time, Ms. Hinnant began receiving threatening phone calls indicating that "Scatter was going to get her" and she informed the police and assistant district attorney of this. Subsequently, on a visit to the assistant district attorney's office, Ms. Hinnant indicated that she did not recognize defendant's picture. On a later occasion, upon seeing defendant in a courtroom, Ms. Hinnant told the assistant district attorney that he was not the same man that shot the victim. The State presented circumstantial evidence and three eyewitnesses who positively identified defendant as the one who shot Jerry Durham. The jury then convicted defendant of first-degree murder.

The trial court concluded that "there existed for the consideration of the jury, strong and cumulative testimony of three eyewitnesses along with circumstantial evidence that, taken together, was of an overwhelming nature pointing to the guilt of the accused." The trial court further concluded that had Ms. Hinnant testified for the defense, her testimony would have been subject to strong and cumulative impeachment evidence by the State. In light of the above, the trial court finally concluded that "there existed no reasonable probability sufficient to undermine confidence in the outcome and result of the proceedings, or that the jury's determina-

tion would in any wise have been different had this evidence been disclosed to the defense for their use." The trial court then denied defendant's motions.

As in *Agurs*, the trial court in this case remained convinced of defendant's guilt beyond a reasonable doubt after reviewing the entire record in context. *See Agurs*, 427 U.S. at 114, 49 L. Ed. 2d at 355-56. Also, as was the Court in *Agurs*, "we are satisfied that [the trial court's] firsthand appraisal of the record was thorough and entirely reasonable." *Id.* We therefore conclude that defendant's right to due process was not violated by the State's failure to disclose information relating to Ms. Hinnant's inability to identify defendant as the assailant. Thus, the trial court did not err in denying defendant's motions. We reject this assignment of error.

[3] Defendant lastly argues that the trial court erred by refusing to rule on defendant's motions for appropriate relief and for mistrial and dismissal prior to sentencing. Defendant contends that the trial court was required to rule on such motions prior to sentencing under N.C.G.S. § 15A-1061. The ruling, defendant argues, would have allowed defendant to decide whether to take the stand during the sentencing phase of his trial. We reject this assignment of error because defendant was not prejudiced by the trial court's failure to rule on defendant's motions prior to sentencing.

Defendant was tried capitally. After the sentencing proceeding, the jury recommended that defendant be sentenced to life imprisonment. Life imprisonment is the least severe sentence that defendant could have received for his conviction of first-degree murder. N.C.G.S. § 14-17 (Supp. 1992). Therefore, defendant's sentence could not have been reduced even if defendant had chosen to testify on his own behalf at the sentencing phase of his trial. Assuming, *arguendo*, that the trial court erred in delaying its ruling until after the sentencing proceeding, such error was not prejudicial to defendant. N.C.G.S. § 15A-1443 (1988).

We conclude defendant received a fair trial, free from prejudicial error.

NO ERROR.

STATE OF NORTH CAROLINA v. DONNIE EDWARD MAY

No. 171A92

(Filed 10 September 1993)

1. Evidence and Witnesses § 1294 (NCI4th)— murder and robbery—physical evidence—obtained from statements to defendant's girlfriend—Miranda violation—admissible

The trial court did not err in a prosecution for murder and armed robbery by admitting into evidence a knife, a pair of gloves, and a rag which had been found by the investigating officer in the yard of the defendant's home where the defendant signed a written waiver of his rights under *Miranda* but invoked his right to counsel after the officers began interrogating him; the interrogation ceased at that time; two days later the defendant's girlfriend, who lived with him, gave officers permission to search his mobile home and his yard; the officers learned from the girlfriend that defendant was concerned about something buried in the backyard; at the suggestion of the officers, the girlfriend called the defendant, who was in jail, and informed him that the officers intended to search the backyard; she asked the defendant whether she "needed" to get rid of anything in the yard; defendant told her there was a tree in the backyard which had a string tied around it and to get rid of what was buried under the tree; the girlfriend reported this conversation to the officers; and they found the disputed items at the place indicated by defendant. The trustworthiness of the physical evidence could not be affected by its admission or exclusion and, although the officers in this case violated the prophylactic rule of *Miranda* as extended by *Edwards*, they did not violate the defendant's constitutional right not to incriminate himself. The deterrent value of the rule is satisfied by the exclusion of the statement made as a result of the *Miranda* or *Edwards* violations.

Am Jur 2d, Evidence §§ 571, 572.

Admissibility of confession as affected by its inducement through artifice, deception, trickery, or fraud. 99 ALR2d 772.

2. Constitutional Law § 342 (NCI4th)— murder and robbery— communications between bailiff and jury—outside defendant's presence—no error

A defendant in a prosecution for robbery and murder was not deprived of his right to be present at every stage of the trial as guaranteed by Article I, Section 23 of the Constitution of North Carolina where the court twice instructed the bailiff during hearings out of the presence of the jury to tell the jury that it was free to leave the jury room for fifteen minutes. The court had the authority to tell the jury this and, without anything in the record to show that something else happened, it will be assumed the bailiff followed the court's instructions.

Am Jur 2d, Criminal Law §§ 692 et seq., 901 et seq.

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

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of life imprisonment entered by Helms (William H.), J., at the 5 November 1991 Criminal Session of Superior Court, Union 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 on 23 July 1992. Heard in the Supreme Court 16 March 1993.

The defendant was tried for first degree murder and armed robbery. The State introduced evidence sufficient to convict the defendant, including testimony by two persons who had been incarcerated with the defendant that the defendant had told them he had stabbed the victim to death and had taken certain items of personal property from her. The defendant was convicted of both charges. A sentencing hearing was held and the jury recommended the defendant be sentenced to life in prison on the murder conviction. The court sentenced the defendant to life in prison for the murder and forty years in prison for the armed robbery. The armed robbery sentence is to be served at the expiration of the sentence for murder. The defendant appealed.

Michael F. Easley, Attorney General, by Valerie B. Spalding, Assistant Attorney General, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, by Staples Hughes, Assistant Appellate Defender, for defendant-appellant.

WEBB, Justice.

[1] The defendant first assigns error to the introduction into evidence by the State of a knife, a pair of gloves, and a rag which had been found by the investigating officer in the yard of the defendant's home. The defendant moved to suppress this evidence at the trial and a hearing on the motion was held out of the presence of the jury. The evidence at the hearing showed that the defendant was arrested on 4 February 1991. The defendant signed a written waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), but invoked his right to counsel after the officers began interrogating him. The interrogation ceased at that time.

Two days later the defendant's girlfriend, who lived with him, gave the officers permission to search his mobile home and his yard. The officers learned from the girlfriend that defendant was concerned about something buried in the backyard. At the suggestion of the officers, the girlfriend called the defendant who was in jail and informed him that the officers intended to search the backyard. She asked the defendant whether she "needed" to get rid of anything in the yard. The defendant told her there was a tree in the backyard which had a string tied around it. The defendant told her to get rid of what was buried under the tree. The girlfriend reported this conversation to the officers and they found the disputed items at the place at which the defendant said they would be.

At the conclusion of the hearing, the court found facts consistent with the above evidence and concluded that the girlfriend acted as an agent of the State when she called the defendant, that the defendant was not under any coercion when he talked to his girlfriend and his telling her of the items under the tree was a voluntary act. The court held that none of the defendant's constitutional rights were violated and ordered the items admitted into evidence.

The defendant contends it was error not to suppress from evidence the items found under the tree because they were found as a result of an interrogation that violated *Miranda* and *Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378 (1981). *Miranda* holds that in order for a defendant's custodial statement to be admissible at trial, the defendant, prior to making the statement, must be advised of his constitutional rights as delineated in that opinion unless some fully effective equivalent is utilized and the defendant

voluntarily and understandably waives his constitutional rights. *Edwards* extends this rule to require that when a defendant asks for an attorney no custodial statement he thereafter makes may be introduced into evidence unless the defendant either has his lawyer with him when he makes the statement or initiates the interview with the officers and waives his rights. The defendant contends that the items seized should be suppressed because they were found as a result of an interview initiated by law enforcement officers after he had invoked his Fifth Amendment right to counsel.

The United States Supreme Court has interpreted *Miranda* in *Michigan v. Tucker*, 417 U.S. 433, 41 L. Ed. 2d 182 (1974) and *Oregon v. Elstad*, 470 U.S. 298, 84 L. Ed. 2d 222 (1985). In those cases, the Supreme Court recognized that the failure to give *Miranda* warnings is not itself the violation of a person's right against self-incrimination. The *Miranda* warnings are a prophylactic standard used to safeguard the privilege against self-incrimination. The exclusionary rule in such a case is applied differently than it is applied in a case in which a person's constitutional rights are violated such as by an illegal search and seizure. In the latter case, evidence gathered as a result of the constitutional violation is the fruit of a poisoned tree and must be excluded. *Wong Sun v. United States*, 371 U.S. 471, 9 L. Ed. 2d 441 (1963). If the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement, it is not necessary to give too broad an application to the exclusionary rule. The statement which is obtained by the violation of the *Miranda* rule must be excluded but some evidence which is obtained as a result of the violation does not have to be excluded. In *Tucker*, the Supreme Court held that a witness who was found only because of a statement taken in violation of *Miranda* should be allowed to testify. In *Elstad*, the Court held that a confession taken after compliance with *Miranda* is admissible although it was procured in part because of an earlier unwarned confession.

The United States Supreme Court has not passed on the question we face in this case, which is whether physical evidence must be suppressed if it is found in violation of the prophylactic rule of *Miranda* or *Edwards* but not as the result of actual coercion which violated the rights of the defendant. The Court had a chance to do so but declined in *Patterson v. United States*, 485 U.S. 922, 99 L. Ed. 2d 255 (1988). The courts which have faced this issue are divided. *See United States ex rel. Hudson v. Cannon*, 529 F.2d

890 (7th Cir. 1976); *United States v. Castellana*, 488 F.2d 65 (5th Cir. 1974); *United States v. Massey*, 437 F. Supp. 843 (M.D. Fla. 1977); *State v. Preston*, 411 A.2d 402 (Me. 1980); *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (Ga. 1982), *cert. denied*, 459 U.S. 1092, 74 L. Ed. 2d 940 (1982).

We hold that the physical evidence discovered as a result of the defendant's statement to his girlfriend was properly admitted into evidence in this case. In *Tucker* and *Elstad*, the United States Supreme Court emphasized that determining whether evidence discovered as the result of a *Miranda* violation should be admitted depends on whether its exclusion would serve to deter improper police conduct or assure the trustworthiness of the evidence. We do not see how the trustworthiness of the physical evidence admitted in this case could be affected by its admission or exclusion. Although the officers in this case violated the prophylactic rule of *Miranda* as extended by *Edwards*, they did not violate the defendant's constitutional right not to incriminate himself. It is important that all relevant evidence be submitted to the jury in order for it to make the proper findings. This outweighs the need to exclude evidence which was gathered as the result of a non-coercive statement made in violation of the prophylactic rule of *Miranda* as extended by *Edwards*. The deterrent value of the rule is satisfied by the exclusion of the statement made as a result of the *Miranda* or *Edwards* violations.

This assignment of error is overruled.

[2] In his second assignment of error, the defendant contends his right to be present at every stage of the trial guaranteed by Article I, Section 23 of the Constitution of North Carolina was violated. He says this was done by certain instructions of the court to the bailiff and the actions taken by the bailiff pursuant to those instructions. At one point in the trial, the jury was in the jury room while a hearing was being conducted. The transcript reveals that the following occurred:

> [PROSECUTOR]: Your Honor, Lieutenant Cox may be the State's next witness and for purposes of the next witness for purposes of voir dire. He needs to go downstairs and get a piece of paper. May he be released for just three minutes, four minutes, to do that?

THE COURT: All right, I think we'll go ahead and take our morning recess anyway.

. . . .

THE COURT: It is [sic] all right for the bailiff to tell the jurors to take fifteen minutes, be back in fifteen minutes?

[DEFENSE COUNSEL]: Yes, sir.

THE COURT: Any objection to that?

[DEFENSE COUNSEL]: No objection.

[PROSECUTOR]: No, sir.

THE COURT: All right, Mr. Bailiff, if you'll tell the jurors to take a fifteen minute recess and be back in the jury room in fifteen minutes, please.

(The witness leaves the witness stand.)

RECESS.

At a later time during the trial, the jury was in its room when the following occurred:

THE COURT: Is there any objection to letting the jury take a break[?] Apparently we're going to be doing this for a while longer.

[DEFENSE COUNSEL]: No, sir.

[PROSECUTOR]: No, sir.

THE COURT: Tell the jury they're free to go—any objection to the Bailiff telling them they're free to get a cup of coffee?

[DEFENSE COUNSEL]: No.

THE COURT: Tell them to be back in the jury room at 11:15, please. All right, go ahead.

The defendant contends that the bailiff was instructed to do what the court could not do, which was to tell the jury how to act. The court did have the authority to tell the jury how to act to the extent it could have told them they were free to leave the jury room for fifteen minutes if they wanted to do so. The defendant also contends that because no record was made of the bailiff's conversation with the jury, we cannot know the nature of the

conversation and it is impossible to reconstruct it. For that reason says the defendant, there is error requiring a new trial. *State v. Monroe*, 330 N.C. 846, 412 S.E.2d 652 (1992); *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987).

In *Payne*, we said that so long as the record did not show to the contrary, we would assume that it spoke the truth as to what happened when the judge said he would deliver this admonition to the jury in the jury room. *Id.* at 139, 357 S.E.2d at 612. We believe we should do the same in this case. The court instructed the bailiff in this case on two occasions to tell the jury it could leave the jury room for fifteen minutes. Without anything in the record to show something else happened, we will assume the bailiff followed the court's instructions. It was not error for the court to send this message by the bailiff to the jury. It would impose a heavy burden on our courts if a court reporter were required to accompany a bailiff every time he is with a jury in order to make a record of what was said. This assignment of error is overruled.

NO ERROR.

STATE OF NORTH CAROLINA v. RICKY LEE PRICE

No. 585A87

(Filed 10 September 1993)

Jury § 151 (NCI4th)— first-degree murder—jury selection—whether State should be required to prove aggravating factors—questions not allowed—no prejudice

There was no prejudice in a first-degree murder prosecution, even assuming error, where the court did not allow defense counsel to ask prospective jurors whether they felt it should be necessary for the State to show additional aggravating factors before they would vote for the death penalty but defendant was allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground, the court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so, and defendant

was then allowed to question the jurors as to their ability to follow the court's instructions in regard to these circumstances and apply the law according to the instructions.

Am Jur 2d, Jury § 197.

On remand from the United States Supreme Court. Heard in the Supreme Court 12 May 1993.

The defendant was convicted of first degree murder and sentenced to death. This Court affirmed his murder conviction and death sentence. The United States Supreme Court vacated the judgment and remanded the case to us for further proceedings in light of *McKoy v. North Carolina*, 494 U.S. 433, 108 L. Ed. 2d 369 (1990). *State v. Price*, 326 N.C. 56, 388 S.E.2d 84, *vacated and remanded*, 498 U.S. 802, 112 L. Ed. 2d 7 (1990) (*Price I*). This Court reaffirmed the conviction and judgment. The United States Supreme Court again vacated the judgment and remanded the case to us for further proceedings in light of *Morgan v. Illinois*, 504 U.S. ---, 119 L. Ed. 2d 492 (1992). *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), *vacated and remanded*, --- U.S. ---, 122 L. Ed. 2d 113 (1993) (*Price II*).

The facts of this case are summarized in *Price I* and will not be restated here except as is necessary for proper treatment of the issue to be addressed.

Michael F. Easley, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

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

WEBB, Justice.

This case has been remanded to us by the United States Supreme Court for further consideration in light of *Morgan v. Illinois*, 504 U.S. ---, 119 L. Ed. 2d 492. In *Morgan*, the United States Supreme Court granted the defendant a new sentencing hearing because the trial court, during jury selection, would not ask the prospective jurors if they would "automatically vote to impose the death penalty no matter what the facts are[.]" *Id.* at ---, 119 L. Ed. 2d at 499. The United States Supreme Court said that the due process clause of the Fourteenth Amendment required

that the defendant be allowed to have this question put to the jury in order to determine whether to exercise a challenge to any juror who answered in the affirmative. The Court said that general questions as to whether the jury "would follow the law" are not sufficient to satisfy the requirement that the defendant be allowed to make a sufficient inquiry to make an intelligent challenge.

The defendant says the rule of *Morgan* was violated by rulings of the court in this case as shown by the following colloquy:

> MR. GALLOWAY: Mr. Kimbrough, if the State were to satisfy you and the jury beyond a reasonable doubt that Ricky Price was guilty of first degree murder, would you then be comfortable in requiring the State to show additional aggravating factors according to the Judge's instructions?
>
> MR. KIMBROUGH: According to the Judge's instructions, yes.
>
> MR. GALLOWAY: Okay. Do you feel that it should be necessary for the State to show additional aggravating factors before you would vote to impose the death penalty?
>
> MR. BREWER: Objection.
>
> THE COURT: Sustained.
>
> MR. GALLOWAY: Mr. Kimbrough, asking you this not to know whether you would follow the Judge's instructions, but to know in the predisposition of your mind, I'll ask you do you feel that the State should be required to show you additional aggravating factors before you would vote to impose the death penalty?
>
> MR. BREWER: Objection.
>
> THE COURT: Sustained.
>
> MR. GALLOWAY: For the record, I would except and would note that I would propose to ask the same question to all twelve jurors. And in the interest of time if the Court would note that.
>
> THE COURT: Let the record so reflect.

The defendant says that this colloquy illustrates that he was denied the opportunity to exercise his right to ask a specific question

of prospective jurors in order to determine whom he should challenge because they might not be able to require the State to prove aggravating circumstances before imposing the death penalty.

Assuming it was error not to allow the questions shown above, we do not believe it was prejudicial to the defendant. He was allowed to ask other questions which should have enabled him to determine if challenges should have been made on this ground. The court instructed the potential jurors as to the method of finding aggravating and mitigating circumstances and the consequences of doing so. The defendant was then allowed to question the jurors as to their ability to follow the court's instruction in regard to these circumstances and apply the law according to the instructions. This should have enabled the defendant to determine whether to challenge a juror on the ground he would automatically vote for the death penalty if the defendant was found guilty.

If the refusal to allow the excluded questions was error, it was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b) (1988). The case is remanded to the Superior Court, Person County, for further proceedings.

DEATH SENTENCE AFFIRMED; MANDATE REINSTATED; CASE REMANDED.

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

AMMONS v. WYSONG & MILES CO.

No. 312P93

Case below: 110 N.C.App. 739

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

BALDWIN v. GTE SOUTH, INC.

No. 220A93

Case below: 110 N.C.App. 54

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 27 August 1993.

BELL v. ALLEGAN

No. 328P93

Case below: 110 N.C.App. 869

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

BOWERS v. CITY OF HIGH POINT

No. 316PA93

Case below: 110 N.C.App. 862

Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993.

DURHAM HERALD CO. v. LOW LEVEL RADIOACTIVE WASTE MGMT. AUTH.

No. 294P93

Case below: 110 N.C.App. 607

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

GAMBILL v. GAMBILL

No. 310P93

Case below: 110 N.C.App. 869

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

GILLIAM v. EMPLOYMENT SECURITY COMM. OF N.C.

No. 330P93

Case below: 110 N.C.App. 796

Motion by the plaintiff to dismiss appeal for lack of substantial constitutional question allowed 9 September 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

GOODRUM v. GREEN

No. 311P93

Case below: 109 N.C.App. 700

Petition by plaintiff for writ of certiorari to the North Carolina Court of Appeals denied 9 September 1993.

IN RE DISMISSAL OF HUANG

No. 326A93

Case below: 110 N.C.App. 683

Petition by respondents for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to those presented as basis for dissenting opinion allowed 9 September 1993.

MABE v. HILL

No. 303P93

Case below: 110 N.C.App. 490

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

MECIMORE v. COTHREN

No. 235P93

Case below: 109 N.C.App. 650

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

MESSICK v. CATAWBA COUNTY

No. 297P93

Case below: 110 N.C.App. 707

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

NORTHWESTERN FINANCIAL GROUP v. COUNTY OF GASTON

No. 295P93

Case below: 110 N.C.App. 531

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

PHELPS v. PHELPS

No. 144PA93

Case below: 109 N.C.App. 242

Motion by plaintiff to dismiss the appeal for lack of significant public interest denied 9 September 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993.

POWELL v. OMLI

No. 271P93

Case below: 110 N.C.App. 336

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

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

PREVETTE v. FORSYTH COUNTY

No. 307P93

Case below: 110 N.C.App. 754

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

RAGAN v. HILL

No. 296PA93

Case below: 110 N.C.App. 648

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993.

RAYMER BROTHERS, INC. v. FUEL CITY, INC.

No. 223P93

Case below: 110 N.C.App. 314

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

RHYNE v. VELSICOL CHEMICAL CORP.

No. 317P93

Case below: 110 N.C.App. 870

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

RICE v. RANDOLPH

No. 240P93

Case below: 110 N.C.App. 490

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

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

ROBINSON v. GENERAL MILLS RESTAURANTS

No. 293PA93

Case below: 110 N.C.App. 633

Petition by defendant and third-party plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993. Petition by third-party defendants for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993.

SOUTH ATLANTIC DREDGING CO. v. T. A. LOVING CO.

No. 165P93

Case below: 109 N.C.App. 489

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

SPIVEY AND SELF v. HIGHVIEW FARMS

No. 298P93

Case below: 110 N.C.App. 719

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. BARRETT

No. 158P93

Case below: 109 N.C.App. 489

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. BRADY

No. 323P93

Case below: 110 N.C.App. 870

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. BROOKS

No. 356A93

Case below: 111 N.C.App. 558

Petition by Attorney General for writ of supersedeas and temporary stay denied 9 September 1993.

STATE v. CONNER

No. 324P93

Case below: 110 N.C.App. 871

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. FARRIS

No. 320PA93

Case below: 111 N.C.App. 254

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 9 September 1993.

STATE v. HAWKINS

No. 286P93

Case below: 110 N.C.App. 837

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 dismissed 9 September 1993.

STATE v. JOHNSON

No. 264P93

Case below: 110 N.C.App. 491

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 September 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

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

STATE v. McRAE

No. 292P93

Case below: 110 N.C.App. 643

Petition by defendants for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. ROGERS

No. 308P93

Case below: 109 N.C.App. 491

Petition by defendant for writ of certiorari to the North Carolina Court of Appeals denied 9 September 1993.

STATE v. SCOTT

No. 283P93

Case below: 110 N.C.App. 492

Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE v. TUCKER

No. 187P93

Case below: 109 N.C.App. 565

Motion by the Attorney General to dismiss the appeal for lack of substantial constitutional question allowed 9 September 1993. Petition by defendant for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

WORLEY v. WORLEY

No. 128PA93

Case below: 108 N.C.App. 789
333 N.C. 578

Motion by plaintiff to dismiss defendant's petition for discretionary review and to vacate the order allowing the petition denied 17 August 1993.

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

YANDLE v. BROWN

No. 259P93

Case below: 110 N.C.App. 318

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 9 September 1993.

STATE OF NORTH CAROLINA v. STEVEN VAN McHONE

No. 148A91

(Filed 8 October 1993)

1. **Evidence and Witnesses § 959 (NCI4th) — first-degree murder — statements of victim — hearsay — state of mind exception**

The trial court did not err in a first-degree murder prosecution by admitting statements by one of the victims regarding threats made by defendant to kill her where the conversations between the victim and the three witnesses related directly to the victim's fear of defendant and were admissible to show the victim's then existing state of mind at the time she made the statements. N.C.G.S. § 8C-1, Rule 803(3) does not refer to the victim's state of mind at the time of death, but to the victim's state of mind at the time the statements were made. Although defendant contended the statements' prejudicial effect far outweighed any probative value since several of the statements were made long before the date of the murders and the most recent discussion about defendant's threats occurred six months before the murders, the evidence tended to show a stormy relationship over a period of years leading up to the murders, and the fact that the last incident testified to occurred six months prior to the murders does not deprive the evidence of its probative value. Finally, considering the eyewitness testimony, it does not appear that the statements in question had any undue tendency to suggest a decision on an improper basis.

Am Jur 2d, Federal Rules of Evidence §§ 228, 230, 231.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed. 170.

2. **Criminal Law § 868 (NCI4th) — first-degree murder — voluntary intoxication — instruction not included with other repeated instructions — no error**

The trial court did not err in a first-degree murder prosecution by not reinstructing the jury on voluntary intoxication when the jury asked the court to review the instructions on first-degree murder in the deaths of the two victims. The request by the jury to be reinstructed on certain elements

of the law of murder as it pertained to the victims was specific and the court reinstructed accordingly. Moreover, defense counsel did not object when the court asked trial counsel if there were any requests for corrections to the instructions after reinstructing the jury.

Am Jur 2d, Trial § 1109.

3. **Criminal Law § 468 (NCI4th)— first-degree murder—prosecutor's closing argument—no gross impropriety**

The arguments of the prosecutors in a first-degree murder prosecution were not so grossly improper as to constitute a denial of defendant's due process rights where defendant contended that the prosecutors employed a barrage of impermissible ploys, including references to the defendant as "one-eyed Jack," arguing facts not in evidence, irrelevant law, misstatements of the law, improper biblical references, and misstatements of expert testimony, but defendant did not object at trial.

Am Jur 2d, Trial §§ 401, 406, 412, 499.

4. **Criminal Law § 1355 (NCI4th)— first-degree murder—sentencing—no significant history of criminal activity—not submitted—no error**

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity where the evidence before the trial court at the sentencing hearing shows that, prior to murdering his mother and stepfather, and shooting his half-brother, this twenty-year-old defendant had prior convictions for: a provisional license violation, failure to stop at the scene of an accident, possession of an alcoholic beverage by a person under twenty-one years of age, being drunk and disruptive in public, fourteen counts of felonious breaking and entering, thirteen counts of felonious larceny, and one count of conspiracy to break and enter. In addition, defendant's psychiatrist, an expert witness, testified that defendant told him that he was convicted at age seventeen for stealing a woman's pocketbook to get drugs and that he had also broken into approximately sixty houses to support his drug problem. No rational juror could have found that defendant had

no significant history of prior criminal activity. N.C.G.S. § 15A-2000(f)(1) (1988).

Am Jur 2d, Criminal Law §§ 598 et seq.

5. **Constitutional Law § 314 (NCI4th)— first-degree murder—sentencing—defense counsel's argument—did not consent to death penalty**

Defense counsel's arguments in a first-degree murder sentencing hearing were not constitutionally deficient where defendant contended that he was entitled to an evidentiary hearing on his knowing consent to his counsel's admission of guilt and sanctioning of the death penalty, but defense counsel's argument, when read in its entirety, neither endorsed nor sanctioned the death penalty. Defendant had already been convicted of the two first-degree murders and defense counsel made every effort during closing arguments to convince the jury not to recommend a sentence of death.

Am Jur 2d, Criminal Law §§ 752, 985.

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal client. 2 ALR4th 27.

6. **Homicide § 476 (NCI4th)— first-degree murder—instructions—transferred intent—no error**

The trial court's instruction regarding transferred intent in a first-degree murder prosecution did not erroneously rely upon an unconstitutional, conclusive presumption. This contention was recently addressed and rejected in *State v. Locklear*, 331 N.C. 239.

Am Jur 2d, Homicide § 500.

7. **Constitutional Law § 371 (NCI4th)— death penalty—constitutional**

The North Carolina death penalty statute is constitutional.

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

8. Criminal Law § 1373 (NCI4th)— death penalty—not disproportionate

The evidence in a sentencing hearing for two first-degree murders clearly supported the jury's finding of aggravating circumstances, there is nothing in the record that suggests that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and it could not be held as a matter of law that the sentence of death was disproportionate or excessive after comparing this case, where defendant killed his defenseless mother by shooting her in the back of the head and also shot and killed his stepfather, to similar cases in the pool.

Am Jur 2d, Criminal Law § 628.

Supreme Court's views on constitutionality of death penalty and procedures under which it is imposed or carried out. 90 L. Ed. 2d 1001.

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 death entered by Long, J., at the 25 February 1991 Criminal Session of Superior Court, Surry County. Defendant's motion to bypass the Court of Appeals as to an additional judgment allowed by the Supreme Court 13 May 1992. Heard in the Supreme Court 2 November 1992.

Michael F. Easley, Attorney General, by Tiare B. Smiley, Special Deputy Attorney General, for the State.

Heidi G. Chapman for defendant-appellant.

FRYE, Justice.

On 4 June 1990 a Surry County grand jury indicted defendant for the murder of Mildred Johnson Adams and Wesley Dalton Adams, Sr. Defendant was also indicted on 20 July 1990 for assault with a deadly weapon with intent to kill inflicting serious injury on Wesley Dalton Adams, Jr. In a capital trial, the jury returned verdicts finding defendant guilty of the first-degree murder of Mildred Johnson Adams (Mrs. Adams or defendant's mother) and Wesley Dalton Adams, Sr. (Mr. Adams or defendant's stepfather).

The jury also found defendant guilty of assault with a deadly weapon with intent to kill Wesley Dalton Adams, Jr. (Wesley Jr. or defendant's half-brother). After a sentencing proceeding held pursuant to N.C.G.S. § 15A-2000, the jury recommended and the trial court imposed sentences of death for each of the first-degree murder convictions. On the same date, the trial court imposed a sentence of ten years imprisonment for the conviction of assault with a deadly weapon with intent to kill. Defendant gave oral notice of appeal on 7 March 1991. An order staying execution was entered by this Court on 25 March 1991.

Defendant brings forward seven assignments of error. After reviewing the record, transcript, briefs, and oral arguments of counsel, we conclude that the 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 tending to show the following facts and circumstances. Wesley Jr., a Captain in the United States Air Force, and his family were visiting in his parents' home in Surry County. At trial, the first witness called by the State was Wendy Adams, Wesley Jr.'s wife and the mother of two-year-old Alex. Wendy Adams (Wendy) testified that on the evening of 2 June 1990, she, Wesley Jr., Alex, and Mr. and Mrs. Adams went on a fishing trip. Wendy and Wesley Jr. cleaned Mr. Adams' camper prior to leaving for the trip. While cleaning the camper they discovered a handgun. Mrs. Adams explained that the gun was for protection from animals when camping.

The family returned from the fishing trip at approximately 12:30 a.m. on 3 June 1990. Defendant, who resided with his parents, was at home when they arrived. Wendy began getting Alex prepared for bed, and while doing so, she overheard defendant arguing with Mr. and Mrs. Adams about money. Defendant told them "he wanted his money and he couldn't go on living like that." Wendy, Wesley Jr., and Alex went to bed. Approximately ten or fifteen minutes after they were in bed, Mrs. Adams opened the door to their room. She asked Wesley Jr. if he had taken the handgun from the camper. Wesley Jr. said that he had not moved the gun. Mrs. Adams responded, "[t]hen its missing" and she closed the bedroom door. Wesley Jr. got up and began to get dressed so that he could find out why defendant was arguing with his parents. However, before he left the bedroom, he and Wendy heard three gunshots.

Wesley Jr. told Wendy "to stay down and keep Alex covered." He then went out into the hallway to find out what had happened. Wendy heard someone coming up the basement stairs, then heard Mr. Adams tell Wesley Jr. to call 911.

Wesley Jr. testified that while he was talking on the telephone with the 911 operator, he turned and saw defendant and Mr. Adams enter the back door. They were wrestling and defendant had a pistol. Wesley Jr. immediately dropped the telephone and disarmed the defendant. Wesley Jr. went back to the telephone and defendant and Mr. Adams began wrestling again. Mr. Adams and defendant struggled out of the living room and headed down the hallway, out of Wesley Jr.'s sight. Approximately a minute later, Mr. Adams reappeared in the kitchen doorway and said, "Your mother is facedown out back. You have got to get help for her. Your mother's facedown. I don't know how badly she's hurt." As Mr. Adams approached Wesley Jr., defendant came to the doorway carrying a shotgun. When Mr. Adams realized that defendant was bringing the gun up into a firing position, aimed at Wesley Jr., he immediately moved toward defendant, reaching for the gun. Defendant fired the shotgun into Mr. Adams' chest, and the force of the discharge threw Mr. Adams into Wesley Jr.'s arms, knocking them both to the floor. Wesley Jr.'s leg was injured. After shooting Mr. Adams, defendant raised the gun in the direction of Wesley Jr. who managed to get up from the floor and take the weapon from defendant. When the struggle ended, Wesley Jr. told defendant to stay down and not to move. Defendant began crying and saying, "Oh, my God. What have I done." Wesley Jr. turned away from defendant to see if his wife was safe. Defendant then stopped crying and reached for the shotgun. Wesley Jr. struggled with defendant again, and was able to keep the weapon from him. Defendant suddenly began to curse Wesley Jr. and told him, "I killed him. Now I want you to kill me, because I don't want to spend the rest of my life in jail. Just shoot me. Just get it over with." Defendant continued to curse Wesley Jr. in a very loud voice and stated that Wesley Jr. was gutless and "if [Wesley Jr.] didn't kill him and he got out of jail he'd hunt [Wesley Jr.] down and hunt his family down and finish [them] off."

William Kent Hall, a member of the first response team organized by the volunteer fire service, testified that when he arrived at the Adams residence Mr. Adams was lying on the kitchen floor. Hall determined that Mr. Adams had a large chest wound and

he did not have a pulse. Tommy Wayne Baker, also a member of the first response team, found Mrs. Adams on the ground in the backyard. She appeared to have been shot in the back of the head, but she was still alive. Mrs. Adams later died from the gunshot wound.

Officer Jimmy Inman, a Deputy Sheriff with the Surry County Sheriff's Department, arrived at the crime scene shortly after 2:00 a.m. When Officer Inman entered the house, defendant yelled, "Why did I do it? What have I done?" Defendant was taken outside and placed in the patrol car. Officer Inman smelled alcohol on defendant's breath. At trial, Officer Inman testified that a person is drunk when that "person's mental and physical capabilities are impaired to the point that he cannot walk, talk, or act in a proper fashion." In his opinion, defendant was not drunk on the night the murders occurred.

Officer Terry Miller, a detective with the Surry County Sheriff's Department, testified that when he entered the couple's residence, defendant stated, "I know what I've done, and I'll have to pay for it. Why don't you just shoot me and get it over with." Miller also testified that although defendant had been drinking, he did not believe that defendant was drunk.

Dr. Patrick Eugene Lantz, a pathologist at North Carolina Baptist Hospital, performed autopsies on Mr. Adams and Mrs. Adams. Dr. Lantz determined that Mr. Adams died of a shotgun wound to the chest, and Mrs. Adams died of a gunshot wound to the head.

The State presented other witnesses who testified to a stormy relationship between defendant and his mother, including several threats by defendant to harm or kill her.

Defendant did not testify. However, defendant presented witnesses whose testimony tended to show the following facts and circumstances. Jimmy McMillian, a social acquaintance of defendant, testified that on 2 June 1990 he, Tammy Sawyers, and defendant drove to Mount Airy and purchased a pint of Jack Daniel's. The group then traveled to a Pizza Hut in Winston-Salem. By the time they arrived at the Pizza Hut, McMillian and defendant had finished a pint and a half of Jack Daniel's. McMillian testified that only he and defendant were drinking and they split the alcohol evenly. While at Pizza Hut, defendant drank a pitcher of beer,

which is the equivalent of five six-ounce beers. In McMillian's opinion, defendant's mental and physical faculties were appreciably impaired because he was staggering and had a "slushy mouth."

Tammy Bryant testified that she had known defendant for a year. They met at a narcotics anonymous meeting. Two weeks before defendant's mother and stepfather were killed, Bryant began seeing defendant romantically. Bryant testified that she saw defendant on 2 June 1990 at Ronald Speaks' house in Mount Airy. According to Bryant, when defendant arrived at Speaks' house he was drunk, his speech was slurred, and he was staggering. Defendant got into a fight with Johnny Swaim because Bryant was with Swaim. Once the fight ended, defendant consumed more alcohol, then walked away from Speaks' house. Defendant later returned to Speaks' house and began to cry when Bryant refused to leave with him. Bryant testified that defendant began "swinging [a] gun around in everyone's face, threatening everybody, moving real swiftly and quickly." Bryant also testified that when she asked defendant several times "what he was on," he responded, "I have taken a couple hits of acid." Approximately thirty minutes later, Bryant, Sawyers, and defendant left the house and went for a ride in Sawyers' car. During the ride, defendant gave his gun to Bryant. Bryant unloaded the gun and then gave it back to defendant. Sawyers drove Bryant back to Speaks' house. Defendant left with Sawyers. Bryant did not see him anymore that evening.

On rebuttal, the State called Sawyers who testified that she did not drink any alcohol on the night in question. She testified that she and defendant had a conversation while driving to Speaks' house and defendant's speech was fine. She also testified that defendant walked fine to and from her vehicle. Sawyers stated that she was never out of defendant's presence for more than five minutes from about 3:00 p.m. on 2 June until nearly 2:00 a.m. the next morning, and she never saw defendant take any controlled substances.

The State did not present any additional evidence during defendant's sentencing proceeding. However, defendant presented the testimony of several witnesses. Dr. James Groce, a psychiatrist, testified that in response to questioning defendant told him about his long history of drug and alcohol abuse. Based on his interview with defendant, Dr. Groce made two psychiatric diagnoses: poly-

substance dependence and adjustment disorder with depressed mood. Dr. Groce defined polysubstance dependence as:

> Dependence on a substance, drugs or alcohol . . . that is a patterned behavior that is compulsive use. That means that an individual could not, without either physical or emotional discomfort, stop the use of that substance. And by polysubstance I mean that this was not limited to one particular chemical, but was a series of chemicals, essentially depending upon availability . . . addictive substances, a series of those. And in his case, it was primarily the alcohol, marijuana and cocaine.

Dr. John Frank Warren, III, a psychologist, testified that he was appointed by the court to evaluate defendant. In his opinion, defendant had a "very serious substance abuse problem" dating from age twelve.

Bobby McHone, defendant's biological father, testified that during defendant's early years, "I stayed drunk. I gambled. I did everything wrong." Mr. McHone also testified that he did not give defendant's mother any peace. Mr. McHone and his wife divorced after ten years of marriage and they shared custody of defendant. Mr. McHone testified that he would leave defendant at home alone while he worked or went out to drink or gamble. He caught defendant drinking at age thirteen or fourteen, and he realized that defendant was taking drugs at age fifteen.

Kathleen Carroll testified that she is a former neighbor of defendant. Defendant helped her run errands and mow the yard at various times. After the defendant's family moved, defendant continued to visit occasionally.

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

I.

[1] In defendant's first assignment of error, he contends that he is entitled to a new trial "based on the admission of highly prejudicial statements made by the victim Mildred Adams." During the guilt-innocence phase of the trial, the prosecutor offered the testimony of three witnesses, Lydia Adams Logan, Cheryl Adams McMillian, and Nelda Adams concerning statements allegedly made by Mrs. Adams to them regarding threats made by defendant to kill her. After a voir dire examination of the three witnesses, the

trial court admitted the statements under Rules 803 and 804 as exceptions to the hearsay rule. N.C.G.S. § 8C-1, Rules 803, 804 (1992). Defendant contends that these statements were inadmissible under Rule 803(3) because they were not statements of the victim's state of mind as of the date of her death.

Rule 803 of the North Carolina Rules of Evidence provides 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).

Cheryl Adams McMillian, defendant's half-sister, testified that the first time her mother related her fear of defendant occurred one day while McMillian was at work. Mrs. Adams called her and said, "You've got to come. He's going to kill me." McMillian told her mother to calm down and tell her who she was talking about. Mrs. Adams responded, "Stevie. He's got a knife." McMillian testified that when she arrived at home shortly after her telephone conversation with her mother she was told that defendant had chased her mother around the dining room table and into the kitchen with a knife. McMillian also testified that the last time her mother expressed fear of defendant was when she told her, "I am afraid of him. I am afraid to be alone with him. When Wes is not around, I have to watch what I say to keep him from getting so upset. He has told me that he is going to kill me."

Lydia Logan testified that Mrs. Adams had spoken to her on several occasions regarding defendant's threats. On one occasion, Mrs. Adams told her "they were afraid to lay down and go to sleep at night, afraid he might come in and kill them while they slept. Sooner or later he's going to kill me."

Nelda Adams testified that Mrs. Adams had spoken with her on two occasions regarding defendant's threats. On one occasion, Mrs. Adams told her "that she was afraid for them to go to sleep

of [sic] a night and get in a relaxed state; that they would fall into a deep sleep, because that [sic] she didn't know what they would do if he came in the room and they were not expecting it and had no defense." On another occasion, Mrs. Adams told her that defendant "had threatened to kill them, and that she was afraid that he would follow through with this."

"Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value." *State v. Cummings*, 326 N.C. 298, 313, 389 S.E.2d 66, 74 (1990) (victim's statements about her husband's threats weeks before her disappearance were relevant to the issue of her relationship with her husband); *see also State v. Wynne*, 329 N.C. 507, 518, 406 S.E.2d 812, 817 (1991) (testimony concerning victim's fear shortly after being in defendant's presence shows victim's existing state of mind); *State v. Lynch*, 327 N.C. 210, 222, 393 S.E.2d 811, 818 (1990) (evidence of threats of defendant to victim shortly before the murder admissible to show victim's then existing state of mind); *State v. Faucette*, 326 N.C. 676, 683, 392 S.E.2d 71, 74 (1990) (victim's statements regarding defendant's threats shortly before the murder admissible).

The conversations between Mrs. Adams and the three witnesses related directly to Mrs. Adams' fear of defendant and were admissible to show Mrs. Adams' then existing state of mind at the time she made the statements. *State v. Meekins*, 326 N.C. 689, 694-95, 392 S.E.2d 346, 348-49 (1990). Contrary to defendant's contention, Rule 803(3) does not refer to the victim's state of mind at the time of death, but refers to the victim's state of mind at the time the statements were made. N.C.G.S. § 8C-1, Rule 803(3) (1992).

Defendant further contends that even if the statements were relevant to show the relationship between the parties or Mrs. Adams' state of mind, the statements' prejudicial effect far outweighed any probative value since several of the statements were made long before the date of the murders and the most recent discussion about his threats occurred six months before the murders.

In this case, the victim told several persons about defendant's numerous threats to harm her. In addition, Ms. McMillian personally witnessed several incidents in which defendant threatened his mother's life. The evidence tended to show a stormy relationship over a period of years leading up to the murders in this case,

and the fact that the last incident testified to occurred six months prior to the murders does not deprive the evidence of its probative value. *See State v. Syriani*, 333 N.C. 350, 377, 428 S.E.2d 118, 132 (1993) (remoteness generally goes to weight of evidence, not admissibility). We conclude that the testimony of the three witnesses was relevant to show the relationship between the victim and defendant.

"Notwithstanding its relevancy, evidence may nevertheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.G.S. § 8C-1, Rule 403 (1992). "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E.2d 350, 357 (1986); Commentary, N.C.G.S. § 8C-1, Rule 403 (1992). The trial judge is charged with the responsibility of making the initial determination of whether the probative value of relevant evidence is outweighed by its tendency unfairly to prejudice defendant. *State v. Meekins*, 326 N.C. at 696, 392 S.E.2d at 349. Considering the eyewitness testimony of Wesley Jr. and his wife, it does not appear that the statements in question had any undue tendency to suggest decision on an improper basis. Thus, we agree with the trial court's conclusion that the probative value of the evidence is not outweighed by any danger of unfair prejudice.

II.

[2] In defendant's second assignment of error, he contends that the trial court erred in failing to reinstruct the jury on voluntary intoxication when the jury asked the court to review the instructions on first-degree murder in the deaths of Mrs. Adams and Mr. Adams. During the charge conference, defense counsel requested the pattern jury instruction on voluntary intoxication regarding the inability to formulate specific intent to commit first-degree murder. The trial court gave the pattern instruction, applying it both to the two charges of first-degree murder and to the charge of assault with a deadly weapon with intent to kill. The trial court first defined the elements of each charge and its lesser included offenses, then applied the voluntary intoxication instruction to the specific intent requirement of first-degree murder and assault with a deadly weapon with intent to kill.

Approximately thirty minutes after the jury left the courtroom to begin deliberations, the jury returned and the foreman requested

that the trial judge provide the jury with "the five things in order to—the charge of Mildred Adams, the burden that we need to, that we're charged with in order to find the defendant guilty of murder in the first degree." The trial judge then asked the foreman if what he wanted was a list of the things that the State would have to prove before it could find the defendant guilty, and the foreman responded, "Yes, sir." The trial court read to the jury the original jury instruction on first-degree murder as to Mrs. Adams, which described the elements of malice, proximate causation, specific intent, premeditation and deliberation, concluding, "[a]nd those are the five things the state must prove beyond a reasonable doubt." The judge then inquired, "Does that answer your request?" The foreman responded, "Yes, sir." After the jury returned to the jury room, the trial judge asked if there were any requests for corrections. Defense counsel responded in the negative.

On the following morning after court had reconvened, the jurors returned to the courtroom and the foreman told the trial court, "We would like for you to go over the law of murder of Wesley Adams, Sr., and six qualifying things that we need to prove for first degree murder." In response to this request the trial court read the original jury instruction as to the first-degree murder of Mr. Adams, which included the law of self-defense in addition to the other five elements. Upon the completion of the reinstruction, the trial court inquired, "Do you also want to hear the remainder of the instructions?" The foreman responded, "No, sir, it's not necessary." After the jury returned to the jury room, the trial judge again asked if there were any requests for corrections. Defendant's attorney responded in the negative.

Defendant now contends that the trial court erred by not reinstructing the jury on voluntary intoxication. We find this contention to be without merit. The request by the jury to be reinstructed on certain elements of the law of murder as it applied to Mrs. Adams and Mr. Adams was specific, and the trial court reinstructed accordingly. In addition, after reinstructing the jury on both occasions, the trial court asked trial counsel if there were any requests for corrections to the instructions. Defense counsel made no objection and did not request any corrections. This assignment of error is rejected.

III.

[3] In his third assignment of error, defendant contends that the trial court erred by allowing the prosecutors to make grossly prejudicial closing arguments in the guilt and sentencing phases of the trial. Defendant argues that the prosecutors "employed a barrage of impermissible ploys during their summations in the guilt and sentencing phases," and the "ploys were sufficiently prejudicial to warrant intervention by the trial court *ex mero motu* and amount to plain error." Examples of the ploys include: the prosecutor's references to the defendant as "one-eyed Jack," the prosecutor arguing facts that were not in evidence, irrelevant law, misstatements of the law, improper biblical references, and misstatements of expert testimony. The transcript in this case indicates that defendant did not object to the prosecutors' statements which are now at issue.

"Control of counsel's argument is largely left to the trial court's discretion." *State v. Robinson*, 330 N.C. 1, 31, 409 S.E.2d 288, 305 (1991) (citing *State v. Whisenant*, 308 N.C. 791, 798, 303 S.E.2d 784, 788 (1983)); *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976). When a defendant does not object to an alleged improper jury argument, the trial judge is not required to intervene *ex mero motu* unless the argument is so grossly improper as to be a denial of due process. *State v. Robinson*, 330 N.C. at 31, 409 S.E.2d at 305 (citing *State v. Zuniga*, 320 N.C. 233, 257, 357 S.E.2d 898, 914, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987)). After reviewing the transcript, we conclude that the arguments of the prosecutors were not so grossly improper as to constitute a denial of defendant's due process rights.

IV.

[4] In defendant's fourth assignment of error, he contends that the trial court erred in the sentencing phase of his trial by failing to submit for the jury's consideration the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. *See* N.C.G.S. § 15A-2000(f)(1) (1988). Defendant filed a written request with the trial court seeking submission of four statutory and thirteen nonstatutory mitigating circumstances. His request did not include the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. However, defendant did request a nonstatutory mitigating circumstance that "defendant has not previously been convicted of a violent crime." The trial court held a charge conference with counsel regarding

the submission of mitigating circumstances to the jury and reviewed the evidence to support the submission of each circumstance requested by defendant. This discussion included a determination that the nonstatutory circumstance requested by defendant—that he had not previously been convicted of a violent crime—would be submitted to the jury. The trial court gave a peremptory instruction to the jury on this mitigating circumstance, and the jury found it to exist as to each murder.

In *State v. Wilson*, 322 N.C. 117, 143, 367 S.E.2d 589, 604 (1988), this Court stated that it is the trial court's duty "to determine whether a rational jury could conclude that defendant had no significant history of prior criminal activity." If the trial court determines that a rational juror could conclude that defendant does not have a significant history of prior criminal activity, the mitigating circumstance must be submitted to the jury. The jury must then decide whether the evidence is sufficient to constitute a significant history of criminal activity. *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989), *sentence vacated*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990), *on remand*, 329 N.C. 679, 406 S.E.2d 827 (1991). The word "significant" means:

> that the activity is likely to have influence or effect upon the determination by the jury of its recommended sentence . . . . In other words, the prior criminal activity could be found by the jury to be completely irrelevant to the issue of sentencing. The prior activity of the defendant could be found by the jury to be completely unworthy of consideration in arriving at its decision. There could be evidence of prior criminal activity in one case that would have no influence or effect on the jury's verdict, which, in another case, could be the pivotal evidence.

Id. (quoting *Wilson*, 322 N.C. 117, 147, 367 S.E.2d 589, 609 (Martin, J., concurring)). A "trial court is not required to instruct upon a statutory mitigating circumstance unless substantial evidence has been presented which would support a reasonable finding by the jury of the existence of such circumstance." *State v. Laws*, 325 N.C. 81, 110, 381 S.E.2d 609, 626 (1989), *sentence vacated*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990), *on remand*, 328 N.C. 550, 402 S.E.2d 573 (1991).

In the present case, the evidence before the trial court at the sentencing hearing shows that prior to murdering his mother

and stepfather, and shooting his half-brother, this twenty-year-old defendant had prior convictions for: a provisional license violation, failure to stop at the scene of an accident, possession of an alcoholic beverage by a person under twenty-one years of age, being drunk and disruptive in public, fourteen counts of felonious breaking and entering, thirteen counts of felonious larceny, and one count of conspiracy to break and enter. In addition, defendant's expert witness, Dr. James Groce, a psychiatrist, testified before the jury that defendant told him that he was convicted at age seventeen for stealing a woman's pocketbook to get drugs and that he had also broken into approximately sixty houses to support his drug problem.

"It is not merely the number of prior criminal activities, but the nature and age of such acts that the trial court considers in determining whether by such evidence a rational juror could conclude that this mitigating circumstance exists." *Artis*, 325 N.C. at 314, 384 S.E.2d at 490. In the present case, defendant's criminal activity exceeds the criminal activity found insufficiently substantial to preclude submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance. *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (error not to submit mitigating circumstance where criminal history included a guilty plea to second-degree kidnapping of defendant's wife, testimony that defendant had stored illegal drugs in his shed, and evidence of his complicity in a theft); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (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) (two twenty-year-old felonies plus more recent alcohol related misdemeanors); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds*, 321 N.C. 570, 364 S.E.2d 373 (1988) (extensive record, but all felonies had occurred more than eighteen years prior to the homicide).

We find defendant's prior criminal activity to be more similar to that of defendants in those cases where we have found the activity too extensive to require the submission of the mitigating circumstance that defendant had no significant history of prior criminal activity. *Artis*, 325 N.C. 278, 384 S.E.2d 470 (court properly refused to submit mitigating circumstance where history included several assaults, assault with a deadly weapon, larcenies, and numerous driving violations); *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983), *appeal after remand*, 319 N.C. 1, 352 S.E.2d

653 (1987) (court properly refused to submit mitigating circumstance where history included several larcenies, several breaking and enterings, possessing and using marijuana all within a five-year period).

Based on the evidence in the record, we are convinced that no rational juror could have found that defendant had no significant history of prior criminal activity. Thus, the trial court did not err by not submitting the (f)(1) mitigating circumstance to the jury.

V.

[5] In defendant's fifth assignment of error, he contends that he "is entitled to an evidentiary hearing on the issue of his knowing consent to defense counsel's admission of his guilt and sanctioning of the death penalty." During the sentencing phase, as part of his closing argument, defense counsel stated:

> And if killing Steve McHone and taking him down to Raleigh and snuffing out his life, if it would bring Mr. and Mrs. Adams back I would say to you, kill, kill Steve McHone; kill him if it would bring Mr. and Mrs. Adams back. . . . If [defendant] could stop the clock and turn back the hands of time I submit to you that he would want them alive today. . . . Is [defendant] going to prison for life . . . where he can make peace with his maker. . . . Ladies and gentlemen, give him that chance. That's all we're asking . . . ."

We have reviewed the transcript in this case, and we find that defense counsel did not admit defendant's guilt during the closing arguments of defendant's sentencing hearing. Defense counsel's argument, when read in its entirety, neither endorsed nor sanctioned the death penalty. Defendant had already been convicted of the two first-degree murders during the guilt-innocence phase of his trial. Defense counsel was now pleading with the jury not to return with a sentence of death.

Defendant bears the burden of proving any constitutionally deficient performance by his trial counsel and actual prejudice. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). We do not find defense counsel's arguments here to be constitutionally deficient; rather, we are convinced that defense counsel made every effort during closing arguments to convince the jury not to recommend a sentence of death for his client. We therefore conclude that defendant is not entitled to an evidentiary hearing.

VI.

[6] In defendant's sixth assignment of error, he contends that the trial court's instruction regarding transferred intent on the charge of the first-degree murder of Mr. Adams erroneously relied upon an unconstitutional, conclusive presumption. Defendant acknowledges that the trial court's instruction on transferred intent follows North Carolina law. *State v. Locklear*, 331 N.C. 239, 415 S.E.2d 726 (1992). However, defendant argues that the instruction created a conclusive presumption that eradicates defendant's right to have the State meet its burden of proof.

This Court recently addressed and rejected this contention in *State v. Locklear*, 331 N.C. at 244, 415 S.E.2d at 730. Defendant does not raise any additional arguments which were not addressed in *Locklear*. We therefore reject this assignment of error.

VII.

[7] Finally, defendant contends that the North Carolina death penalty statute—and consequently the death sentence in this case—is unconstitutional, imposed in a discriminatory manner, vague and overbroad, and involves subjective discretion, all in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 27 of the North Carolina Constitution.

Defendant concedes that on numerous occasions this Court has upheld the constitutionality of the North Carolina death penalty statute. *See State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), *cert. denied*, 471 U.S. 1030, 85 L. Ed. 2d 324 (1985); *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, *cert. denied*, 469 U.S. 963, 83 L. Ed. 2d 299 (1984); *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982), *reh'g denied*, 459 U.S. 1189, 74 L. Ed. 2d 1031 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, 455 U.S. 1038, 72 L. Ed. 2d 155 (1982). However, defendant requests this Court to reexamine its prior holdings and vacate the death sentences in this case. Defendant makes no contentions not previously considered by this Court. Therefore, this assignment of error is rejected.

PROPORTIONALITY

[8] Defendant makes no argument that: 1) the record does not support the jury's finding of an aggravating circumstance; or 2) the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; or 3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. However, this Court is required to address these issues before it may affirm a sentence of death. N.C.G.S. § 15A-2000(d)(2) (1988); *State v. Robbins*, 319 N.C. 465, 526, 356 S.E.2d 279, 315, *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987).

In the first-degree murder of defendant's mother, the jury found the one aggravating circumstance which was submitted—"[w]as this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons?" The jury also found both of the aggravating circumstances which were submitted in the first-degree murder of defendant's stepfather. Those circumstances were: 1) was this murder committed while the defendant was engaged in an attempt to commit any homicide upon some person other than the deceased?, and 2) was this murder part of a course of conduct in which the defendant engaged and did that course of conduct include the commission by the defendant of other crimes of violence against other persons?

The evidence at trial showed that defendant committed crimes of violence against three of his family members on 3 June 1990. Defendant fired a shotgun point-blank at his half-brother, injuring his half-brother and killing his stepfather who stepped between them. This occurred minutes after defendant had shot his own mother in the head. The evidence clearly supports the jury's finding of the aggravating circumstance in the first-degree murder of Mrs. Adams and the aggravating circumstances found in the first-degree murder of Mr. Adams.

Further there is nothing in the record that 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.

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." *State v. Brown*, 315 N.C. 40, 70, 337 S.E.2d 808, 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. Syriani, 333 N.C. 350, 400, 428 S.E.2d 118, 146 (quoting *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)).

The proportionality 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). However, this Court is not required to give a citation to every case in the pool of similar cases used for comparison. *State v. Williams*, 308 N.C. at 81, 301 S.E.2d 335 at 356. The Court's consideration of cases in the pool focuses on those cases "which are roughly similar with regard to the crime and the defendant . . . ." *State v. Syriani*, 333 N.C. 350, 401, 428 S.E.2d 118, 146 (quoting *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)).

In the present case defendant killed his mother and his stepfather in their home. For years, the defendant had threatened to physically harm and kill his mother. Defendant also assaulted his half-brother with the intent to kill him, and threatened, if allowed to live, to "hunt down and finish off" his half-brother's family after being released from jail.

As to the charge of first degree murder of defendant's mother, the jury found the following mitigating circumstances: 1) the murder was committed while the defendant was under the influence of mental or emotional disturbance, 2) the defendant had a history of long-term substance abuse and on the night of the offense was under the influence of alcohol, 3) the defendant had shown remorse for the crime committed, 4) the defendant enjoyed a normal childhood until the time his parents separated, and after that, he began abus-

ing drugs and alcohol, 5) the defendant had previously sought help for his substance abuse problems, 6) defendant's father abused alcohol and gambled excessively and defendant, while he was a child, often spent time with his father in bars while his father drank and gambled, 7) defendant often witnessed arguments between his father and mother, 8) defendant had not previously been convicted of a violent crime, 9) defendant, while he resided with his father, was often left alone at night, without supervision, while his father worked third shift, 10) defendant, while he resided with his father, often had to reside in undesirable places, and 11) any other circumstance(s) arising from the evidence which one or more of the jurors deemed to have mitigating value.

As to the charge of first degree murder of defendant's stepfather, the jury found the same mitigating circumstances as in the murder of his mother with the exception of "the defendant had shown remorse for the crime committed."

On both charges the jury found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstances found by one or more jurors. After considering the crime and the defendant, we cannot hold as a matter of law that the death sentences recommended by the jury in this case are disproportionate to the penalties imposed in similar cases. As the majority of this Court observed in a recent case:

> This Court has found the death sentence disproportionate in seven cases. *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *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); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In none of these cases was the defendant convicted of more than one murder.

State v. McNeil, 324 N.C. 33, 59-60, 375 S.E.2d 909, 925 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756 (1990), *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, --- U.S. ---, 113 L. Ed. 2d 459 (1991).

In the instant case, defendant was convicted of two first degree murders—his mother and his stepfather. As we said in *State v. Robbins*, 319 N.C. 465, 529, 356 S.E.2d 279, 316 (1987), *cert. denied*, 484 U.S. 918, 98 L. Ed. 2d 226 (1987), "a heavy factor against [the defendant] is that he is a multiple killer." This Court has affirmed the death penalty in several cases involving death or serious injury to one or more persons other than the murder victim. *See Robbins*, 319 N.C. 465, 356 S.E.2d 279; *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), *cert. denied*, 469 U.S. 1230, 84 L. Ed. 2d 369 (1985), *reh'g denied*, 471 U.S. 1050, 85 L. Ed. 2d 342 (1985); *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), *cert. denied*, 464 U.S. 865, 78 L. Ed. 2d 173 (1983); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), *overruled in part*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981), *cert. denied*, 464 U.S. 1065, 79 L. Ed. 2d 207 (1984).

We recognize that there are multiple murder cases in the pool where the jury has returned a life sentence. Some of them, like the instant case, involved the killing of members of the defendant's family. For example, the jury recommended a life sentence in *State v. Shytle*, 323 N.C. 684, 374 S.E.2d 573 (1989), where the defendant murdered her husband and her son. She also shot and injured her daughter, then shot herself in the head. At trial, the defendant relied on a defense of insanity and presented expert testimony that she did not know the difference between right and wrong in relation to shooting her family members. *Id.* at 687, 374 S.E.2d at 576-77. *Shytle* may be distinguished from the instant case based on the evidence of insanity and attempted suicide by the defendant.

Another such example is *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987). There, the defendant held his sister, nephew and niece hostage; then, he killed his sister and nephew. At trial, he relied upon a defense of insanity and presented evidence tending to show that during the siege, he suffered from paranoia. *Id.* at 156, 353 S.E.2d at 379. Several psychologists testified to the effect that the defendant was under the delusion that Colombian commandos were trying to kill him and his family. *Id.* There was also extensive testimony by expert witnesses that "[the defendant's] paranoia affected his actions, and he was incapable of knowing right from wrong in relation to the acts charged." *Id.* at 162, 353 S.E.2d at 383. No such evidence of insanity was presented in the instant case.

We are not unmindful of the fact that the defendant was only twenty years of age at the time of the homicides. We note first that the age of the defendant was submitted to the jury as a possible mitigating circumstance, but the jury did not find defendant's age to be mitigating as to either murder. This is understandable in view of defendant's substantial criminal history over a period of several years. We also observe that while the General Assembly has limited the circumstances under which persons of tender years can be sentenced to death,[1] several juries have recommended sentences of death notwithstanding the youthful age of the defendant. *See, e.g., State v. McCollum*, 334 N.C. 208, 433 S.E.2d 144 (1993) (defendant age nineteen); *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (defendant age nineteen); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981) (defendant age twenty-one).

After a thorough review of the transcript, record on appeal, the briefs of both parties, and the oral arguments of counsel, we find that the record fully supports the jury's written findings in aggravation in the death of both victims. We further conclude that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor. We hold that defendant received a fair trial and sentencing proceeding, free of prejudicial error. After comparing this case, where defendant killed his defenseless mother by shooting her in the back of the head and also shot and killed his stepfather, to similar cases in the pool, we cannot hold as a matter of law that the sentence of death is disproportionate or excessive. Therefore, the judgments of the trial court must be and are left undisturbed.

NO ERROR.

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

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1. N.C.G.S. § 14-17 (defendant under seventeen years of age at time of commission of first-degree murder may not be sentenced to death unless murder committed while serving or on escape from serving sentence for previous murder).

E. V. FERRELL, JR., DOUGLAS DILLARD, AND ROSENA F. DILLARD v. DEPARTMENT OF TRANSPORTATION

No. 452A91

(Filed 8 October 1993)

1. **State § 4 (NCI3d)— condemned land not needed for highway purposes—statutory rights of original owners—waiver of DOT's sovereign immunity**

In enacting the statutory scheme set forth in N.C.G.S. § 136-19 (1986) which empowers the DOT to acquire title to land that it deems necessary for the construction or maintenance of roads and provides that, when the DOT later determines that a parcel is not needed for highway purposes, first consideration shall be given to any offer to repurchase by the original owners and their assigns, the legislature implicitly waived the DOT's sovereign immunity to the extent of the rights afforded in N.C.G.S. § 136-19.

Am Jur 2d, Eminent Domain § 171.

2. **Declaratory Judgment Actions § 7 (NCI4th)— condemned land not needed for highway purposes—price of reconveyance to original owner—justiciable controversy**

A justiciable controversy existed so as to permit plaintiffs' declaratory judgment action for a determination pursuant to N.C.G.S. § 136-19 (1986) of the price at which the DOT must reconvey to them land which the DOT previously took by eminent domain but no longer needs for highway purposes because litigation over the price appears unavoidable where the DOT offered the property to plaintiffs on 6 January 1989; plaintiffs made a counteroffer on 12 September 1989 which was rejected by the DOT when it raised its asking price in October 1989; the DOT stated that its offer would terminate on 8 November 1989; extensive efforts taken to appraise the property and to negotiate with plaintiffs demonstrate that the DOT has been consistently moving toward an eventual sale of the property; and there is no indication that the parties will agree on a price for the property. Although DOT regulations prohibit the sale of unneeded land to the original owner unless the sale is first approved by the DOT, the Council of State, and the Governor, none of these parties has approved a sale to plaintiffs, and the property has not been declared

unnecessary by the DOT, these contingencies and possibilities do not make the case nonjusticiable.

Am Jur 2d, Declaratory Judgments §§ 25-41.

3. **Eminent Domain § 6 (NCI4th)— condemned land not needed by DOT—price of reconveyance to original owner**

When land previously condemned by the DOT was no longer needed for highway purposes, N.C.G.S. § 136-19 (1986) required the DOT to permit the original owner or his assigns to repurchase the land for the initial award plus interest and the cost of any improvements rather than for the fair market value, since the legislature did not intend for the state to profit from the appreciation of condemned land due to the very public improvements accomplished by the condemnation but intended to return the parties to the positions they would have been in if the DOT had not originally taken more land than was necessary.

Am Jur 2d, Eminent Domain § 142.

Justices WEBB and MITCHELL dissent.

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

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 104 N.C. App. 42, 407 S.E.2d 601 (1991), affirming judgment for plaintiffs entered by Freeman, J., on 9 August 1990, in the Superior Court, Forsyth County. We allowed defendant's petition for further review as to additional issues which the Court of Appeals decided unanimously. Heard in the Supreme Court 12 May 1992.

Petree, Stockton & Robinson, by F. Joseph Treacy, Jr., for plaintiff-appellees.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Archie W. Anders and Elaine A. Dawkins, for defendant-appellant.

EXUM, Chief Justice.

This is an action for declaratory and injunctive relief against the Department of Transportation (DOT). Plaintiffs petitioned the

trial court to determine pursuant to N.C.G.S. § 136-19 the price at which the DOT must reconvey to them land which the DOT previously took by eminent domain but no longer needs. At the time of this suit, N.C.G.S. § 136-19 provided:

> If any parcel is acquired in fee simple as authorized by this section and the Department of Transportation later determines that the parcel is not needed for highway purposes, first consideration shall be given to any offer to repurchase made by the owner from whom said parcel was acquired or the heirs or assigns of such owner.

N.C.G.S. § 136-19 (1986) (amended 1992).

The questions presented on appeal are whether the DOT is shielded from suit due to sovereign immunity, whether a justiciable controversy exists, and the price at which the DOT must reconvey the land. A unanimous Court of Appeals panel held that the DOT is subject to suit and that the controversy is justiciable; a majority of the panel held that the DOT must reconvey the land for the initial condemnation award plus interest. We allowed review as to all issues, and we now affirm the Court of Appeals.

I.

On 17 April 1972, the DOT acquired 34.93 acres of land through eminent domain proceedings (1972 taking). The land taken was part of an 86.08 acre tract owned by E.V. Ferrell, Jr. and J.C. Smith as tenants in common. Ferrell owned an eighty percent undivided interest in the property, and Smith owned twenty percent. Ferrell and Smith had spouses with marital interests in the property. In 1975 the parties filed a Consent Judgment in which the DOT paid Ferrell and Smith $305,500 for this taking. This land was to be used for the construction of Corporation Freeway. Due to changes in the plans, however, only a portion of the freeway was constructed, which became part of the Interstate 40 Bypass. These modifications required that the DOT acquire an additional 5.84 acres from the remaining Ferrell-Smith tract, which it did on 22 December 1986 (1986 taking). The DOT used all of the property from the 1986 taking and 5.823 acres from the 1972 taking for the construction of a ramp that is part of the Interstate 40 Bypass and Hanes Mall Boulevard.

Pursuant to a property settlement, Mr. Ferrell obtained any interest Mrs. Ferrell had in the property. The Smiths conveyed

their interest in the land, and any rights they had under N.C.G.S. § 136-19, to the Dillards. Mr. Ferrell and the Dillards are therefore the current owners of any right to repurchase derivative of the takings.

The plaintiffs wanted to repurchase the unused portion of the 1972 taking, which amounted to 29.107 acres, and made numerous inquiries of the DOT. Although the DOT's general policy is to retain condemned property until a project is completed, the DOT determined that the property was no longer needed for highway purposes and decided that it was amenable to selling the land. Due to the development caused by the highway, the value of the land surrounding the highway had risen sharply. W.R. Weir, Jr., hired by the DOT to conduct an appraisal of the land, valued the land at $1,819,175 in November 1988. Max Loflin, a staff appraiser for the DOT, valued the property at $2,294,500 in November 1988. On 6 January 1989 the DOT offered to sell the property to the plaintiffs for $1,819,175. Plaintiffs hired an appraiser who valued the property at $1,018,750 in August 1989. On 12 September 1989 plaintiffs met with the DOT and offered $845,000, which represented the original award of $305,000 plus interest.

The DOT agreed to re-evaluate its offer amount, and on 17 October 1989 the DOT increased the price for the land to $2,294,500. The DOT stated that this offer was to terminate on 8 November 1989. In arriving at this figure, James E. Rhodes, manager of the Right of Way Branch, reviewed the DOT's files on the property, including the 1972 and 1986 condemnation files, the acreage used to construct Hanes Mall Boulevard, the DOT's two appraisals, an inspection of the property, correspondence with Mr. Ferrell, and discussions with his staff.

Plaintiffs then filed suit under the Declaratory Judgment Act requesting the trial court to determine the price for which the 29.107 acres must be sold back to the plaintiffs under N.C.G.S. § 136-19. The plaintiffs also sought an injunction to prevent the DOT from conveying the land to any other parties. The trial court found for the plaintiffs, declaring that the DOT must reconvey the property for $821,938.25, which represents the amount of the condemnation award plus interest; the trial court also granted the injunction against the DOT. A majority of the Court of Appeals affirmed, concluding that N.C.G.S. § 136-19 requires the DOT to reconvey to plaintiffs their former property for the initial award

plus interest. Defendants appealed this conclusion as of right based on the dissent in the Court of Appeals; we granted further review of the additional issues of sovereign immunity and justiciability.

II.

[1] The DOT argues that since it is an agency of the state, it is immune from suit under the doctrine of sovereign immunity. It is well established that a state and its agencies may not be sued unless sovereign immunity is waived. *Guthrie v. State Ports Authority*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). This State has expressly waived sovereign immunity for various types of civil actions. *See, e.g.*, N.C.G.S. § 143-135.3(d) (1990) (permitting suit for certain contract claims after procedural remedies are exhausted). Also, the state may implicitly waive its immunity through conduct. *See Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976) (state implicitly consents to suit when it enters a valid contract); *Bell Arthur Water Corp. v. N.C. Dept. of Transportation*, 101 N.C. App. 305, 310, 399 S.E.2d 353, 356, *disc. rev. denied*, 328 N.C. 569, 403 S.E.2d 507 (1991) (state implicitly waived immunity by law requiring DOT to compensate injured party).

In *Smith* we held that various policy considerations compel the conclusion that when the state enters into a contract through its authorized officers and agencies, it implicitly consents to suit for damages if it breaches that contract.[1] *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24. The Court was persuaded that denying the injured contracting party a remedy would "take his property without compensation and thus . . . deny him due process." *Id.* at 320, 222 S.E.2d at 423. The Court was also moved by the consideration that permitting the state to "arbitrarily avoid its obligation under a contract . . . would be judicial sanction of the highest type of governmental tyranny." *Id.* Further, the Court refused "[t]o attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens," because that would "impute[ ] to that body 'bad faith and shoddiness' foreign to a democratic government." *Id. Smith* also recognized that a "citizen's

1. This principle is followed in several states. *See, e.g., V.S. DiCarlo Constr. Co. v. Missouri*, 485 S.W.2d 52, 54 (Miss. 1972); *Kinsey Constr. Co. v. South Carolina Dep't of Mental Health*, 272 S.C. 168, 171, 249 S.E.2d 900, 902-03 (1978), *overruled on other grounds, McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *Architectural Woods, Inc. v. Washington*, 92 Wash.2d 521, 526, 598 P.2d 1372, 1375 (1979).

petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party." *Id.*

It has also been held that the North Carolina General Assembly implicitly waived sovereign immunity when it obligated the DOT to pay for the cost of relocating water and sewer lines owned by certain entities. *Bell Arthur Corp. v. North Carolina Dep't of Transp.*, 101 N.C. App. 305, 310, 399 S.E.2d 353, 356. In *Bell Arthur*, the court reasoned that the statute entitling the injured party to compensation logically implies a waiver of sovereign immunity as to those costs. *Id.*

Other jurisdictions have also found that statutory schemes conferring rights to citizens imply a waiver of sovereign immunity. *See, e.g., King v. DeSermonis*, 481 S.W.2d 652, 655 (Ky. App. 1972) (statute requiring Department of Highways to reinstate employee with back pay implicitly waives sovereign immunity to that extent); *State Employees' Assoc. of New Hampshire, Inc. v. Belknap County*, 122 N.H. 614, 621-22, 448 A.2d 969, 972-73 (1982) (state retirement system contains implicit waiver of sovereign immunity).

We find in the case before us the same considerations that led the courts in *Smith* and *Bell Arthur* to find a waiver of sovereign immunity. N.C.G.S. § 136-19 empowers the DOT to acquire title to land that it deems necessary for the construction or maintenance of roads. That section also grants owners and their assigns the rights sought to be asserted in this litigation. In enacting this statutory scheme, the legislature has implicitly waived the DOT's sovereign immunity to the extent of the rights afforded in N.C.G.S. § 136-19 (1986).

III.

[2] The DOT next argues that there is no justiciable controversy between the parties. Plaintiffs sought relief under the Declaratory Judgment Act, which provides:

> Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C.G.S. § 1-254 (1983). As with all other actions, however, there must be a justiciable controversy before the Declaratory Judgment Act may be invoked. There is a justiciable controversy if litigation over the matter upon which declaratory relief is sought appears unavoidable. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 589, 347 S.E.2d 25, 32 (1986).

Here, we conclude that litigation over the price at which DOT must convey this property to plaintiffs is unavoidable. The DOT offered the property to the plaintiffs on 6 January 1989. On 12 September 1989 the parties met again and the plaintiffs made a counteroffer. This counteroffer was considered and rejected by the DOT when it raised its asking price in October 1989. Further, the DOT stated that its offer would terminate on 8 November 1989. The extensive efforts taken to appraise the property and to negotiate with the plaintiffs demonstrate that the DOT was consistently moving toward an eventual sale of the property. Further, there is no indication the parties will agree on a price for the property. The plaintiffs' last attempt at negotiation met with a second offer from the DOT that was higher than the DOT's initial offer. "[W]here the court is convinced that litigation, sooner or later, appears to be unavoidable," the plaintiffs' case is ripe. *Insurance Co. v. Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 802-03 (1971). Because litigation on this matter appears unavoidable, plaintiffs' claim is ripe.

The DOT argues that it is conceivable that litigation will not arise. The DOT refers to its regulations which prohibit the sale of unneeded land to the original owner unless the sale is first approved by the DOT, the Council of State, and the Governor. The DOT points out that none of these parties has approved a sale to the plaintiffs; it further notes that the property has not been declared unnecessary by the DOT. The DOT also raises the possibility that it may decide that the land in question is needed for highway construction. These contingencies and possibilities, however, do not make the case nonjusticiable. We do not require the plaintiff to show with absolute certainty that litigation will arise; the plaintiff must merely demonstrate to a "practical certainty" that litigation will ensue. *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 590, 347 S.E.2d 25, 32.

We therefore affirm the determination of the Court of Appeals that there is a justiciable controversy which provides the necessary underpinning for plaintiffs' declaratory judgment action.

IV.

[3] The substantive issue presented is whether N.C.G.S. § 136-19 requires the DOT to sell land previously condemned but no longer needed to the original owner when the original owner offers to repurchase the land for the initial award plus interest. The plaintiffs contend that the Court of Appeals was correct in determining that this statute requires the DOT to reconvey the land for the amount of the initial award plus interest. The defendant argues that it may reconvey the land for its fair market value. Based on the following analysis, we affirm the conclusion of the Court of Appeals that the DOT must reconvey the property for the initial award plus interest.

Since the statute does not specify at what price the DOT is to sell to the original owners, we must determine by statutory construction what the legislature intended. *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978). The language of the statute is generally the strongest evidence of legislative intent. When the language is unclear, however, legislative intent must be discerned by looking to the legislature's purpose in enacting the statute and the consequences of various interpretations. *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

This precise issue arose before the Minnesota Supreme Court on a similar statute. *First Am. Nat'l Bank v. Minnesota*, 322 N.W.2d 344 (Minn. 1982). The relevant Minnesota statute governing the sale of condemned property no longer needed stated that "the lands shall first be offered for reconveyance to [a] previous owner or his surviving spouse."[2] Minn. Stat. § 161.44 (amended 1983). The Minnesota Supreme Court stated:

> While reconveyance is clearly provided for, the intended reconveyance price is unclear. In ascertaining legislative intent we may therefore consider, among other matters, the object to be obtained by the statute. We think an overriding objective of section 161.44 is to restore, to the extent possible, the *status quo ante*. . . . Put another way, we do not think the legislature intended the state to profit from sudden appreciations in land values occasioned by public improvements for which the land was taken but never used. To hold otherwise would put a

2. Although the Minnesota statute contained a provision stating that the landowner may not pay less for a portion of land than he initially received, that difference is immaterial to the issue before us.

> premium on, and encourage a practice of, condemning more land than is reasonably necessary for public purposes.

Id. at 346.

Our analysis leads us to the same conclusion reached by the Minnesota Supreme Court: the legislature did not intend the state to profit from the appreciation of condemned land due to the very public improvements accomplished by the condemnation.[3]

The defendant correctly points out that subsequent to the Minnesota court's decision, the Minnesota legislature passed a statute setting the repurchase price equal to current market value. 1983 Minn. Laws c. 143, ss. 6, 8 (codified at Minn. Stat. § 161.43 (1986)). The North Carolina General Assembly, however, has acted quite differently in this area.

Our legislature specifically addressed the price for land condemned by the DOT but no longer needed when it amended N.C.G.S. § 136-19 in 1992 to read:

> If the Department of Transportation acquires by purchase, donation, or condemnation part of a tract of land in fee simple for highway right-of-way as authorized by this section and the Department of Transportation later determines that the property acquired for highway right-of-way, or a part of that property, is no longer needed for highway right-of-way, then the

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3. The method of computing the compensation to which a landowner is entitled also indicates that the state is not entitled to fair market value. It is well established that one whose land is condemned is not entitled to its value increased by the project for which it was condemned. N.C.G.S. § 136-112 (1986); *see, e.g., Williams v. Highway Commission*, 252 N.C. 514, 519-20, 114 S.E.2d 340, 344 (1960); *Highway Commission v. Black*, 239 N.C. 198, 203, 79 S.E.2d 778, 783 (1954). This rule is in accord with the general provisions for eminent domain found in N.C.G.S. § 40A-63, which states:

> The determination of the amount of compensation shall reflect the value of the property immediately prior to the filing of the petition [for an appraisal] or the complaint [to condemn property] and except as provided in the following sections shall not reflect an increase or decrease due to the condemnation. The day of the filing of a petition or complaint shall be the date of valuation of the interest taken.

N.C.G.S. § 40A-63 (1984); *see also* N.C.G.S. § 40A-65(a) (1984) (to the same effect as N.C.G.S. § 40A-63). That the legislature has provided the landowner may not benefit in a condemnation proceeding from any increase in the value of land due to the condemnation itself is some evidence that the legislature did not intend for the DOT to profit by reconveying that land to the original owner at an increased value due, at least in part, to that construction project itself.

> Department shall give first consideration to any offer to purchase the property made by the former owner. . . . [I]f the Department acquires the property by condemnation and determines that the property or a part of that property is no longer needed for highway right-of-way, *the Department of Transportation may reconvey the property to the former owner upon payment by the former owner of the full price paid to the owner when the property was taken, the cost of any improvements, together with interest at the legal rate to the date when the decision was made to offer the return of the property.*

1991 Sess. Laws c. 979 s. 1 (emphasis added) (codified at N.C.G.S. § 136-19(a), (b) (Supp. 1992)).

When a statute is unclear and the legislature subsequently enacts a clarifying amendment, that amendment may be referred to for guidance in construing the earlier statute. *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E.2d 481, 484 (1968); *Thomas v. Barnhill*, 102 N.C. App. 551, 553-54, 403 S.E.2d 102, 103-04 (1991). To determine whether the amendment clarifies the prior law or alters it requires a careful comparison of the original and amended statutes. Often the amendment is "to improve the diction, or to clarify that which was previously doubtful. Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision." *Childers*, 274 N.C. at 260, 162 S.E.2d at 484 (citations omitted). Likewise, when a statute that fails expressly to address a particular point is subsequently amended to address that point, the amendment is more likely to be clarifying than altering. Since here the statute before amendment provided no express guidance as to selling price, the amendment which addresses the selling price is best interpreted as clarifying the statute as it existed before the amendment. It is, therefore, strong evidence of what the legislature intended when it enacted the original statute.[4]

Furthermore, if the legislature intended the DOT to offer the property at fair market value, it presumably would have provided

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4. We recognize that the amended statute limits its application to the "former owner," N.C.G.S. § 136-19(a), (b) (as amended), whereas the statute at issue in this case clearly applies to the original owner and "the heirs or assigns of such owner." N.C.G.S. § 136-19. Both statutes are clear as to whom they apply and need no interpretation in this regard. The former statute, however, is ambiguous as to the price at which the DOT must reconvey the land to original owners or assigns

the means for determining fair market value. When the legislature has expressed an intent that fair market value be used in various transactions, it has expressly set forth the method for determining it. *See, e.g.*, N.C.G.S. § 136-109 (1986) (upon request of landowner or DOT, clerk of court shall appoint three disinterested freeholders to appraise the fair market value of the condemned property); N.C.G.S. § 54-166(c) (1990) (member of association who objects to merger or consolidation is entitled to fair market value of his interest; clerk of court appoints three disinterested appraisers to determine fair market value); *see also* N.C.G.S. §§ 46-7 & -10 (1984) (where land is to be partitioned, court shall appoint three disinterested commissioners, who have specific powers and obligations, to divide land into equal shares based on "value"). When the legislature amended the statute in 1992, in addition to authorizing the DOT to reconvey the property to the original owner for the initial award, it provided for the sale of unnecessary land generally. This part of the 1992 enactment states: "The Department may refuse any offer that is less than the current market value of the property, *as determined by the Department.*" N.C.G.S. § 136-19(a) (Supp. 1992) (emphasis added). If the intent behind the statute at issue in this case were that fair market value govern the sale of land to the original owner, the legislature presumably would have specified the method of determining fair market value.[5] The legislature's silence as to the method of determining fair market value indicates that it contemplated the more simple solution of conveying the property for the initial award plus interest and the cost of any improvements.

Defendant argues that reconveying the land for less than fair market value would result in a windfall to the former landowner. The value of land, however, is often affected by developments

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and calls for interpretation as to this aspect of it. We thus refer to the amended statute for guidance only as to the price at which the legislature intended in the statute before us that the land be sold back to the original owner or assigns. We also note that plaintiff Ferrell originally owned an eighty percent interest in the property jointly with his wife. At the time this action was brought Ferrell owned the entire eighty percent interest.

5. Subsequent to Minnesota's amended statute, which set the price for which unneeded land is sold to the former owner equal to "appraised current market value," the Minnesota Court of Appeals noted at least three methods of determining the fair value of previously condemned land: an independent appraisal; a jury determination; and a determination by the court after receiving appraisals from the state, the landowner, and an independent appraiser. *Mortenson v. Minnesota*, 446 N.W.2d 674, 677, 677 n.2 (Minn. Ct. App. 1989).

in surrounding areas; and landowners often benefit when the state purchases and improves adjacent parcels of land. Plaintiffs in this case would have experienced such a benefit if the DOT had taken only the land that was eventually determined to be necessary for highway construction. Because the intent of the legislature was to return the parties to the positions they would have been in if the DOT had not originally taken more land than was necessary, the former landowner is necessarily entitled to any appreciation in the property.

Defendant also argues that the Board of Transportation has interpreted N.C.G.S. § 136-19 as permitting the DOT to reconvey land at fair market value, and that the Board's interpretation is entitled to deference. Defendant refers to a rule which states:

> Should the Department of Transportation purchase a property in its entirety for right of way purposes and at a later date reduce the right of way, thus creating a residue, the original owner shall be offered the first refusal to purchase the residue. The purchase price is to be negotiated with the former owner or other prospective buyers taking into consideration the purchase price paid by the Department of Transportation, the current value of the property, and the proportionate part of the entire tract being retained by the Department of Transportation. In the event the former owner does not desire to repurchase the residue area, the residue shall be offered for sale at public sale with the right reserved to reject all bids.

19A NCAC 2B .0143(b) (February 1988). While "the construction of statutes adopted by those who execute and administer them is evidence of what they mean," *Comr. of Insurance v. Automobile Rate Office*, 294 N.C. 60, 76, 241 S.E.2d 324, 329 (1978), that interpretation is not binding on the courts, *MacPherson v. City of Asheville*, 283 N.C. 299, 196 S.E.2d 200 (1973). Such interpretations "will be given consideration by the Court, though [they are] not controlling." *Bottling Co. v. Shaw, Comr. of Revenue*, 232 N.C. 307, 310, 59 S.E.2d 819, 822 (1950). After giving consideration to the other aids to construction in addition to this one, we conclude our construction of the statute, although contrary to that of the DOT, is the more reasonable one and is, therefore, controlling.

We hold, therefore, that N.C.G.S. § 136-19, as it existed before the 1992 amendments, requires DOT to reconvey unneeded property previously condemned to the former owner and assigns at a

price equal to the condemnation award plus interest and the cost of any improvements made to the property by DOT.

In the case before us there is no evidence or contention that DOT incurred any cost (other than the cost of the project itself for which the property was condemned) in improving the subject property. Its reconveyance to plaintiffs, as the Court of Appeals held, must, therefore, be for a price equal to the initial condemnation award plus interest.

AFFIRMED.

Justices WEBB and MITCHELL dissent.

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

JACQUELINE HARRINGTON GARDNER, ADMINISTRATRIX OF THE ESTATE OF SETH CAMPBELL GARDNER, JACQUELINE HARRINGTON GARDNER, INDIVIDUALLY v. BENJAMIN A. GARDNER

No. 285A92

(Filed 8 October 1993)

Damages § 21 (NCI4th); Negligence § 19 (NCI4th)— child injured in car accident—negligence by defendant—emotional distress of mother not foreseeable

Plaintiff mother could not recover for negligent infliction of emotional distress when she suffered mental anguish upon being informed that her child was in a car accident caused by defendant's negligence, rushing to the hospital where she observed resuscitation efforts by emergency personnel upon her child, and later learning of her child's death where plaintiff was not present at the time of defendant's negligent act, and there was no allegation or forecast of evidence that defendant knew that plaintiff was subject to an emotional or mental disorder or other severe or disabling emotional or mental condition as a result of his negligence and its consequences, since plaintiff's injury was not reasonably foreseeable by defendant and its occurrence was too remote from the negligent act itself to hold defendant liable for such consequences.

Am Jur 2d, Damages § 251 et seq.; Negligence § 488 et seq.

Recovery of damages for grief or mental anguish resulting from death of child—modern cases. 45 ALR4th 234.

Chief Justice EXUM dissenting.

Justice MEYER concurring in the result.

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. 635, 418 S.E.2d 260 (1992), reversing an order for partial summary judgment in favor of defendant entered by Duke, J., on 31 May 1991 in Superior Court, Pitt County. Heard in the Supreme Court 14 January 1993.

Gaskins and Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff-appellee.

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and R.B. Daly, Jr., for defendant-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto, for North Carolina Association of Defense Attorneys, amicus curiae.

WHICHARD, Justice.

This case presents the question whether a mother who is not present at the scene of a car accident in which her child is injured may recover for negligent infliction of emotional distress (NIED) when she suffers mental anguish upon being informed of the accident, rushing to the hospital where she observes resuscitative efforts by emergency personnel upon her child, and later learning of her child's death. We hold that because the pleadings and forecast of evidence fail to establish the reasonable foreseeability of her injury, she cannot, and we therefore reverse the decision of the Court of Appeals and remand for reinstatement of the trial court's order dismissing plaintiff's NIED claim with prejudice.

On 18 August 1990, thirteen-year-old Seth Campbell Gardner was injured when the truck being driven by his father, defendant Benjamin Gardner, ran into a bridge abutment on a rural road near Greenville. The accident occurred several miles away from the home of Seth's maternal grandmother, where his mother, plaintiff Jacqueline Gardner, was residing. Upon learning of the accident by telephone, plaintiff went directly to the emergency room at Pitt County Memorial Hospital. About five minutes after she arrived, she saw her son wheeled into the emergency room and ob-

served emergency room personnel applying resuscitative techniques to him. The boy was taken immediately to a treatment room, and plaintiff was taken to a private waiting room. Plaintiff did not see her son again but periodically was advised of his condition. Some time later plaintiff was told that her son had died and was requested to donate his organs.

In her capacity as administratrix plaintiff sued defendant for the wrongful death of their minor son, and in her individual capacity she sued him for negligent infliction of emotional distress. She alleged that she suffered severe emotional distress and, as a result, has sought and received professional counseling; that the injury to her son and emotional distress she suffered were caused by defendant's negligence; and that it was reasonably foreseeable that defendant's negligent conduct would cause her severe emotional distress.

The trial court treated defendant's motion to dismiss as a motion for summary judgment. For purposes of that motion the parties stipulated that their son had died as a result of defendant's negligence and that plaintiff had suffered severe emotional distress as a result of the accident and death. The trial court granted summary judgment as to plaintiff's claim for NIED and dismissed that claim with prejudice. It ruled that, as a matter of law, plaintiff could not establish a claim for NIED because she did not witness the accident nor was she in sufficiently close proximity thereto to satisfy the "foreseeability factors" set forth in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

On appeal, the Court of Appeals held that plaintiff's emotional distress as a result of defendant's negligence was foreseeable. Emphasizing that the *Ruark* factors were not requirements for foreseeability but were "*to be considered* on the question of foreseeability," the court stated:

> In common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than . . . a parent who is actually exposed to the scene of the accident.

Gardner v. Gardner, 106 N.C. App. 635, 639, 418 S.E.2d 260, 263 (1992). The court held that defendant "could have reasonably fore-

seen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress," *id.*, and it accordingly reversed the trial court.

Judge Eagles dissented on the grounds that plaintiff did not observe and was not in close proximity to the negligent act and therefore "failed to establish sufficient proximity to satisfy the foreseeability requirements of *Ruark*." *Id.* at 640, 418 S.E.2d at 263 (Eagles, J., dissenting). Defendant appealed to this Court as a matter of right based on the dissent. N.C.G.S. § 7A-30(2) (1989).

Summary judgment can be sustained only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). "[I]ts purpose is to eliminate formal trials where only questions of law are involved." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). It is, however, "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). Notwithstanding, "summary judgment . . . is proper where the evidence fails to establish negligence on the part of defendant . . . or establishes that the alleged negligent conduct was not the [foreseeable and] proximate cause of [plaintiff's] injury." *Rorrer v. Cooke*, 313 N.C. 338, 355, 329 S.E.2d 355, 366 (1985) (quoting *Williams v. Power & Light Co.*, 36 N.C. App. 146, 147, 243 S.E.2d 143, 144, *rev'd on factual grounds*, 296 N.C. 400, 250 S.E.2d 255 (1979)).

In *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85, we concluded that an action for negligent infliction of emotional distress had its roots in one hundred years of North Carolina jurisprudence, beginning with *Young v. Telegraph Co.*, 107 N.C. 370, 11 S.E. 1044 (1890). We noted that *Young* and, subsequently, *Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916), permitted a cause of action for emotional distress arising not from a plaintiff's concern for his own welfare, but from his concern for that of another. *Ruark*, 327 N.C. at 296, 395 S.E.2d at 93. From these cases we concluded that in order to state a claim for negligent infliction of emotional distress, a "plaintiff need not allege or prove any physical impact, physical injury, or physical manifestation of emotional distress." *Id.* at 304, 395 S.E.2d at 97. The only requisite allegations were "that (1) the defendant negligently engaged in

conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Id.* " '[S]evere emotional distress,' " we specified, "means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* The touchstone for whether a plaintiff may recover for NIED is whether "the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.* To guide the determination of whether the plaintiff's injury was a foreseeable result of the defendant's negligence, we suggested three factors to be considered: "[1] the plaintiff's proximity to the negligent act, [2] the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and [3] whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. Notably, these factors were not termed "elements" of the claim. They were neither requisites nor exclusive determinants in an assessment of foreseeability, but they focused on *some* facts that could be particularly relevant in any one case in determining the foreseeability of harm to the plaintiff. Whatever their weight in this determination, we stressed that "[q]uestions of foreseeability and proximate cause must be determined under *all* the facts presented" in each case. *Id.* (emphasis added).

In this case the parties stipulated to two of the three factors necessary to state a claim for NIED. They agreed that their minor son died as a result of defendant's negligence and that plaintiff suffered severe emotional distress as a result of the accident and the death of her son. The third requisite factor—that it was reasonably foreseeable defendant's conduct would cause plaintiff's severe emotional distress—is the crux of this appeal. In order to determine whether there is a genuine issue of material fact as to this question, we must look at all of the facts guided by the factors suggested in *Ruark*.

Plaintiff here, like the plaintiffs in *Ruark*, alleges that she is the parent of the child who died as a result of defendant's negligence. Plaintiff was not, however, in close proximity to, nor did she observe, defendant's negligent act. At the time defendant's vehicle struck the bridge abutment, plaintiff was at her mother's

house several miles away. This fact, while not in itself determinative, unquestionably militates against defendant's being able to foresee, at the time of the collision, that plaintiff would subsequently suffer severe emotional distress as a result of his accident. Because she was not physically present at the time of defendant's negligent act, plaintiff was not able to see or hear or otherwise sense the collision or to perceive immediately the injuries suffered by her son. Her absence from the scene at the time of defendant's negligent act, while not in itself decisive, militates against the foreseeability of her resulting emotional distress.

Further, and more importantly, to establish an NIED claim a plaintiff must allege and prove "that *severe* emotional distress was a foreseeable and proximate result of [the] negligence . . .; mere temporary fright, disappointment or regret will not suffice." *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97 (emphasis added). "In this context, the term '*severe* emotional distress' means any *emotional or mental disorder*, such as . . . neurosis, psychosis, chronic depression, phobia, or any other type of *severe and disabling* emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.* (emphasis added). While anyone should foresee that virtually any parent will suffer *some* emotional distress—"temporary disappointment . . . or regret"—in the circumstances presented, to establish a claim for NIED the law requires reasonable foresight of an emotional or mental disorder or other severe and disabling emotional or mental condition. Here, there is neither allegation nor forecast of evidence that defendant knew plaintiff was subject to an emotional or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences. Absent such knowledge, such an outcome cannot be held to be reasonably foreseeable, and plaintiff has failed to establish a claim for NIED.

That plaintiff suffered severe emotional distress upon seeing her son in the emergency room undergoing resuscitative efforts a period of time after the accident, and upon learning subsequently of his death, is stipulated. Nevertheless, absent reasonable foreseeability, this is not an injury for which defendant is legally accountable. "[P]art of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages." *Gates v. Richardson*, 719 P.2d 193, 198 (Wyo. 1986). Given her absence from the time and place of the tort and her failure to show that defendant knew she was susceptible to an emotional

or mental disorder or other severe and disabling emotional or mental condition as a result of his negligence and its consequences, we hold that plaintiff's injury was not reasonably foreseeable and its occurrence was too remote from the negligent act itself to hold defendant liable for such consequences.

The trial court thus properly granted summary judgment to defendant on the NIED issue. The decision of the Court of Appeals reversing that judgment is accordingly reversed, and the cause is remanded to the Court of Appeals for further remand to the Superior Court, Pitt County, for reinstatement of the order of summary judgment for defendant on plaintiff's claim, in her individual capacity, for negligent infliction of emotional distress.

REVERSED AND REMANDED.

Chief Justice EXUM dissenting.

While agreeing that the majority has identified the appropriate legal principles to resolve this case, I cannot agree with its application of them to the facts here. Because of the close family relationship between the tortfeasor, the child and the plaintiff, I believe a jury might appropriately find that the tortfeasor should reasonably have foreseen that if he negligently killed the child of his marriage to plaintiff, plaintiff would suffer severe emotional distress, even as that term is defined by the majority.

This case is not entirely like *Sorrells*,[1] decided today, or *Ruark*,[2] but it is much closer to *Ruark*—close enough so that our decision in *Ruark* should control. Indeed, the foreseeability issue here seems more easily resolved in plaintiff's favor than it was in *Ruark*. In *Ruark* the alleged tortfeasor was a physician whose negligence allegedly caused the death of the fetus of the plaintiff who was his patient. Here the tortfeasor is plaintiff's husband who, according to the stipulations, negligently caused the death of his and plaintiff's thirteen-year-old child, in turn causing plaintiff to suffer severe emotional distress. Because of the deceased child's age, thirteen, the parent-child bonding and the parents' emotional investment in the child were likely to be quite strong. That the

1. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 435 S.E.2d 320 (1993).

2. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 395 S.E.2d 85 (1990).

tortfeasor is plaintiff's husband and was the child's father and the child was born of his and plaintiff's marriage further exacerbate the total tragedy.

The majority says, quoting from a Wyoming case, that "part of living involves some unhappy and disagreeable emotions with which we must cope without recovery of damages." While true as far as it goes, this aphorism should have no application to the psychological and emotional trauma which any mother must surely suffer when her thirteen-year-old child is killed by the negligence of her husband who is also the child's father. A more emotionally shattering family tragedy is hard to imagine. That it would likely produce severe emotional distress on the part of the child's mother when she learns of it, however physically close to the accident scene itself she might have been, seems to me reasonably foreseeable to the father-husband tortfeasor. At least a jury might reasonably find it to be so.

For these reasons, I vote to affirm the decision of the Court of Appeals.

Justice MEYER concurring in result.

I concur only in the result reached by the majority for the reasons expressed in my concurring in result opinion in *Sorrells v. M.Y.B. Hospitality Ventures*, 334 N.C. 669, 675, 435 S.E.2d 320, 323 (1993).

LINDA SORRELLS AND HUSBAND, RONALD E. SORRELLS v. M.Y.B. HOSPITALITY VENTURES OF ASHEVILLE, D/B/A RHAPSODY'S FOOD AND SPIRITS

No. 61A93

(Filed 8 October 1993)

Intoxicating Liquor § 43 (NCI4th); Negligence § 19 (NCI4th)— alcohol served to intoxicated patron—patron killed in one car accident—emotional distress to patron's parents—foreseeability

The trial court did not err by dismissing an action for negligent infliction of emotional distress under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs alleged that they were the parents

of a 21-year-old student who was served alcohol at defendant's place of business by employees who knew that their son was highly intoxicated, that their son was killed when he lost control of his car as he drove home, and that the information that their son had been killed had a devastating emotional impact on plaintiffs. The possibility that defendant's negligence in serving alcohol to plaintiffs' son would combine with the son driving while intoxicated to result in a fatal accident which would cause the son's parents (if he had any) not only to become distraught, but also to suffer severe emotional distress as defined in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, simply was a possibility too remote to permit a finding that it was reasonably foreseeable.

Am Jur 2d, Intoxicating Liquors § 265; Negligence § 488 et seq.

Justice MEYER concurring in the result.

Appeal as of right pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 108 N.C. App. 668, 424 S.E.2d 676 (1993), reversing an order entered by John, J., in Superior Court, Haywood County, on 5 July 1991. Heard in the Supreme Court on 16 September 1993.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiffs-appellees.

Harrell & Leake, by Larry Leake, for defendant-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

MITCHELL, Justice.

The issue before us in this case is whether it was reasonably foreseeable that the plaintiffs would suffer severe emotional distress upon learning that their son had been killed in a one-car accident after he was negligently served alcohol at the defendant's place of business. We hold that it was not reasonably foreseeable; therefore, we reverse the decision of the Court of Appeals.

As this case was dismissed prior to trial pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6), we must treat the allegations of the complaint

as true. *See Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 327 N.C. 283, 286, 395 S.E.2d 85, 87 (1990); *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). The plaintiffs' complaint alleges that they were the parents of Travis Cain Sorrells (hereinafter "Travis"), a 21-year-old community college student. On or about the evening of 21 May 1990, Travis was drinking alcohol with friends at Rhapsody's Food and Spirits, the defendant's place of business. Other members of Travis' party asked their waitress not to serve Travis any more drinks because he "had had enough to drink" and would be driving himself home. Nevertheless, other Rhapsody's employees continued to serve Travis alcohol knowing he was highly intoxicated. As Travis was driving home from Rhapsody's he lost control of his car, struck a bridge abutment and was killed.

The complaint further alleges that when the plaintiffs learned that their son had been killed in a car accident and "his body mutilated," the information "had a devastating emotional effect" on them. As a result, they "suffered . . . sickness, helplessness [and] frailty and . . . under[went] much grief, worry, loss of enjoyment of life, a wrecked nervous system, depression and emotional grief."

The defendant moved to dismiss this action for negligent infliction of emotional distress on the ground that the complaint failed to state a claim upon which relief could be granted. *See* N.C.G.S. § 1A-1, Rule 12(b)(6) (1990). After a hearing, the trial court entered an order granting the defendant's motion and dismissing the action.

The Court of Appeals held that the question of foreseeability in the case at bar was one for the jury and the trial court had therefore erred in dismissing the plaintiffs' claim. *Sorrells v. M.Y.B. Hospitality Ventures*, 108 N.C. App. 668, 672, 424 S.E.2d 676, 679-80 (1993). Therefore, the Court of Appeals reversed the trial court's order.

This Court has recognized claims for negligent infliction of emotional distress for more than one hundred years. *Johnson v. Ruark Obstetrics*, 327 N.C. at 290, 395 S.E.2d at 89. *See generally* Robert G. Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C. L. Rev. 435 (1980). In *Johnson v. Ruark Obstetrics* we briefly reviewed the various mechanical and arbitrary "tests" applied to claims for negligent infliction of emotional distress in other jurisdictions. *Ruark*, 327 N.C. at 288-90, 395 S.E.2d at 88-89. We

expressly refused, however, to adopt any of those mechanical tests and emphasized that claims for emotional distress filed in our courts "must, of course, be decided under North Carolina law." *Id.* at 290, 395 S.E.2d at 89. We surveyed the decisions of this Court applying North Carolina law and expressly held that "our law includes *no* arbitrary requirements to be applied mechanically to claims for negligent infliction of emotional distress." *Id.* at 291, 395 S.E.2d at 89 (emphasis added).

To state a claim for negligent infliction of emotional distress under North Carolina law, the plaintiff need only allege that: "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Id.* at 304, 395 S.E.2d at 97. In *Ruark* we emphasized that "mere temporary fright, disappointment or regret will not suffice." *Id.* Rather, to establish "severe emotional distress" as defined in *Ruark*, the plaintiff must show an "emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." *Id.*

Where, as in the case at bar, the plaintiff is seeking to recover for his or her severe emotional distress arising from an injury to another, the plaintiff may recover "*if* . . . [he or she] can prove that he or she has suffered such severe emotional distress as a proximate and *foreseeable* result of the defendant's negligence." *Id.* (emphasis in original). In making this foreseeability determination, the "factors to be considered" include, *but are not limited to*: (1) "the plaintiff's proximity to the negligent act" causing injury to the other person, (2) "the relationship between the plaintiff and the other person," and (3) "whether the plaintiff personally observed the negligent act." *Id.* at 305, 395 S.E.2d at 98. However, such factors *are not* mechanistic *requirements* the absence of which will inevitably defeat a claim for negligent infliction of emotional distress. *See generally Gardner v. Gardner*, 334 N.C. 662, --- S.E.2d --- (1993). The presence or absence of such factors simply is not determinative in all cases. *Id.* Therefore, North Carolina law forbids the mechanical application of any arbitrary factors—such as a requirement that the plaintiff be within a "zone of danger" created by the defendant or a requirement that the plaintiff personally observe the crucial negligent act—for purposes of determining

foreseeability. Rather, the question of reasonable foreseeability under North Carolina law "must be determined under all the facts presented, and should be resolved on a case-by-case basis by the trial court and, where appropriate, by a jury." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. While some may fear that such reliance on reasonable foreseeability, "if carried out to its fullest extent, would directly lead to the recovery of damages for all kinds of mental suffering," this Court long ago concluded in emotional distress cases that we are "compelled to carry out a principle *only* to its necessary and logical results, and not to its furthest theoretical limit, in disregard of other essential principles." *Chappell v. Ellis*, 123 N.C. 259, 263, 31 S.E. 709, 711 (1898) (emphasis added), *quoted with approval in Ruark*, 327 N.C. at 306, 395 S.E.2d at 98.

As this case hinges on the issue of reasonable foreseeability, it is useful and instructive to note other cases—in addition to *Ruark*—in which this Court has considered the foreseeability of a plaintiff's emotional distress arising from his or her concern for another. One such case is *Bailey v. Long*, 172 N.C. 661, 90 S.E. 809 (1916), in which the plaintiff's wife died due to the negligence of the defendant physician and his hospital. The plaintiff had taken his wife to the defendant's hospital for treatment of a broken hip. Because of the defective construction of the plaintiff's wife's room, rain water leaked into the room through the windows "to such an extent that the floor of the room was covered with water to a depth of more than one inch on several occasions." *Id.* at 661-62, 90 S.E. at 809. The room was so cold and damp as a result that the plaintiff's wife eventually contracted pneumonia and died. The plaintiff sought to recover for the "great pain and mental anguish" he suffered "in witnessing the agony and suffering of his said wife while lingering with . . . pneumonia, and in the act and article of death resulting therefrom." *Id.* at 662, 90 S.E. at 809. This Court reversed the trial court's dismissal of the plaintiff's action, holding that: "We see no reason why . . . the husband . . . should not recover for the mental anguish occasioned by witnessing . . . [his wife's] suffering and death against the alleged author of such suffering and death." *Id.* at 663, 90 S.E. at 810.

This Court reached a contrary result in *Michigan Sanitarium and Benevolent Ass'n v. Neal*, 194 N.C. 401, 139 S.E. 841 (1927). Mrs. Neal, who had placed her son in a sanitarium for treatment, alleged that because of the sanitarium's negligent treatment of her son, "instead of being benefited," he "sustained . . . a violent

derangement of mind and temporary loss of sanity." *Id.* at 402, 139 S.E. at 841. Because of her son's derangement, Mrs. Neal "suffered great mental anguish." *Id.* Despite the close personal relationship between Mrs. Neal and her son and the fact that the sanitarium almost certainly knew of this relationship, this Court held that Mrs. Neal's "damages are too remote to be made the subject of an action." *Id.* at 403, 139 S.E. at 842.

As in *Neal*, we hold in the case at bar that the plaintiffs' alleged *severe* emotional distress arising from their concern for their son was a possibility "too remote" to be reasonably foreseeable. Here, it does not appear that the defendant had any actual knowledge that the plaintiffs existed. Further, while it may be natural to assume that any person is likely to have living parents or friends and that such parents or friends may suffer some measure of emotional distress if that person is severely injured or killed, those factors are not determinative on the issue of foreseeability. The determinative question for us in the present case is whether, absent specific information putting one on notice, it is reasonably foreseeable that such parents or others will suffer "severe emotional distress" as that term is defined in law. We conclude as a matter of law that the *possibility* (1) the defendant's negligence in serving alcohol to Travis (2) would combine with Travis' driving while intoxicated (3) to result in a fatal accident (4) which would in turn cause Travis' parents (if he had any) not only to become distraught, but also to suffer "severe emotional distress" as defined in *Ruark*, simply was a possibility too remote to permit a finding that it was reasonably foreseeable. This is so despite the parent-child relationship between the plaintiffs and Travis. With regard to the other factors mentioned in *Ruark* as bearing on, *but not necessarily determinative of*, the issue of reasonable foreseeability, we note that these plaintiffs did not personally observe any negligent act attributable to the defendant. However, we reemphasize here that any such factors are merely matters to be considered among other matters bearing on the question of foreseeability. *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. It is well established under North Carolina law that such factors are *not* determinative requirements to be applied mechanically. *Id.* at 291, 395 S.E.2d at 89.

As we reverse the Court of Appeals on the issue of foreseeability, we do not consider or address the other defense proffered by the defendant—that Travis' contributory negligence in driving

while highly intoxicated is imputed to the plaintiffs, thereby barring their claim.

For the foregoing reasons, the decision of the Court of Appeals, reversing the trial court's order granting the defendant's motion to dismiss, is reversed. This case is remanded to the Court of Appeals for reinstatement of the trial court's order.

REVERSED AND REMANDED.

Justice MEYER concurring in result.

I concur only in the result reached by the majority. I continue, primarily for the reasons stated in my dissent and that of Justice Webb in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 307, 318, 395 S.E.2d 85, 99, 106 (1990), to believe that this Court should place some limitations on the nebulous "foreseeability" rule adopted by the majority. Those restrictions should, in accord with those adopted by the overwhelming majority of jurisdictions, be based on the relationship of the claimant to the injured or deceased person and the proximity of perception as well as the severity of the claimant's mental or emotional injury. For limitations on foreseeability based on plaintiff's relationship to the victim, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d 644, 667-68, 771 P.2d 814, 829-30, 257 Cal. Rptr. 865, 880 (1989) (mother of victim is "closely related"); *Elden v. Sheldon*, 46 Cal. 3d 267, 273, 758 P.2d 582, 587, 250 Cal. Rptr. 254, 258 (1988) (unmarried cohabitant denied recovery); *Dillon v. Legg*, 68 Cal. 2d 728, 741, 441 P.2d 912, 920, 69 Cal. Rptr. 72, 80 (1968) (mother of victim is "closely related"); *Quesada v. Oak Hill Improvement Co.*, 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769, 778, *reh'g denied & op. modified, rev. denied* (1989) (niece given opportunity to prove sufficiently close relationship). For limitations on foreseeability based on the proximity of perception, *see, e.g., Thing v. La Chusa*, 48 Cal. 3d at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881 (recovery denied to mother who was neither present at scene of accident nor aware that son was being injured); *Wright v. City of Los Angeles*, 219 Cal. App. 3d 318, 350, 268 Cal. Rptr. 309, 329, *rev. denied* (1990) (plaintiffs must be on the scene and "*then* aware [that decedent] was being injured by [the tort-feasor's] negligent conduct"); *Kelley v. Kokua Sales & Supply, Ltd.*, 56 Haw. 204, 209, 532 P.2d 673, 676 (1975) (physical proximity to scene of tort is determining factor); *Wilder v. City of Keene*, 131 N.H. 599, 604, 557 A.2d 636, 639 (1989) (recovery denied to parents who neither

saw nor heard collision); *Burris v. Grange Mutual Cos.*, 46 Ohio St. 3d 84, 93, 545 N.E.2d 83, 91 (1989) (recovery denied to parent who had "no sensory perception of the events surrounding the accident"); *Gain v. Carroll Mill Co.*, 114 Wash. 2d 254, 261, 787 P.2d 553, 557 (1990) (plaintiff required to be "present at the scene of the accident and/or arrive shortly thereafter").

I also believe that this Court should require the joinder of any negligent infliction of emotional distress claim with the suit on the underlying wrongful death or personal injury claim. The jury would thereby be able to view the claims in their proper context and fashion its remedies accordingly. To allow the parents or other loved ones to bring a wrongful death claim separate and apart from their negligent infliction of emotional distress claim raises the possibility of inconsistent verdicts based on the same act of negligence and, in many cases, double recoveries by the same parties for the same loss.

This approach is not without precedent in North Carolina law. In *Nicholson v. Hospital*, 300 N.C. 295, 266 S.E.2d 818 (1980), this Court held that

> a spouse may maintain a cause of action for loss of consortium due to the negligent actions of third parties so long as that action for loss of consortium is joined with any suit the other spouse may have instituted to recover for his or her personal injuries.

Id. at 304, 266 S.E.2d at 823. A claim of negligent infliction of emotional distress flowing from an injury to a third party bears sufficient resemblance in all pertinent respects to a claim for loss of consortium to merit requiring the two claims to be joined in the same action. *See Ruark*, 327 N.C. at 314-15, 395 S.E.2d at 103 (Meyer, J., dissenting).

THE DURHAM HERALD CO., INC. v. COUNTY OF DURHAM; WILLIAM V. BELL; BECKY HURON; MARYANN BLACK; DEBORAH GILES; AND ELLEN RECKHOW

No. 30PA93

(Filed 8 October 1993)

Public Officers and Employees § 57 (NCI4th); State § 1.2 (NCI3d)—applications for sheriff—Public Records Law inapplicable—no right of inspection by public

Applications for the position of county sheriff sought by a board of county commissioners seeking to fill a vacancy in that office pursuant to N.C.G.S. § 162-3 are governed by N.C.G.S. § 153-98 (1991) rather than by the Public Records Law, N.C.G.S. Ch. 132, and under that statute the applications are not subject to disclosure to the public. Therefore, the trial court erred by granting plaintiff newspaper an injunction prohibiting a board of county commissioners from withholding access to the applications.

Am Jur 2d, Constitutional Law § 504; Public Officers and Employees § 137; Sheriffs, Police, and Constables § 12.

On discretionary review prior to determination by the Court of Appeals, pursuant to N.C.G.S. § 7A-31(b), of a preliminary injunction entered by Brannon, J., on 2 February 1993 against defendants Durham County and the individual members of the Durham County Board of Commissioners. Heard in the Supreme Court 15 April 1993.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Robert E. Levin and George W. Miller, Jr., for plaintiff-appellant.

Thomas Russell Odom for defendant-appellees.

EXUM, Chief Justice.

When Durham County Sheriff Roland Leary resigned effective 31 December 1992, the Durham County Board of Commissioners (Board) advertised the vacancy and solicited applications from persons interested in filling it. After the Board denied plaintiff access to the applications it had received, plaintiff, contending the applications were subject to disclosure under the Public Records Law, Chapter 132 of the General Statutes, brought this action seeking

to enjoin the Board from withholding access to the applications. Judge Brannon, after hearing, granted the injunction. Defendants appealed to the Court of Appeals. We allowed plaintiff's petition to review Judge Brannon's order prior to determination by the Court of Appeals. We also allowed defendants' petition for writ of supersedeas staying the trial court's order pending determination of the appeal. Concluding that the applications in question are governed by the provisions of N.C.G.S. § 153A-98 (1991) rather than the Public Records Law and, under that statute, are not subject to disclosure to the public, we reverse the trial court's order.

This case is governed by our decision in *Elkin Tribune v. Yadkin County Board of Commissioners*, 331 N.C. 734, 417 S.E.2d 465 (1992). In that case, the Yadkin County Board of Commissioners had instructed the interim Yadkin County Manager to take applications for the position of county manager. *The Elkin Tribune* requested access to the applications on the ground that they were public records as defined by the Pubic Records Law. The trial court granted judgment in favor of the *Tribune*. Upon review, we held that the county manager applications were "personnel files of . . . applicants for employment maintained by a county" as those terms are used in section 153A-98[1] and governed by that statute rather than the Public Records Law. We also held that since section 153A-98 did not provide for disclosure of "the files of applicants for positions with counties[,] [i]t was error for the court to order the release of the applications for the position of County Manager." *Id.* at 737, 417 S.E.2d at 466-67.

Since here the applications for sheriff solicited and obtained by Durham County are likewise applications for a position with

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1. This section reads in pertinent part as follows:

§ 153A-98. **Privacy of employee personnel records.**

(a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the county.

the county, they, like the applications in *Elkin Tribune*, are not subject to disclosure.

Plaintiff contends *Elkin Tribune* is distinguishable because the county sheriff, unlike a county manager, is not an "employee" of the county; section 153A-98 governs only the personnel records of "employees" and "applicants for employment"; therefore it does not govern applications received by the Board for the position of sheriff. Plaintiff's argument that the sheriff is not an employee rests on the propositions, first, that the sheriff occupies a constitutionally created office and is an elected public official[2] whose work is not directed or controlled by the Board, and second, the sheriff is "elected" rather than "hired" by the Board.[3]

We are not persuaded by this argument. While there are certainly differences between the office of sheriff and the position of county manager, which would be material in other contexts, the application of section 153A-98 does not turn on such distinctions. The clear purpose of this statute is to provide some confidentiality to those who apply to county boards or their agents for positions which those boards and their agents are authorized to fill. It is in this sense that the statute uses the terms "applicants for employment" and makes the personnel files of such applicants subject to its provisions. An "applicant" holds no position with the county whether as an "employee" in the strict sense of the term or as an elected public official such as the sheriff. He, or she, is merely an applicant for such positions. It is as applicants that the statute seeks to afford them and their applications some measure of confidentiality.

The protection from public disclosure which section 153A-98 affords applicants and applications for positions with counties comports with similar protection provided in the State Personnel Act, Chapter 126 of the General Statutes, for "all State employees not herein exempt," N.C.G.S. § 126-5(a)(1) (1991), and a number of

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2. See N.C. Const., Art. VII, § 2.

3. N.C.G.S. § 162-3 (1987) provides:

> Every Sheriff may vacate his office by resigning the same to the board of county commissioners of his county; and thereupon the board may proceed to elect another Sheriff.

local employees.[4] Section 126-22 of the State Personnel Act provides:

> Personnel files of State employees, former State employees, or applicants for State employment shall not be subject to inspection and examination as authorized by G.S. § 132-6.

N.C.G.S. § 126-22 (1991). This provision of the State Personnel Act, contained in Article 7 of Chapter 126, applies to those who occupy constitutionally created positions and are elected officials. *See* N.C.G.S. § 126-5(c1) (1991), which provides in pertinent part:

> Except as to the provisions of Articles 6 and 7 of this Chapter, the provisions of this Chapter shall not apply to:
>
> (1) Constitutional officers of the State.
>
> (2) Officers and employees of the Judicial Department.
>
> (3) Officers and employees of the General Assembly.

N.C.G.S. § 143-318.11(8) (1990) provides that a "public body may hold an executive session and exclude the public . . . to consider qualifications . . . or conditions of initial employment . . . of a prospective public officer or employee."

The legislature, then, has clearly exempted from the Public Records Law personnel records of state officials, elected and otherwise, including applicants and applications for positions held by these officials and has provided for executive sessions for public bodies considering employing public officers or employees. We are confident, therefore, that the legislature intended section 153A-98 to apply to applicants and applications for the position of county sheriff sought by boards of county commissioners seeking to fill a vacancy in that office pursuant to N.C.G.S. § 162-3 and that our decision in *Elkin Tribune* controls this case.

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4. The State Personnel Act also applies to:

> all employees of area mental health, mental retardation, substance abuse authorities, and to employees of local social services departments, public health departments, and local emergency management agencies that receive federal grant-in-aid funds; and the provision of this Chapter may apply to such other county employees as the several boards of county commissioners may from time to time determine.

N.C.G.S. § 126-5(a)(2) (1991).

For the foregoing reasons, the order of the trial court granting access to the applications for the position of sheriff is

REVERSED.

IN THE MATTER OF STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, AND SOLOMON HORNEY v. MOUNTAIN ELECTRIC COOPERATIVE, INC., AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION

No. 22A93

(Filed 8 October 1993)

Appeal by intervenor North Carolina Electric Membership Corporation pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 108 N.C. App. 283, 423 S.E.2d 516 (1992), affirming an order entered on 28 January 1991 by the North Carolina Utilities Commission. Heard in the Supreme Court 13 September 1993.

Robert P. Gruber, Public Staff, by Antoinette R. Wike, Chief Counsel, and A. W. Turner, Jr., Staff Attorney, for appellee.

Thomas K. Austin, Associate General Counsel, for intervenor-appellant North Carolina Electric Membership Corporation.

PER CURIAM.

AFFIRMED.

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

GAIL LOVELL, ADMINISTRATRIX OF THE ESTATE OF ALLISON LOVELL, DECEASED v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 41A93

(Filed 8 October 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, 108 N.C. App. 416, 424 S.E.2d 181 (1993), which affirmed the trial court's denial of defendant's motion for a new trial based upon the excessive amount of the punitive damages awarded by the jury. Defendant's petition for discretionary review as to additional issues allowed by the Supreme Court 7 April 1993. Heard in the Supreme Court 17 September 1993.

DeVore and Acton, P.A., by William D. Acton, Jr., and Fred W. DeVore, III, for plaintiff-appellee.

Kennedy Covington Lobdell & Hickman, by Wayne Huckel, for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal based on the dissenting opinion of Walker, J., we affirm the decision of the Court of Appeals. We conclude that the petition for discretionary review as to additional issues was improvidently allowed.

AFFIRMED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE OF NORTH CAROLINA v. TONYA LOLETHA CAVINESS

No. 53A93

(Filed 8 October 1993)

Appeal by defendant pursuant to N.C.G.S. § 7A-30(2) from the decision, 108 N.C. App. 573, 425 S.E.2d 14 (1993), by unpublished opinion of a divided panel of the Court of Appeals, finding no error in defendant's trial resulting in a verdict of guilty of voluntary manslaughter and a judgment of imprisonment entered by McHugh, J., presiding, at the 8 May 1991 Criminal Session of Superior Court, Randolph County. Heard in the Supreme Court 15 September 1993.

Michael F. Easley, Attorney General, by Deborah L. McSwain, Associate Attorney General, for the State.

Clark R. Bell for defendant-appellant.

PER CURIAM.

AFFIRMED.

WILLIAM R. MOORE v. BETTY EVANS MOORE

No. 99A93

(Filed 8 October 1993)

On writ of certiorari to review an opinion of the Court of Appeals, 108 N.C. App. 656, 424 S.E.2d 673 (1993), affirming partial summary judgment in favor of the defendant, entered by Vaden, J., in the District Court, Alamance County, on 14 May 1991. Heard in the Supreme Court on 15 September 1993.

Tuggle Duggins & Meschan, P.A., by Carolyn J. Woodruff, for the plaintiff-appellant.

Wishart, Norris, Henninger & Pittman, P.A., by June K. Allison and G. Wayne Abernathy, for the defendant-appellee.

PER CURIAM.

Affirmed.

STATE OF NORTH CAROLINA v. BILLY FRED WILSON, JR.

No. 169A93

(Filed 8 October 1993)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals finding error in defendant's trial before Caviness, J., at the 4 November 1991 Criminal Session of Superior Court, Catawba County, and remanding the case for a new trial. Heard in the Supreme Court 14 September 1993.

Michael F. Easley, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, and Linda M. Fox, Assistant Attorney General, for the State-appellant.

Sigmon, Sigmon and Isenhower, by W. Gene Sigmon, for defendant-appellee.

PER CURIAM.

AFFIRMED.

RICHARD S. GRIFFIN v. C. W. PRICE, JR., AND WIFE, MARGARET PRICE; DONALD EUGENE PRICE; MICHAEL EUGENE PRICE AND WIFE, KATHY LAMAR PRICE

No. 47PA93

(Filed 8 October 1993)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 108 N.C. App. 496, 424 S.E.2d 160 (1993), reversing an order entered 24 June 1991 and a judgment entered 25 June 1991 by Long, J., in Superior Court, Union County, granting respondents' motion for judgment notwithstanding the verdict. Heard in the Supreme Court 17 September 1993.

Steelman & Long, by Sanford L. Steelman, Jr., for petitioner-appellee.

James E. Griffin and Larry E. Harrington for respondent-appellants.

PER CURIAM.

On the authority of *Speight v. Anderson*, 226 N.C. 492, 39 S.E.2d 371 (1946) (*see also West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985)), the decision of the Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the Superior Court, Union County, for reinstatement of the order and judgment allowing the respondents' motion for judgment notwithstanding the verdict.

REVERSED AND REMANDED.

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

BOESCHE v. RALEIGH-DURHAM AIRPORT AUTHORITY

No. 353PA93

Case below: 111 N.C.App. 149

Motion by defendants to dismiss the appeal for lack of substantial constitutional question denied 7 October 1993. Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

BRANTLEY v. STARLING

No. 359PA93

Case below: 111 N.C.App. 669

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

CLARK v. VELSICOL CHEMICAL CORP.

No. 318PA93

Case below: 110 N.C.App. 803

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

DAVIS v. SENCO PRODUCTS, INC.

No. 289PA93

Case below: 109 N.C.App. 700

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

HICKMAN v. McKOIN

No. 170PA93

Case below: 109 N.C.App. 478

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

IN RE DELK

No. 249PA93

Case below: 110 N.C.App. 310

Petition by N.C. State Bar for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

KAPP v. KAPP

No. 273PA93

Case below: 110 N.C.App. 490

Petition by plaintiffs for discretionary review pursuant to G.S. 7A-31 denied 7 October 1993. Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

MOSS v. J. C. BRADFORD AND CO.

No. 332PA93

Case below: 110 N.C.App. 788

Petition by defendants for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

STATE v. HARRIS

No. 381P93

Case below: 111 N.C.App. 930

Petition by Attorney General for temporary stay allowed 24 September 1993 pending consideration and determination of the State's petition for discretionary review.

STATE v. PIPKINS

No. 335PA93

Case below: 111 N.C.App. 458

Petition by Attorney General for discretionary review pursuant to G.S. 7A-31 allowed 7 October 1993.

STATE v. STEWART

No. 387P93

Case below: 112 N.C.App. 136

Petition by Attorney General for temporary stay pursuant to Rule 23(e) N.C.R.App.P. and petition for writ of supersedeas pursuant to Rule 23(b) N.C.R.App.P. in which the State indicates it does not intend to petition for discretionary review are dismissed 28 September 1993.

STATE v. WILLIAMS

No. 245P93

Case below: 111 N.C.App. 861
110 N.C.App. 306
334 N.C. 438

Petition by Attorney General for writ of supersedeas and temporary stay denied 27 September 1993. Petition by Attorney General for writ of supersedeas and temporary stay denied 6 October 1993.

VERNON v. STEVEN L. MABE BUILDERS

No. 275A93

Case below: 110 N.C.App. 552

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 and Appellate Rule 16(b) as to issues in addition to these presented as the basis for the dissenting opinion allowed 7 October 1993.

APPENDIXES

PRESENTATION OF SCHENCK PORTRAIT

AMENDMENT TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IMPOSE A $75 LATE FEE UPON ATTORNEYS WHO PAY THEIR ANNUAL DUES AFTER JULY 1

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR REQUIRING DISBARRED AND SUSPENDED LAWYERS TO REIMBURSE MISAPPROPRIATED FUNDS PRIOR TO REINSTATEMENT

AMENDMENT TO ARTICLE VI OF THE RULES OF THE NORTH CAROLINA STATE BAR CHANGING THE NAME OF THE COMMITTEE ON PROFESSIONAL CORPORATIONS TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE

AMENDMENTS TO THE REGULATIONS FOR PROFESSIONAL CORPORATIONS PRACTICING LAW

PRESENTATION OF THE PORTRAIT

OF

MICHAEL SCHENCK

Associate Justice

SUPREME COURT OF NORTH CAROLINA

1934-1948

November 19, 1993

RECOGNITION OF MICHAEL SCHENCK III

BY

CHIEF JUSTICE JAMES G. EXUM, JR.

Chief Justice James G. Exum, Jr., welcomed official and personal guests of the Court and recognized the members of the Schenck family, present for the occasion. They were: Michael Schenck III, Emily Floried Ripley, Tom Ripley, Anne Satterfield, Bill Satterfield, Mary Schenck, Martha Schenck, Kris Purdy, Flo Purdy, Michelle Purdy, Ginny Schenck, Nancy Schenck, Phillip Schenck, Phillip Schenck, Jr., and Emily Ripley. The invocation was pronounced by Reverend Perry Scruggs, Rector, Church of the Good Shepherd, Raleigh, N.C.

The Chief Justice then recognized Michael Schenck III, the grandson of the late Associate Justice Michael Schenck, as follows:

Michael Schenck III was born in Raleigh and attended the public schools here—Underwood, Daniels and Broughton. He received his undergraduate degree at the University of North Carolina at Chapel Hill. He worked with the Episcopal Diocese of North Carolina here in Raleigh for 10 years until he moved to Boston in January 1984 to work with the Church Pension Fund for the Episcopal Church. He moved to New York in 1989 where he continues to work with the Church Pension Fund. Michael is the fourth child of Michael Schenck, Jr., who moved to Raleigh with his father Justice Schenck when Justice Schenck became a member of the Court.

PRESENTATION ADDRESS

by

MICHAEL SCHENCK III

November 19, 1993

In preparation for this presentation, I relied heavily on the press and other publications that reported on the life and times of Michael Schenck and for that I would like to extend my thanks and acknowledgements. I am most grateful for these records for I was only a mere child when my Grandfather died, as were many of you here present today. My own personal recollections are few, but for many years he lived on through his lovely wife, my Grandmother, whom I knew quite well and dearly loved; and through his children. My father quoted him often. Fond memories have been rekindled.

I would also like to thank Danny Moody and the Historical Society of the Supreme Court. Because of his interest and contact with my sisters, this project was initiated to display a portrait of our Grandfather along with the more than 80 persons who have served on the Supreme Court since 1819 when it was created as we know it today.

Of course, all this would not have been possible without the talent and ability of Ned Bittinger, the artist of the portrait. He captured on canvas a remarkably fine likeness of Justice Schenck based on very old photographs and very weak memories. Ned has rendered the essence of this "gentle man" that we called "DeeDee."

Michael Schenck was born December 12, 1876, in Lincolnton, N.C. He was the eighth child of David and Sallie Ramseur Schenck. On that day, David, a Superior Court Judge, was holding court in Catawba County. According to his diary, David was quite concerned because this was the first time that he had been away from home at the birth of one of their children. Further reference in his diary reveals that David and Sallie were having quite a debate over naming this child. If it was a boy, David was holding out for a longtime family name. One that had been skipped for the last two generations and a name that Sallie disliked very much. Nevertheless, a few days after the birth, Sallie relented and this sixth son was named Michael.

In 1881, when Michael was 5 years old, the family moved to Greensboro. Citing low salary that was inadequate to meet the needs of his family, David resigned his position as Superior Court

Judge for the 18th district and accepted a position as General Counsel for the Richmond and Danville Railway (which later became the Southern Railway). Michael's early education was in the Greensboro public schools and his secondary education was at Oak Ridge Institute. Upon graduation from Oak Ridge, he went to The University of North Carolina where he graduated with the class of 1897.

After graduation, he taught for one year at Oak Ridge Institute, then moved to Wilmington where he worked for the Atlantic Coast Line Railroad. Michael served with the Insular Civil Service for 3 years in Havana, Cuba, during the Spanish-American War. While in Cuba he was able to save enough money to return to North Carolina and to the University of North Carolina where he aspired to the study of law. In 1903 he graduated from law school.

In August of that year, he along with other notable classmates J.C.B. Ehringhaus, Elmer Long, Ernest Green, Murray Allen and Joe Ramsey set up headquarters at the old Yarborough Hotel for last minute cramming for the "Supreme Court Examination." The night prior to taking the exam, he and his friend, Blucher, had had enough. They were tired and apprehensive from studying so they snuck out to a show. Presumably it worked, for they both passed the examination, with honors, and were admitted to the bar that Fall.

Michael returned to Greensboro and practiced law for a year and a half before moving to Hendersonville, N.C. in 1905, where he established a law practice. In the Spring of 1907 he ran for Mayor of that city, his first political endeavor. He won the election by 17 votes and was sworn into office on May 31st. He was the first democrat ever to be elected to office in this overwhelmingly Republican area of the State; but he only served for two years. As he told the *State Magazine* in an interview later:

> "I must have been too active in public improvements. We paved a great many streets and sidewalks during my term of office."

Even though he was no longer Mayor of Hendersonville he continued his practice of law and a native daughter of that City still agreed to marry him. On November 15, 1909, Rose Emily Few, daughter of Dr. Columbus and Floried Justus Few became Mrs. Michael Schenck. A year later, their first child was born. It was a boy. This time there was no lengthy, heated discussions on the name of this child. He was named Michael Jr. Their first

daughter came along eight years later and was named Rosemary Ramseur, after her mother and paternal grandmother. Their second daughter, and last child, came along years later and was named Emily Floried, after her mother and maternal grandmother.

In 1913 Governor Locke Craig appointed Michael to be Solicitor of the 18th District. In 1914, Michael was elected to a full 4 year term.

In September 1918 at the age of 42, Michael resigned his position as Solicitor to enter the US Army. He received an appointment as a Major and was assigned to the Judge Advocate General Department. His initial assignment was in Washington, D.C. During the summer of 1919 he received orders to sail for France; but fortunately the armistice was signed before he reached his ship and he never went.

Upon his return to Hendersonville and his family in 1919, he resumed his private practice of law.

In November 1924, Governor Cameron Morrison appointed Michael Superior Court Judge for the 18th District; he won election to this office without opposition in 1926 for a full 8 year term.

Now as a Superior Court Judge, he was recognized as an outspoken jurist and legal scholar. Since Superior Court Judges now held court throughout the state rather than the district from which they were elected, Michael traveled state wide. During a session in Catawba County, the local newspaper praised Judge Schenck saying that:

> ". . . He was the best informed judge that had served in that area. He attends strictly to business when on the bench, retaining the human element which is often considered lacking in many judges."

At a speech to the Rotarians in Greensboro, Michael introduced the idea of probation for youth, suggesting that first time offenders post bond and report weekly to some "man of exemplary precept." On the other hand, to a Concord Grand Jury, he said that any person convicted of driving while drunk should never be allowed to drive again. Ideas and statements such as these led *The Charlotte Observer* to write:

> "Michael demonstrates that the law is the last result of human wisdom acting upon human experience for the benefit of the public."

In 1931 Governor O. Max Gardner appointed Michael to the 9-member commission to amend or rewrite the State Constitution. The voters subsequently approved a new constitution in the Fall of 1934.

On May 22, 1934, Michael got a long distance telephone call from his friend and former classmate, J.C.B. Ehringhaus, who was now Governor of the State. "Blucher" said to him: "Michael, I want you to come to Raleigh and the Supreme Court again!", making gentle reference to the time 31 years before when they had both come to Raleigh and sat before the court taking the bar exam. This time Blucher wanted Michael to be on that Court. For the several days prior to this phone call there had been much speculation in the press as to who would fill the vacancy on the Court created by the recent death of Associate Justice W. J. Adams. Following tradition, it was expected that Governor Ehringhaus would appoint his gubernatorial campaign manager Major Lennox Polk McLendon; however, McLendon had declined the nomination.

Upon accepting the appointment, Michael said to his colleagues:

> "I feel some twisted heartstrings in giving up my work here. I shall go to Raleigh and do all in my power to attend to my duties there in a way that will justify the honor given me; but I shall never call any place except Western North Carolina my home."

His appointment was lavishly praised in the press. The local newspaper, *The Hendersonville Times*, ran 1" banner headlines the next day:

"SCHENCK ELEVATED TO SUPREME COURT"

They went on to congratulate their hometown Judge saying:

> "he will grace the bench of that august tribunal. He has the qualifications and the temperament which should make him an outstanding member of the Court."

The State Magazine said "the legal community applauds this appointment of the Governor."

The News and Observer in an editorial called him a jurist of the highest ability. It went on to say:

> "the Supreme Court should not be used as a field of high political patronage of Governors, . . . the judiciary ought to be free from politics . . . and governors should be moved by their wish for the highest justice and not the greatest

political advantage. The appointment of Judge Schenck, with a record of long and distinguished service on the bench, places the emphasis where it should be—on the justice of the people and not on the political debt of the Governor."

The Charlotte Observer used words like: "a fine man with strong character, a cultured scholar, broad-visioned and progressive. Schenck would tend to liberalize and humanize the Court."

The Greensboro Daily News also wrote a favorable editorial. It claimed him as a "fellow-townsman", one step away from a native son. They did acknowledge that he was not born in Greensboro, nor did he live there then; but by upbringing he was a "Greensburgher"—their word, not mine.

The Asheville Citizen followed suit saying that Judge Schenck has the judicial temperament and is respected by lawyers who have practiced in his court.

So on May 28, 1934, at the age of 57, Judge Michael Schenck of the Superior Court was sworn in as Associate Justice of the Supreme Court of North Carolina. The Bible used was the same that he had used for his swearing in as Mayor of Hendersonville in 1907, for Solicitor in 1913 and 1915, and for Superior Court Judge in 1924 and 1926. It was the Bible handed down to him from his father David who had received it at age ten from his father in 1844.

For the next fourteen years, Justice Schenck sat on this bench rising to Senior Associate in the early 1940's. During those years, he wrote many decisions which have affected many people and have been recorded in the *North Carolina Supreme Court Reports*. You, the Members of this Court, probably know this better than we, as these opinions surround you in your everyday work and life. He was noted for his soundness of rulings on intricate problems and had a reputation among his profession for his knowledge of constitutional law.

Citing his "poor physical condition", Associate Justice Michael Schenck submitted his resignation to Governor Gregg Cherry to be effective January 31, 1948. He had been sick for the last several months and did not feel that he could continue serving the Court on a full-time basis. The Governor reluctantly accepted his resignation; but also appointed him as an emergency judge. His health continued to decline during the summer and fall of that year, and on November 5, 1948, 10 months after retiring, Michael Schenck, former Associate Justice of the Supreme Court, died at the age of 71.

We are here today to honor this man, this Associate Justice of the Supreme Court of the State of North Carolina, this devoted husband and father, and yes our Grandfather. While his legacy will live forever in the *Court Reports* and opinions, and while his memory remains with us in our hearts and minds, we—Anne, Mary Lou, Martha, and I—are honored to be able to make this presentation on behalf of our parents—Michael Jr. and Annie Laurie Schenck. When Michael was sworn in as Associate Justice, my father—Michael Jr.—was quoted as saying:

"it looks mighty good to see Daddy sitting up there."

In like sentiment today, it will look mighty good seeing a portrait of "DeeDee" hanging here among his colleagues and the many distinguished Justices of the Supreme Court of North Carolina.

UNVEILING OF PORTRAIT

The Chief Justice, after thanking Michael Schenck III for his splendid presentation, recognized Phillip and Ginny Satterfield, the children of Anne Satterfield, and Phillip's son, Phillip, Jr., who unveiled the portrait.

The Chief Justice then recognized the artist Ned Bittinger and his wife, Mary, who stood to much applause.

ACCEPTANCE OF JUSTICE SCHENCK'S PORTRAIT BY CHIEF JUSTICE EXUM

The Court truly appreciates this gift. Michael Schenck has already alluded to the fact that appellate court opinions hang around for a very long time—decades, even centuries. When we today try to resolve some of the legal issues that come before us, we use the opinions as precedents. In a case argued earlier this week, one of the opinions written by Justice Schenck figured prominently in the arguments before the Court and in the briefs and in the Court's deliberation on the case. The opinion was in State v. Perry, 210 N.C. 796, 188 S.E. 639 (1936). It was a well constructed and well written opinion.

Justice Schenck's portrait is accepted with the Court's gratitude to Michael Schenck III, and other members of the Schenck family who made the gift possible. The ceremonies which you have heard today, including the remarks of Michael Schenck III, in presenting

the portrait, will be spread upon the minutes of the Court; and Justice Schenck's portrait will be hung in the halls outside the courtroom where it will serve to remind us of this occasion and of the contributions Associate Justice Michael Schenck made to the development of the law while he served on this Court.

AMENDMENT TO ARTICLE II OF THE RULES OF THE NORTH CAROLINA STATE BAR TO IMPOSE A $75 LATE FEE UPON ATTORNEYS WHO PAY THEIR ANNUAL DUES AFTER JULY 1

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 October 29, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article II, Section 2, of the Rules of the North Carolina State Bar be amended as follows:

Article II, Section 2—Annual Membership Fees; When Due.

(Insert the words, "All membership fees tendered to the Secretary-Treasurer after July 1 must be accompanied by a $75 late fee. The North Carolina State Bar may, after providing notice and an opportunity to be heard, suspend the license of a member who fails to pay the annual membership fee and any applicable late fee" after the words, "The annual membership fee shall be in the amount fixed by statute and said membership fee shall be due and payable to the Secretary-Treasurer on the first day of January in each year and the same shall become delinquent if not paid on or before July 1 of each year" as follows:)

The annual membership fee shall be in the amount fixed by statute and said membership fee shall be due and payable to the Secretary-Treasurer on the first day of January in each year and the same shall become delinquent if not paid on or before July 1 of each year. All membership fees tendered to the Secretary-Treasurer after July 1 must be accompanied by a $75 late fee. The North Carolina State Bar may, after providing notice and an opportunity to be heard, suspend the license of a member who fails to pay the annual membership fee and any applicable late fee.

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 October 29, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 1st day of November, 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 4th day of November 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 4th day of November, 1993.

s/ PARKER, J.

For the Court

AMENDMENTS TO ARTICLE IX OF THE RULES OF THE NORTH CAROLINA STATE BAR REQUIRING DISBARRED AND SUSPENDED LAWYERS TO REIMBURSE MISAPPROPRIATED FUNDS PRIOR TO REINSTATEMENT

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 annual meeting on October 29, 1993.

BE IT RESOLVED by the Council of North Carolina State Bar that Article IX, Section 25 A. and B. be and hereby is amended as follows:

Amendments to Article IX of the Rules of the North Carolina State Bar to require disbarred and suspended attorneys to submit proof of reimbursement of misappropriated funds prior to reinstatement of license.

Section 25. Reinstatement
(create a new section 25(A)(3)(m) and 25(A)(3)(n) as follows):

A. After disbarment:

. . .

3. The petitioner will have the burden of proving by clear, cogent, and convincing evidence that:

. . .

m. the petitioner has reimbursed the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment.

n. the petitioner has reimbursed all sums which the Disciplinary Hearing Commission found in the order of disbarment were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

. . .

(Create new sections 25(B)(3)(f) and 25(B)(3)(g) as follows):

B. After Suspension:

. . .

3. Any suspended attorney seeking reinstatement must file a verified petition with the secretary . . . The petitioner must have satisfied the following requirements to be eligible for reinstatement . . .

. . .

f. reimbursement of the Client Security Fund of the North Carolina State Bar for all sums, including costs other than overhead expenses, disbursed by the Client Security Fund as a result of the petitioner's misconduct. This section shall not be deemed to permit the petitioner to collaterally attack the decision of the Client Security Fund Board of Trustees regarding whether to reimburse losses occasioned by the misconduct of the petitioner. This provision shall apply to petitions for reinstatement submitted by attorneys who were disciplined after the effective date of this amendment.

g. reimbursement of all sums which the Disciplinary Hearing Commission found in the order of suspension were misappropriated by the petitioner and which have not been reimbursed by the Client Security Fund.

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 October 29, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of November, 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 2nd day of December 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 2nd day of December, 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 PROFESSIONAL CORPORATIONS TO THE PROFESSIONAL ORGANIZATIONS COMMITTEE

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 annual meeting on October 29, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that Article VI, Section 5, h. be amended by striking the words "Committee on Professional Corporations" and substituting in lieu thereof the words "Professional Organizations Committee," so that the entire subsection shall read as follows:

> h. The Professional Organizations Committee of not less than five nor more than seven Councillors to be 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 October 29, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of November, 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 2nd day of December 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 2nd day of December, 1993.

s/ PARKER, J.
For the Court

AMENDMENTS TO THE REGULATIONS FOR PROFESSIONAL CORPORATIONS PRACTICING LAW

The following amendments to the rules, regulations and certificate of organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its annual meeting on October 29, 1993.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Regulations for Professional Corporations Practicing Law be stricken in their entirety and the following Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law be inserted in lieu thereof:

REGULATIONS FOR PROFESSIONAL CORPORATIONS AND PROFESSIONAL LIMITED LIABILITY COMPANIES PRACTICING LAW

I.

AUTHORITY, SCOPE AND DEFINITIONS

1.1 **Authority.** Chapter 55B of the General Statutes of North Carolina, being "The Professional Corporation Act," particularly Section 55B-12, and Chapter 57C, being the "North Carolina Limited Liability Company Act," particularly Section 57C-2-01(c), authorizes the Council of the North Carolina State Bar to adopt regulations for professional corporations and professional limited liability companies practicing law. These regulations are adopted by the Council pursuant to that authority.

1.2 **Statutory Law.** These regulations only supplement the basic statutory law governing professional corporations (Chapter 55B) and professional limited liability companies (Chapter 57C) and shall be interpreted in harmony with those statutes and with other statutes and laws governing corporations and limited liability companies generally.

1.3 **Definitions.** All terms used in these regulations shall have the meanings set forth below or shall be as defined in The Professional Corporation Act or the North Carolina Limited Liability Company Act as appropriate:

(i) "Council" shall mean the Council of the North Carolina State Bar.

(ii) "Licensee" shall mean any natural person who is duly licensed to practice law in North Carolina.

(iii) "Professional limited liability company or companies" shall mean any professional limited liability company or com-

panies organized for the purpose of practicing law in North Carolina.

(iv) "Professional corporations" shall mean any professional corporation or corporations organized for the purpose of practicing law in North Carolina.

(v) "Secretary" shall mean the Secretary of the North Carolina State Bar.

II.

NAME OF PROFESSIONAL CORPORATION OR PROFESSIONAL LIMITED LIABILITY COMPANY

2.1 **Name of Professional Corporation.** The name of every professional corporation shall contain the surname of one or more of its shareholders or of one or more persons who were associated with its immediate corporate, individual, partnership or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Paragraphs 2.1.1 and 2.1.5. The following additional requirements shall apply to the name of a professional corporation:

2.1.1 **Corporate Designation.** The name of a professional corporation shall end with the following words:

(i) "Professional Association" or the abbreviation "P.A."; or

(ii) "Professional Corporation" or the abbreviation "P.C."

2.1.2 **Deceased or Retired Shareholder.** The surname of any shareholder of a professional corporation may be retained in the corporate name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her shares of stock in the professional corporation.

2.1.3 **Disqualified Shareholder.** If a shareholder in a professional corporation whose surname appears in the corporate name becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder, and such shareholder shall promptly dispose of his or her shares of stock in the corporation.

2.1.4 **Shareholder Becomes Judge or Official.** If a shareholder in a professional corporation whose surname ap-

pears in the corporate name becomes a judge or other adjudicatory officer or holds any other office which disqualifies such shareholder to practice law, the name of the professional corporation shall be promptly changed to eliminate the name of such shareholder and such person shall promptly dispose of his or her shares of stock in the corporation.

2.1.5 **Trade Name Allowed.** A professional corporation shall not use any name other than its corporate name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.

2.2 **Name of Professional Limited Liability Company.** The name of every professional limited liability company shall contain the surname of one or more of its members or one or more persons who were associated with its immediate corporate, individual, partnership or professional limited liability company predecessor in the practice of law and shall not contain any other name, word or character (other than punctuation marks and conjunctions) except as required or permitted by Paragraphs 2.2.1 and 2.2.5. The following requirements shall apply to the name of a professional limited liability company:

2.2.1 **Professional Limited Liability Company Designation.** The name of a professional limited liability company shall end with the words "Professional Limited Liability Company" or the abbreviation "P.L.L.C."

2.2.2 **Deceased or Retired Member.** The surname of any member of a professional limited liability company may be retained in the limited liability company name after such person's death, retirement or inactivity due to age or disability, even though such person may have disposed of his or her interest in the professional limited liability company.

2.2.3 **Disqualified Member.** If a member of a professional limited liability company whose surname appears in the name of such professional limited liability company becomes a "disqualified person" as that term is defined in the Professional Corporation Act, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member, and such member shall promptly dispose of his or her interest in the professional limited liability company.

2.2.4 **Member Becomes Judge or Official.** If a member of a professional limited liability company whose surname appears in the professional limited liability company name becomes

a judge or other adjudicatory official or holds any other office which disqualifies such person to practice law, the name of the professional limited liability company shall be promptly changed to eliminate the name of such member and such person shall promptly dispose of his or her interest in the professional limited liability company.

2.2.5 **Trade Name Allowed.** A professional limited liability company shall not use any name other than its limited liability company name, except to the extent a trade name or other name is required or permitted by statute, rule of court or the Rules of Professional Conduct.

III.

REGISTRATION WITH THE NORTH CAROLINA STATE BAR

3.1 **Registration of Professional Corporation.** At least one of the incorporators of a professional corporation shall be an attorney at law duly licensed to practice in North Carolina. The incorporators shall comply with the following requirements for registration of a professional corporation with the North Carolina State Bar:

3.1.1 **Filing with State Bar.** Prior to filing the articles of incorporation with the Secretary of State, the incorporators of a professional corporation shall file the following with the Secretary of the North Carolina State Bar:

(i) the original articles of incorporation;

(ii) an additional executed copy of the articles of incorporation;

(iii) a conformed copy of the articles of incorporation;

(iv) a registration fee of fifty dollars ($50.00);

(v) an Application for Certificate of Registration for a Professional Corporation (see Section VI, Form PC-1) verified by all incorporators, setting forth (a) the names and addresses of each person who will be an original shareholder or an employee who will practice law for the corporation; (b) the name and address of at least one person who is an incorporator; (c) the name and address of at least one person who will be an original director; and (d) the name and address of at least one person who will be an original officer, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the corporation will be conducted in compliance with The Professional Corporation Act and these regulations; and

(vi) a Certification for Professional Corporation by Council of the North Carolina State Bar (see Section VI, Form PC-2), a copy of which shall be attached to the original, the executed copy and the conformed copy of the articles of incorporation, to be executed by the Secretary in accordance with Paragraph 3.1.2 below.

3.1.2 **Certificates Issued by Secretary and Council.** The Secretary shall review the articles of incorporation for compliance with the laws relating to professional corporations and these regulations. If the Secretary determines that all persons who will be original shareholders are duly licensed to practice law in North Carolina and that the articles of incorporation conform with the laws relating to professional corporations and these regulations, the Secretary shall take the following actions:

(i) execute the Certification for Professional Corporation by Council of the North Carolina State Bar (Form PC-2) attached to the original, the executed copy and the conformed copy of the articles of incorporation and return the original and the conformed copies of the articles of incorporation, together with the attached Certificates, to the incorporators for filing with the Secretary of State;

(ii) retain the executed copy of the articles of incorporation together with the Application (Form PC-1) and the Certification of Council (Form PC-2) in the office of the North Carolina State Bar as a permanent record;

(iii) issue a Certificate of Registration for a Professional Corporation (see Section VI, Form PC-3) to the professional corporation to become effective upon the effective date of the articles of incorporation after said articles are filed with the Secretary of State.

3.2 **Registration of a Professional Limited Liability Company.** At least one of the persons executing the articles of organization of a professional limited liability company shall be an attorney at law duly licensed to practice law in North Carolina. The persons executing the articles of organization shall comply with the following requirements for registration with the North Carolina State Bar:

3.2.1 **Filing with State Bar.** Prior to filing the articles of organization with the Secretary of State, the persons executing the articles of organization of a professional limited liability company shall file the following with the Secretary of the North Carolina State Bar:

(i) the original articles of organization;

(ii) an additional executed copy of the articles of organization;

(iii) a conformed copy of the articles of organization;

(iv) a registration fee of fifty dollars ($50.00);

(v) an Application for Certificate of Registration for a Professional Limited Liability Company (see Section VI, Form PLLC-1) verified by all of the persons executing the articles of organization, setting forth (a) the names and addresses of each original member or employee who will practice law for the professional limited liability company; (b) the name and address of at least one person executing the articles of organization; and (c) the name and address of at least one person who will be an original manager, and stating that all such persons are duly licensed to practice law in North Carolina, and representing that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and these regulations; and

(vi) a Certification for Professional Limited Liability Company by Council of the North Carolina State Bar (see Section VI, Form PLLC-2), a copy of which shall be attached to the original, the executed copy and the conformed copy of the articles of organization, to be executed by the Secretary in accordance with Paragraph 3.2.2 below.

3.2.2 **Certificates Issued by the Secretary.** The secretary shall review the articles of organization for compliance with the laws relating to professional limited liability companies and these regulations. If the Secretary determines that all of the persons who will be original members are duly licensed to practice law in North Carolina and the articles of organization conform with the laws relating to professional limited liability companies and these regulations, the Secretary shall take the following actions:

(i) execute the Certification for Professional Limited Liability Company by Council of the North Carolina State Bar (Form PLLC-2) attached to the original, the executed copy and the conformed copy of the articles of organization and return the original and the conformed copies of the articles of organization, together with the attached Certificates to the persons executing the articles of organization for filing with the Secretary of State;

(ii) retain the executed copy of the articles of organization together with the Application (Form PLLC-1) and the Certification (Form PLLC-2) in the office of the North Carolina State Bar as a permanent record;

(iii) issue a Certificate of Registration for a Professional Limited Liability Company (see Section VI, Form PLLC-3) to the professional limited liability company to become effective upon the effective date of the articles of organization after said articles are filed with the Secretary of State.

3.3 **Refund of Registration Fee.** If the Secretary is unable to make the findings required by Paragraphs 3.1.2 or 3.2.2, the Secretary shall refund the fifty dollar ($50.00) registration fee.

3.4 **Expiration of Certificate of Registration.** The initial Certificate of Registration for either a professional corporation or a professional limited liability company shall remain effective through June 30 following the date of registration.

3.5 **Renewal of Certificate of Registration.** The Certificate of Registration for either a professional corporation or a professional limited liability company shall be renewed on or before July 1 of each year, upon the following conditions:

3.5.1 **Renewal of Certificate of Registration for Professional Corporation.** A professional corporation shall submit an Application for Renewal of Certificate of Registration for a Professional Corporation (see Section VI, Form PC-4) to the Secretary listing the names and addresses of all of the shareholders and employees of the corporation who practice law for the professional corporation and the name and address of at least one officer and one director of the professional corporation, and certifying that all such persons are duly licensed to practice law in the State of North Carolina and representing that the corporation has complied with these regulations and the provisions of The Professional Corporation Act. Upon a finding by the Secretary that the representations in the Application are correct, the Secretary shall renew the Certificate of Registration by making a notation in the records of the North Carolina State Bar.

3.5.2 **Renewal of Certificate of Registration for a Professional Limited Liability Company.** A professional limited liability company shall submit an Application for Renewal of Certificate of Registration for a Professional Limited Liability Company (see Section VI, Form PLLC-4) to the Secretary listing the

names and addresses of all of the members and employees of the professional limited liability company who practice law, and the name and address of at least one manager, and certifying that all such persons are duly licensed to practice law in the State of North Carolina, and representing that the professional limited liability company has complied with these regulations and the provisions of the North Carolina Limited Liability Company Act. Upon a finding by the Secretary that the representations in the Application are correct, the Secretary shall renew the Certificate of Registration by making a notation in the records of the North Carolina State Bar.

3.5.3 **Renewal Fee.** An Application for Renewal of a Certificate of Registration for either a professional corporation or a professional limited liability company shall be accompanied by a renewal fee of twenty-five dollars ($25.00).

3.5.4 **Refund of Renewal Fee.** If the Secretary is unable to make the findings required by Paragraphs 3.5.1 or 3.5.2, the Secretary shall refund the twenty-five dollar ($25.00) registration fee.

3.5.4 **Failure to Apply for Renewal of Certificate of Registration.** In the event a professional corporation or a professional limited liability company shall fail to submit the appropriate Application for Renewal of Certificate of Registration, together with the renewal fee, to the North Carolina State Bar within thirty (30) days following the expiration date of its Certificate of Registration, the Secretary shall send a notice to show cause letter to the professional corporation or the professional limited liability company advising said professional corporation or professional limited liability company of the delinquency and requiring said professional corporation or professional limited liability company to either submit the appropriate Application for Renewal of Certificate of Registration, together with the renewal fee, to the North Carolina State Bar within thirty (30) days or to show cause for failure to do so. Failure to submit the Application and the renewal fee within said thirty days, or to show cause within said time period, shall result in the suspension of the Certificate of Registration for the delinquent professional corporation or professional limited liability company and the issuance of a notification to the Secretary of State of the suspension of said Certificate of Registration.

3.5.5 **Reinstatement of Suspended Certificate of Registration.** Upon (i) the submission to the North Carolina State Bar of

the appropriate Application for Renewal of Certificate of Registration, together with all past due renewal fees; and (ii) a finding by the Secretary that the representations in the Application are correct, a suspended Certificate of Registration of a professional corporation or professional limited liability company shall be reinstated by the Secretary by making a notation in the records of the North Carolina State Bar.

IV.

MANAGEMENT AND FINANCIAL MATTERS

4.1 **Management.** At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be attorneys at law duly licensed to practice in North Carolina.

4.2 **Authority Over Professional Matters.** No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services.

4.3 **No Income to Disqualified Person.** The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is a "disqualified person," as such term is defined in G.S. 55B-2(1), or after a shareholder or a member becomes a judge, other adjudicatory officer or the holder of any other office, as specified in Paragraphs 2.1.4 and 2.2.4, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

4.4. **Stock of a Professional Corporation.** A professional corporation may acquire and hold its own stock.

4.5 **Acquisition of Shares of Deceased or Disqualified Shareholder.** Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under The Professional Corporation Act or under these regulations.

4.6 **Stock Certificate Legend.** There shall be prominently displayed on the face of all certificates of stock in a professional

corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of The Professional Corporation Act and these regulations.

4.7 **Transfer of Stock of Professional Corporation.** When stock of a professional corporation is transferred, the professional corporation shall request that the Secretary issue a Stock Transfer Certificate (see Section VI, Form PC-5) as required by G.S. 55B-6. The Secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars ($2.00) for each transferee listed on the Stock Transfer Certificate.

4.8 **Stock Register of Professional Corporation.** The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the Secretary or his delegate during business hours at the principal office of the corporation.

V.

GENERAL AND ADMINISTRATIVE PROVISIONS

5.1 **Administration of Regulations.** These regulations shall be administered by the Secretary, subject to the review and supervision of the Council. The Council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the Secretary to bring to the attention of the Council or its appropriate committee any violation of the law or of these regulations.

5.2 **Appeal to Council.** If the Secretary shall decline to execute any certificate required by Paragraphs 3.1.2, 3.2.2 or 4.7, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the Council review such action. Upon receipt of such a request, the Council shall provide a formal hearing for the aggrieved party through a committee of its members.

5.3 **Articles of Amendment, Merger, and Dissolution.** A copy of the following documents, duly certified by the Secretary of State, shall be filed with the Secretary within ten (10) days after filing with the Secretary of State:

(i) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(ii) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(iii) all articles of dissolution dissolving a professional corporation or a professional limited liability company; and

(iv) any other documents filed with the Secretary of State changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

5.4 **Filing Fee.** Except as otherwise provided in these regulations all reports or papers required by law or by these regulations to be filed with the Secretary shall be accompanied by a filing fee of two dollars ($2.00).

5.5 **Accounting for Filing Fees.** All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the Secretary to its account, and such account shall be separately stated on all financial reports made by the Secretary to the Council and on all financial reports made by the Council.

5.6 **Records of State Bar.** The Secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

5.7 **Additional Information.** A professional corporation or a professional limited liability company shall furnish to the Secretary such information and documents relating to the administration of these regulations as the Secretary or the Council may reasonably request.

VI.

FORMS

Form PC-1:

Application for Certificate of Registration for a Professional Corporation

The undersigned, being all of the incorporators of _____, a professional corporation to be incorporated under the laws of the

State of North Carolina for the purpose of practicing law, hereby certify to the Council of the North Carolina State Bar:

1. At least one person who is an incorporator, at least one person who will be an original officer, and at least one person who will be an original director, and all persons who, to the best knowledge and belief of the undersigned, will be original shareholders and employees who will practice law for said professional corporation are duly licensed to practice law in the State of North Carolina. The names and addresses of such persons are:

Name and Position (incorporator, officer, director, shareholder, employee)	Address
_____	_____
_____	_____
_____	_____

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the State of North Carolina.

3. The undersigned represent that the professional corporation will be conducted in compliance with The Professional Corporation Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional corporation's articles of incorporation after said articles are filed with the Secretary of State.

5. Attached hereto is the registration fee of fifty dollars ($50.00).

This the _____ day of _____, 19____.

_____
Incorporator

_____
Incorporator

_____
Incorporator
[Signatures of all incorporators.]

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, _____, _____, _____, and _____, being all of the incorporators of _____, a professional corporation, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this __ day of _____, 19____.

_____
Notary Public

My commission expires:

_____

Form PC-2:

Certification for Professional Corporation by Council of the North Carolina State Bar

The incorporators of _____, a professional corporation, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original owners of said professional corporation's shares.

Based upon that certification and my examination of the roll of attorneys listed to practice law in the State of North Carolina, I hereby certify that each person who will be an original owner of the shares of stock of said professional corporation is duly licensed to practice law in the State of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this ____ day _____, 19____.

_____
Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and must be attached to the original Articles of Incorporation when filed with the Secretary of State. See Regulation 3.1.2.]

Form PC-3:

Certificate of Registration for a Professional Corporation

It appears that _____, a professional corporation, has met all of the requirements of G.S. 55B-4, G.S. 55B-6 and the Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law of the North Carolina State Bar.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Corporation pursuant to the provisions of G.S. 55B-10 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of incorporation of said professional corporation after said articles are filed with the Secretary of State and expires on June 30, 19____.

This the ____ day of _____, 19____.

_____

Secretary of the North Carolina State Bar

Form PC-4:

Application for Renewal of Certificate of Registration for Professional Corporation

Application is hereby made for renewal of the Certificate of Registration for Professional Corporation of _____, a professional corporation.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the officers and one of the directors, and all of the shareholders and employees of said professional corporation who practice law for said professional corporation are duly licensed to practice law in the State of North Carolina. The names and addresses of such persons are:

Name and Position (incorporator, officer, director, shareholder, employee)	Address
_____	_____
_____	_____
_____	_____

2. At all times since the issuance of its Certificate of Registration for Professional Corporation, said professional corporation has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with The Professional Corporations Act.

3. Attached hereto is the renewal fee of twenty-five dollars ($25.00).

This the ____ day of _____, 19____.

_____
(Professional Corporation)

By _____
President (or Chief Executive)

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, being the _____ of _____, a professional corporation, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Corporation and that the statements contained therein are true.

Witness my hand and notarial seal, this __ day of ____, 19____.

_____
Notary Public

My commission expires:

_____

Form PC-5:

North Carolina State Bar
Stock Transfer Certificate

I hereby certify that _____
(transferee)
is duly licensed to practice law in the State of North Carolina and as of this date may be a transferee of shares of stock in a professional corporation formed to practice law in the State of North Carolina.

This certificate is executed under the authority of the Council of the North Carolina State Bar, this __ day of _____, 19__.

_____

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-6 and must be attached to the transferee's stock certificate. See Regulation 4.7.]

Form PLLC-1:

Application for Certificate of Registration for a Professional Limited Liability Company

The undersigned, being all of the persons executing the articles of organization of _____, a professional limited liability company to be organized under the laws of the State of North Carolina for the purpose of practicing law, hereby certify to the Council of The North Carolina State Bar:

1. At least one person executing the articles of organization, at least one person who will be an original manager, and all persons who, to the best knowledge and belief of the undersigned, will be original members and employees who will practice law for said professional limited liability company are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

Name and Position (incorporator, officer, director, shareholder, employee)	Address

2. To the best of our knowledge and belief, all of the persons listed above are duly licensed to practice law in the State of North Carolina.

3. The undersigned represent that the professional limited liability company will be conducted in compliance with the North Carolina Limited Liability Company Act and with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

4. Application is hereby made for a Certificate of Registration to be effective upon the effective date of the professional limited liability company's articles of organization after said articles are filed with the Secretary of State.

5. Attached hereto is the registration fee of fifty dollars ($50.00).

This the ____ day of _____, 19____.

_____

_____

_____

[Signatures of all persons executing articles of organization.]

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, _____, _____, and _____, being all of the persons executing the articles of organization of _____, a professional limited liability company, personally appeared before me this day and stated that they have read the foregoing Application for Certificate of Registration for a Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this __ day of ____, 19____.

_____

Notary Public

My commission expires:

_____

Form PLLC-2:

Certification for Professional Limited Liability Company by Council of the North Carolina State Bar

All of the persons executing the articles of organization of _____, a professional limited liability company, have certified to the Council of the North Carolina State Bar the names and addresses of all persons who will be original members of said professional limited liability company.

Based upon that certification and my examination of the roll of attorneys licensed to practice law in the State of North Carolina, I hereby certify that each person who will be an original member of said professional limited liability company is duly licensed to practice law in the State of North Carolina.

This certificate is executed under the authority of the Council of North Carolina State Bar, this ____ day of _____, 19____.

_____

Secretary of the North Carolina State Bar

[This certificate is required by G.S. 55B-4(4) and G.S. 57C-2-01 and must be attached to the original Articles of Organization when filed with the Secretary of State. See Regulation 3.2.2.]

Form PLLC-3:

Certificate of Registration for a
Professional Limited Liability Company

It appears that _____, a professional limited liability company, has met all of the requirements of G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

By the authority of the Council of the North Carolina State Bar, I hereby issue this Certificate of Registration for a Professional Limited Liability Company pursuant to the provisions of G.S. 55B-10, G.S. 57C-2-01 and the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law.

This registration is effective upon the effective date of the articles of organization of said professional limited liability company after said articles are filed with the Secretary of State and expires on June 30, 19____.

This the ____ day of _____, 19____.

_____

Secretary of the North Carolina State Bar

Form PLLC-4:

Application for Renewal of Certificate of Registration
for Professional Limited Liability Company

Application is hereby made for renewal of the Certificate of Registration for Professional Limited Liability Company of _____, a professional limited liability company.

In support of this application, the undersigned hereby certify to the Council of the North Carolina State Bar:

1. At least one of the managers, and all of the members and employees of said professional limited liability company who practice law for said professional limited liability company are duly licensed to practice law in the State of North Carolina. The names and addresses of all such persons are:

Name and Position (manager, member, employee)	Address
_____	_____
_____	_____
_____	_____

2. At all times since the issuance of its Certificate of Registration for Professional Limited Liability Company, said professional limited liability company has complied with the North Carolina State Bar's Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law and with the provisions of the North Carolina Limited Liability Company Act.

3. Attached hereto is the renewal fee of twenty-five dollars ($25.00).

This the ____ day of _____, 19____.

_____
(Professional Limited Liability Company)

By _____
Manager

NORTH CAROLINA
_____ COUNTY

I hereby certify that _____, being a manager of _____, a professional limited liability company, personally appeared before me this day and stated that he/she has read the foregoing Application for Renewal of Certificate of Registration for Professional Limited Liability Company and that the statements contained therein are true.

Witness my hand and notarial seal, this __ day of ____, 19____.

_____
Notary Public

My commission expires:

_____

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 October 29, 1993.

Given over my hand and the Seal of the North Carolina State Bar, this the 29th day of November, 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 2nd day of December, 1993.

s/JAMES G. EXUM, JR.
James G. Exum, Chief Justice

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 54 (NCI4th). Judicial review under Administrative Procedure Act generally; jurisdiction

The superior court has only appellate jurisdiction over final decisions of the State Personnel Commission on State employee grievances. **Harding v. N.C. Dept. of Correction**, 414.

APPEAL AND ERROR

§ 48 (NCI4th). Sufficiency of record to show jurisdiction of superior court

The Court of Appeals did not err by vacating the superior court's judgment in a prosecution for publishing unsigned materials about a candidate for public office on the ground that the record on appeal showed that the superior court lacked original subject matter jurisdiction to try these misdemeanor charges on the basis of grand jury indictments. **State v. Petersilie**, 169.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Defendant in a first-degree murder and robbery prosecution waived the issues of whether the trial court erred by excusing a prospective alternate juror upon its own motion and in refusing to allow defendant to rehabilitate that juror where defendant did not object to the excusal for cause and did not make a request to rehabilitate the prospective juror. **State v. Wiggins**, 18.

A defendant in a murder prosecution did not preserve for appellate review the issue of whether the trial judge erred by not declaring a mistrial as a result of the prosecutor's improper closing argument where the defendant did not make a motion for a mistrial. **State v. Ginyard**, 155.

§ 360 (NCI4th). Omission of necessary part of record; search warrants; affidavits

A motion by the State to amend the record on appeal by adding affidavits from the trial judge and the prosecutor was denied. **State v. Gay**, 467.

§ 362 (NCI4th). Omission of necessary part of record; indictment, verdict, and judgment

A statement in the trial transcript by the district attorney informing the court that the misdemeanor charges originated by presentment was insufficient to comply with the requirement of Appellate Rule 9(a)(3)(e) that the record shall contain "copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court." **State v. Petersilie**, 169.

§ 367 (NCI4th). Amendments and additions to record

The Court of Appeals did not err when it denied the State's motion to amend the record on appeal by adding copies of the presentment upon which misdemeanor charges were initiated against defendant to show that the superior court had jurisdiction over the case, but the Supreme Court elects to allow the amendment so that it may reach the substantive issues of the appeal. **State v. Petersilie**, 169.

§ 471 (NCI4th). Discretionary matters generally

While the decision to grant or deny a continuance traditionally rests within the discretion of the trial court, that discretion does not extend to the point of permitting the denial of a continuance that results in a violation of a defendant's right to due process. **State v. Tunstall**, 320.

APPEAL AND ERROR — Continued

§ 504 (NCI4th). Error as harmless or prejudicial; invited error

Any error in the admission of testimony by defendant's psychiatric expert using the legal term of art "duress" and in the incorporation of the expert's testimony into the closing arguments of both defendant and the prosecution was invited error. **State v. Gay**, 467.

ASSAULT AND BATTERY

§ 116 (NCI4th). Submission of lesser degrees of offenses; particular circumstances not requiring submission

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by not instructing on the lesser-included offense of assault with a deadly weapon inflicting serious injury where the evidence of intoxication was insufficient to negate the necessary intent for assault with a deadly weapon with intent to kill inflicting serious injury and all the evidence tended to show a shooting with a deadly weapon with the intent to kill. **State v. Oliver**, 513.

BURGLARY AND UNLAWFUL BREAKINGS

§ 70 (NCI4th). Burglary; constructive breaking

There was sufficient evidence of burglary where the evidence supports constructive breaking in that defendant induced the occupant to open the door by knocking at the door under the pretense of business. **State v. Oliver**, 513.

§ 99 (NCI4th). Burglary; sufficiency of evidence; consent

There was no error in a prosecution for murder and burglary in the court's reinstructions on breaking and entering where the circumstances under which defendant, armed with a pistol, gained entry at 2:30 in the morning were sufficient to negate any issue of whether the victim was authorized to or granted consent to defendant's entry. **State v. Oliver**, 513.

§ 151 (NCI4th). Instructions on felonious intent

The trial court did not err by refusing to give defendant's requested instruction that the jury could consider defendant's mental ability in connection with her ability to form "the specific intent to commit burglary" since the specific intent element of burglary relates solely to the intent to commit a felony within the dwelling place. **State v. Gay**, 467.

§ 153 (NCI4th). Instructions on defenses to felonious intent

Assuming that an instruction on diminished capacity as a defense to burglary would have been appropriate in light of the evidence presented, the trial court sufficiently instructed the jury on this defense when it gave a diminished capacity instruction in relation to the charge of the intended felony of first-degree murder. **State v. Gay**, 467.

§ 165 (NCI4th). Instructions on lesser included offenses not required

The trial court did not err in a first-degree burglary prosecution by failing to submit the lesser included offense of felonious breaking or entering where all of the evidence showed a "constructive" breaking and entering during the nighttime into an apartment with people sleeping inside with the intent "to rob the Mexicans." **State v. Oliver**, 513.

CRIMINAL LAW — Continued

was required under G.S. 15-169 and 15-170 to instruct the jury as to those lesser included crimes. **State Collins**, 54.

A defendant may not decline an opportunity for instructions on a lesser included offense and then claim on appeal that failure to instruct on the lesser offense was error. **State v. Gay**, 467.

§ 868 (NCI4th). Repetition of instructions relating to other features of case

The trial court did not err in a first-degree murder prosecution by not reinstructing the jury on voluntary intoxication when the jury asked the court to review the instructions on first-degree murder in the deaths of the two victims. **State v. McHone**, 627.

§ 940 (NCI4th). Motion for appropriate relief; notice of appeal

The trial court correctly denied a murder defendant's motion for appropriate relief alleging ineffective assistance of counsel where defendant was convicted on 26 March, filed notice of appeal on that same day, and filed the motion on 10 August. **State v. Ginyard**, 155.

§ 951 (NCI4th). Motion for appropriate relief and other post-trial relief; hearing generally

A first-degree murder defendant was not prejudiced by the court's refusal to rule on his motions for appropriate relief, mistrial and dismissal prior to sentencing where the jury recommended that defendant be sentenced to life imprisonment, the least severe sentence defendant could have received. **State v. Howard**, 602.

§ 959 (NCI4th). Grounds for motion for appropriate relief; newly discovered evidence

The trial court did not abuse its discretion in denying defendant's motion for appropriate relief based on newly discovered evidence in a murder prosecution where the trial court concluded that the information was known and available to defendant at the time of trial. **State v. Wiggins**, 18.

§ 1158 (NCI4th). Aggravating factors under Fair Sentencing Act; use of or armed with deadly weapon; same evidence used to support more than one factor

The trial court did not err when sentencing defendant for first-degree burglary by using the fact that defendant was armed with a deadly weapon at the time of the breaking and entering to aggravate the sentence; the North Carolina Supreme Court has consistently held that possession of a deadly weapon may be used to aggravate the sentence for a burglary conviction when the use of the same weapon constitutes a separate offense. **State v. Oliver**, 513.

§ 1193 (NCI4th). Aggravating factors under the Fair Sentencing Act; prior convictions; matters on appeal

The trial court did not err when sentencing defendant for first-degree burglary and assault with a deadly weapon with intent to kill inflicting serious injury by finding the aggravating factor of prior convictions where one of those convictions was on appeal but defendant failed to object to the use of this conviction on the ground that it was on appeal and stipulated to the validity of his prior conviction. **State v. Oliver**, 513.

CRIMINAL LAW — Continued

§ 1199 (NCI4th). Mitigating factors under Fair Sentencing Act; applicability of jury's findings in sentencing phase of capital case

The trial court erred by adopting the "catchall" mitigating circumstance found by the jury for the capital crime of first-degree murder when imposing sentences for kidnapping, aggravated assault and armed robbery without indicating in the record its conclusion as to exactly what the circumstance denoted. **State v. Yelverton**, 532.

§ 1318 (NCI4th). Capital sentencing; instructions generally

The trial court did not err by instructing the jury that the imposition of the death penalty would be proper if the State proved beyond a reasonable doubt, inter alia, that "the defendant himself killed the victim, or intended to kill the victim, or was a major participant in the underlying felony and exhibited reckless indifference to human life." **State v. McCollum**, 208.

§ 1333 (NCI4th). Capital cases; consideration of aggravating circumstances generally

The trial court did not err in submitting as aggravating circumstances for first-degree murder that the offense was (1) especially heinous, atrocious, or cruel, (2) committed during a burglary, and (3) part of a course of conduct where there was separate evidence to support each of these circumstances, but the court should have instructed the jury in such a way as to ensure that jurors would not use the same evidence to find more than one aggravating circumstance. **State v. Gay**, 467.

§ 1338 (NCI4th). Aggravating circumstances; avoiding arrest or effecting escape

The trial court properly submitted the aggravating circumstance that a first-degree murder was committed for the purpose of avoiding or preventing a lawful arrest where defendant's actions showed that he adopted his companion's statement that they had "to kill her to keep her from telling the cops on us." **State v. McCollum**, 208.

There was no merit to defendant's contention that since the jury failed to convict him of first-degree murder under a theory of premeditation and deliberation, the jury could not reasonably find that he acted intentionally and with premeditation during the sentencing phase and thus could not find the aggravating circumstance that he participated in the killing to avoid arrest. **Ibid.**

§ 1343 (NCI4th). Aggravating circumstances; particularly heinous, atrocious, or cruel offense; instructions

The trial court did not err by instructing the jury in a capital sentencing proceeding that it could find the especially heinous, atrocious or cruel aggravating circumstance if "this murder" was especially heinous, atrocious or cruel rather than requiring the jury to find that this aggravating circumstance was supported by the defendant's own conduct where defendant was an active participant in the murder. **State v. McCollum**, 208.

§ 1355 (NCI4th). Procedure for determining sentencing in capital cases; mitigating circumstances; lack of prior criminal activity

The trial court did not err in a first-degree murder prosecution by not submitting the statutory mitigating circumstance of no significant history of prior criminal activity where no rational juror could have found that defendant had no significant history of prior criminal activity. **State v. McHone**, 627.

EVIDENCE AND WITNESSES — Continued

§ 315 (NCI4th). Admissibility of other crimes, wrongs, or acts; rape and other sex offenses generally

Evidence of defendant's rape of a second victim a few hours after his rape of the victim in this case was admissible to show identity, motive and intent, and the probative value of such evidence was overwhelming and not outweighed by the danger of unfair prejudice. **State v. Yelverton**, 532.

§ 351 (NCI4th). Admissibility of other crimes, wrongs, or acts to show motive, reason, or purpose; homicide offenses generally

The trial court did not err in a murder prosecution by admitting evidence that defendant sold cocaine on the night of the shooting. **State v. Cook**, 564.

§ 653 (NCI4th). Order ruling on motion to suppress

The trial court's order denying defendant's motion to suppress his statements to a police officer filed fifty-seven days after defendant gave notice of appeal of his conviction was not improperly entered when the court was functus officio where the court held a hearing on the motion prior to trial and the judge in open court stated that the motion to suppress was denied. **State v. Palmer**, 104.

§ 668 (NCI4th). "Plain error" rule in criminal cases

There was no plain error in a first-degree murder prosecution where defendant did not object at trial to the admission of certain testimony by an expert in fiber identification and comparison. **State v. Potts**, 575.

§ 725 (NCI4th). Prejudicial error in the admission of evidence; other offenses committed by defendant generally

There was prejudicial error in a first-degree murder prosecution where the court permitted the State to cross-examine defendant about prior offenses. **State v. Lynch**, 402.

§ 758 (NCI4th). Cure of prejudicial error by admission of other evidence; statements of opinion or conclusion

There was no prejudice in a murder prosecution from the testimony of a guard that a defendant had said something which indicated that he was planning to shoot a woman where the guard could not remember what defendant had said but there was other strong and unequivocal evidence of direct threats against a woman by defendant while he was in her presence and armed. **State v. Harvell**, 356.

§ 876 (NCI4th). Statements not offered to prove truth of matter asserted; to show state of mind of victim

A hearsay statement by decedent, defendant's mother, that she would not give defendant money to bail him out of an embezzlement charge was admissible under the state of mind exception to the hearsay rule and was relevant to show a motive by defendant to kill his mother. **State v. Palmer**, 104.

Testimony that a murder victim told a friend approximately a week before she was killed that she intended to end her relationship with defendant when he returned from a trip was admissible as evidence of the victim's mental or emotional condition at the time she made the statement. **State v. Shoemaker**, 252.

§ 906 (NCI4th). Particular evidence as hearsay or not; testimony as to what someone else had said

Testimony by two candidates for public office as to the actual opinions expressed by certain local residents out of court concerning whether unsigned materials

EVIDENCE AND WITNESSES — Continued

were derogatory or hurtful to their chances of being elected was admitted for the truth of what was said and was inadmissible hearsay. **State v. Petersilie**, 169.

§ 907 (NCI4th). Evidence as hearsay or not; testimony regarding conclusions based on what someone had told witness

Testimony from an officer that a witness who could not be located could not add anything was not hearsay in that the testimony did not repeat, summarize, or intimate any oral or written assertions made during the investigatory interview and merely contained the officer's conclusion based on his interview. **State v. Oliver**, 513.

§ 959 (NCI4th). Exceptions to hearsay rule; state of mind

The trial court did not err in a first-degree murder prosecution by admitting statements by one of the victims regarding threats made by defendant to kill her where the conversations between the victim and the three witnesses related directly to the victim's fear of defendant and were admissible to show the victim's then existing state of mind at the time she made the statements. **State v. McHone**, 627.

§ 1154 (NCI4th). Acts and declarations of companions, codefendants, and co-conspirators; subsequent to crime

There was no prejudice in a murder prosecution from the admission of testimony regarding statements made by a codefendant where the statements were neither made during the conspiracy nor in furtherance of it and did not fall within the coconspirator's exception to the hearsay rule. Furthermore, the evidence against defendant was overwhelming. **State v. Marlow**, 273.

§ 1235 (NCI4th). Custodial interrogation defined

The trial court did not err in a prosecution for first-degree murder and robbery by denying defendant's motion to suppress his statement to an S.B.I. agent where there was nothing to suggest that defendant was in custody or deprived of his freedom of action in any significant way and the totality of the circumstances suggests that defendant's statement to the agent was not involuntary. **State v. Wiggins**, 18.

§ 1249 (NCI4th). Custodial interrogation; warnings as to rights

Defendant waived his right to counsel under the Sixth Amendment to the U.S. Constitution and Art. I, § 23 of the N.C. Constitution when he signed a written waiver of his rights after being given the Miranda warnings even though he was not informed that he was entitled to counsel under the Sixth Amendment and Art. I, § 23 rather than under the Fifth Amendment since adversary judicial proceedings had been commenced against him. **State v. Palmer**, 104.

§ 1263 (NCI4th). Waiver of constitutional rights; form of waiver; express waiver not required

The trial court properly admitted defendant's statements and some boxes where defendant was arrested at a boarding house, informed of his Miranda rights and asked whether he understood those rights; defendant responded that he did but stood mute when asked whether he wished to waive his right to remain silent and whether he wished to waive his right to have counsel present during questioning; someone asked defendant whether anything in the room belonged to him; defendant responded that he owned the boxes on the floor; and defendant responded affirmatively when asked whether he would consent to a search of the boxes. **State v. Williams**, 440.

EVIDENCE AND WITNESSES — Continued

§ 1294 (NCI4th). Waiver of constitutional rights; fraud, deception, or trickery generally

The trial court did not err in a prosecution for murder and armed robbery by admitting into evidence a knife, a pair of gloves, and a rag which had been found in the yard of defendant's house where defendant's girlfriend acted as an agent of the State in talking with defendant about the location of those items in violation of defendant's rights under Miranda and Edwards but the trustworthiness of the physical evidence could not be affected by its admission or exclusion and the deterrent value of the exclusionary rule is satisfied by the exclusion of defendant's statement. **State v. May**, 609.

§ 1341 (NCI4th). Confessions; mental or physical condition

The trial court did not err by failing to exclude from evidence defendant's statements to police officers on the ground that defendant's mental retardation and emotional disabilities prohibited him from knowingly and intelligently waiving his constitutional rights. **State v. McCollum**, 273.

§ 1617 (NCI4th). Audio tape recordings generally

There was no error where a partially inaudible tape recording was admitted and a witness and the prosecutor were allowed to "interpret" the tape recording for the jury. The witness testified to defendant's statements from his own knowledge of the conversation and the prosecutor argued that the tape contained various incriminating statements by defendant. **State v. Williams**, 440.

§ 1618 (NCI4th). Audio tape recordings; effect of tape not being audible

The trial court did not err by admitting a tape recording allegedly containing admissions by defendant where the tape was partially inaudible. A tape recording which is not sufficiently audible cannot be considered competent evidence, but a tape recording should not be excluded merely because parts of it are inaudible if there are other parts that can be heard. **State v. Williams**, 440.

§ 1623 (NCI4th). Audio tape recordings; authentication and foundation; requirements for recordings

The seven-prong test of *State v. Lynch*, 279 N.C. 1, for authentication of tape recordings has been superseded by the authentication requirements of G.S. 8C-1, Rule 901, under which authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. **State v. Williams**, 440.

§ 1686 (NCI4th). Gruesome, inflammatory, or otherwise prejudicial photographs where photographs were not repetitious

The trial court did not abuse its discretion in a murder prosecution by allowing the State to use two photographs showing the victim as found at the crime scene with blood streaked across his face and head to illustrate the testimony of the person who found the body and to illustrate the testimony of the SBI agent who analyzed the crime scene. **State v. Williams**, 440.

§ 1695 (NCI4th). Photographs of homicide victims; decomposed body

A photograph showing a homicide victim's neck and throat during the autopsy was properly admitted to illustrate the medical examiner's testimony as to the cause of death, and two photographs of the victim's body depicting the decomposition process at both the crime scene and at the time of the autopsy were properly

and instructed the jury that the testimony was admitted to show the basis for the treatment which the witness administered to his patient and not to prove the truth of the matters stated. The limiting instruction given was favorable to defendant and, since the record is silent as to a request for a limiting instruction on corroboration, the failure to give such an instruction was not error. **State v. Quarg**, 92.

§ 2479 (NCI4th). Sequestration of witnesses in criminal prosecutions generally

The trial court did not abuse its discretion by denying defendant's request to have her expert mental health witness view a portion of defendant's testimony because a reciprocal sequestration order had been entered. **State v. Gay**, 467.

§ 2510 (NCI4th). Qualifications of witnesses; knowledge acquired from senses; observation

A detective was properly permitted to testify that there was no forced entry into a murder victim's apartment where the detective testified concerning his inspection of the apartment which formed the basis for this conclusion. **State v. Palmer**, 104.

§ 2803 (NCI4th). Leading questions; questions suggesting desired response

Questions asking witnesses about defendant's emotional state or demeanor on the night of a shooting were not leading because they did not suggest a desired response. **State v. Shoemaker**, 252.

§ 2807 (NCI4th). Leading questions; when allowed generally

There was no abuse of discretion in a prosecution for murder, robbery, and burglary where the prosecutor was allowed to lead a witness on direct examination because the testimony related to equivalent testimony that was introduced earlier in the trial. **State v. Marlow**, 273.

§ 2916 (NCI4th). Impeachment of credibility; cross-examination; scope and extent

Details of defendant's prior convictions were not admissible in a murder prosecution where the State contended that the governing rule is G.S. 8C-1, Rule 611(b) rather than 609(a) because the evidence arose during cross-examination rather than on direct. Rule 611(b) neither stands alone nor preempts other rules of evidence. **State v. Lynch**, 402.

§ 2983 (NCI4th). Basis for impeachment; conviction of crime generally

The trial court erred in a first-degree murder trial by allowing the district attorney to exceed the scope of the allowable inquiry in cross-examining defendant about prior convictions. **State v. Lynch**, 402.

§ 3019 (NCI4th). Basis for impeachment; accusation, arrest, or prosecution when defendant "opens door"

A murder defendant did not open the door to cross-examination about prior offenses with his brief summary of his criminal record where his summary was accurate and complete and he did not use it to create inferences favorable to himself. **State v. Lynch**, 402.

§ 3106 (NCI4th). Corroboration; inclusion of new facts

An SBI agent's testimony was properly admitted for the purpose of corroborating defendant's ex-wife's earlier testimony about a gun owned by defendant where

HOMICIDE — Continued

§ 136 (NCI4th). Sufficiency of indictment to support convictions or pleas of other crimes

There was no plain error in a murder prosecution in the failure to instruct on the lesser included offense of felonious assault where there was evidence that defendant had shot the victim but not caused his death but defendant had been charged by a short-form indictment. **State v. Collins**, 54.

§ 199 (NCI4th). Sufficiency of evidence that death resulted from injuries inflicted by defendant generally

The State's evidence was sufficient to show that defendant's attack on the victim with a mop handle was the proximate cause of the victim's death from a heart attack so as to support his conviction of felony murder even though injuries received by the victim would not have been fatal to a person in good health. **State v. Yelverton**, 532.

§ 226 (NCI4th). Evidence of identity linking defendant to crime sufficient

There was sufficient circumstantial evidence for the jury to find that defendant was the perpetrator of a first-degree murder of the woman with whom he was living. **State v. Shoemaker**, 252.

§ 230 (NCI4th). Sufficiency of evidence of first-degree murder in general

There was sufficient evidence of first-degree murder to withstand defendant's motion to dismiss and take the case to the jury. **State v. Bryant**, 333.

§ 244 (NCI4th). Sufficiency of evidence; malice, premeditation, and deliberation; intent to kill; generally

The evidence was clearly sufficient to support a conclusion that a murder was premeditated and deliberate where defendant carried a knife with him during an attempted safecracking, struck the victim numerous times with a heavy object, causing at least three lethal injuries, some of the lethal blows may have been inflicted while the victim was lying helpless on the ground, and there was no evidence to show that defendant was provoked. **State v. Williams**, 440.

§ 250 (NCI4th). First-degree murder; malice, premeditation, and deliberation; prior altercations, threats, and the like, along with other evidence

The State's evidence, including testimony that defendant and the victim had previously experienced ill will resulting from an ongoing love triangle involving them and a female and that defendant had repeatedly threatened the victim's life, was sufficient for the jury to find that defendant was the perpetrator of the killing of the victim and that he acted with premeditation and deliberation. **State v. Barnes**, 67.

The State's evidence, including a note written by the victim on the date of her death indicating that defendant had pulled a gun on her and threatened her life, was sufficient to take the issue of premeditation and deliberation to the jury in a first-degree murder prosecution. **State v. Shoemaker**, 252.

§ 254 (NCI4th). Malice, premeditation, and deliberation; intent to kill; nature and number of wounds

There was sufficient substantial evidence of premeditation and deliberation to support the trial court's denial of the defendant's motion to dismiss at the

conclusion of all of the evidence where evidence of the nature and number of the victim's wounds provides substantial evidence from which the jury could properly infer that defendant premeditated and deliberated before killing the victim. **State v. Ginyard**, 155.

§ 256 (NCI4th). Evidence concerning planning and execution of crime

There was sufficient evidence of first-degree murder based on premeditation and deliberation. **State v. Wiggins**, 18.

§ 257 (NCI4th). Malice, premeditation, and deliberation; intent to kill; where defendant took weapon with apparent intent to use weapon

There was sufficient substantial evidence of premeditation and deliberation to support the trial court's denial of the defendant's motion to dismiss at the conclusion of all of the evidence where the fact that defendant was carrying a knife was evidence tending to support an inference that he had anticipated a possible confrontation with the victim and that he had given some forethought to how he would resolve that confrontation. **State v. Ginyard**, 155.

§ 263 (NCI4th). Felony murder; proof of underlying felony

There was sufficient evidence that defendant took U.S. currency and a pistol from decedent to support his conviction of murder in the perpetration of armed robbery. **State v. Palmer**, 104.

§ 279 (NCI4th). Murder in perpetration of felony; burglary, felonious breaking and entering, felonious larceny, and similar crimes

The trial court did not err by instructing a jury that it could convict defendant of first-degree murder if it found that the killing had occurred during the commission of a burglary with explosives. **State v. Williams**, 440.

§ 280 (NCI4th). Murder in perpetration of felony; discharge of firearm into occupied residence or vehicle

The trial court did not err when it denied defendants' motions to dismiss charges of first-degree murder and discharging a firearm into occupied property for insufficient evidence where there was ample evidence from which a jury could find that defendants fired weapons into the vehicle driven by the victim; that a bullet from defendant Cook's weapon struck the victim causing his death; and that defendants were acting in concert when they engaged the victim in conversation and fired shots at his automobile as he drove away. **State v. Cook**, 564.

§ 396 (NCI4th). Effect of failure to give requested instructions; substance of instructions given

The trial court did not err by failing to give defendant's requested instruction in a prosecution for three first-degree murders that "where a defendant is charged on a theory of acting in concert for crimes requiring a specific intent, that intent must be shown as to each defendant" where the substance of the requested instruction was given. **State v. Gay**, 467.

§ 476 (NCI4th). Propriety of instructions on particular matters; intent

The trial court's instruction regarding transferred intent in a first-degree murder prosecution did not erroneously rely upon an unconstitutional, conclusive presumption. **State v. McHone**, 627.

HOMICIDE — Continued

§ 612 (NCI4th). Self-defense; reasonableness of apprehension of death or great bodily harm

The trial court in a felony murder prosecution was not required to instruct on self-defense by evidence that defendant took a knife away from his mother and stabbed her as she walked away from him or that he shot his mother when she crawled toward him after being stabbed and threatened him. **State v. Palmer**, 104.

§ 658 (NCI4th). Intoxication generally

The trial court in a first-degree murder prosecution did not err by failing to instruct the jury on voluntary intoxication because the evidence would not support a reasonable finding that defendant was "utterly incapable" of forming a premeditated and deliberated intent to kill. **State v. Shoemaker**, 252.

§ 678 (NCI4th). Instructions on diminished capacity

Assuming that an instruction on diminished capacity as a defense to burglary would have been appropriate, the trial court sufficiently instructed the jury on this defense when it gave a diminished capacity instruction in relation to the intended felony of first-degree murder. **State v. Gay**, 467.

§ 696 (NCI4th). Instructions on duress generally

The trial court did not commit plain error by failing to instruct on duress as a defense to felony murder predicated upon burglary where the court instructed the jury on duress as a defense to burglary. **State v. Gay**, 467.

§ 706 (NCI4th). Cure of error in instructions on voluntary manslaughter by conviction of first-degree murder

The trial court's failure to instruct on the lesser included offense of voluntary manslaughter was harmless error where the court instructed on first-degree and second-degree murder and the jury returned a verdict of guilty of first-degree murder. **State v. Shoemaker**, 252.

§ 1070 (NCI4th). Sufficiency of evidence to support instruction on flight

The trial court's instruction on flight was supported by evidence that defendant made unexpected visits to friends in Virginia and South Carolina following a homicide and by evidence that, while awaiting trial, defendant wrote a letter to his sister planning his escape if convicted. **State v. Barnes**, 67.

INDIGENT PERSONS

§ 14 (NCI4th). Scope of entitlement to counsel

Principles of due process require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages. **McBride v. McBride**, 124.

INSURANCE

§ 499 (NCI4th). Validity of provision in policy which contravenes purpose of Financial Responsibility Act

The public policy goals of the Financial Responsibility Act did not preclude application of the entitlement exclusion of an automobile liability policy where the Act provided no mandatory coverage to the tortfeasor. **Newell v. Nationwide Mut. Ins. Co.**, 391.

INSURANCE — Continued

§ 509 (NCI4th). Uninsured motorist coverage generally

Several principles have evolved from the interpretation of G.S. 20-279.21(b)(3) and G.S. 20-279.21(b)(4): the statutory scheme for liability coverage is essentially vehicle oriented while uninsured and underinsured coverage is essentially person oriented, and G.S. 20-279.21(b)(3) provides for two classes of insureds. Insureds of the first class are covered whether or not they are injured while in the insured vehicle while insureds of the second class are insured only when in the vehicle and only for coverage provided for persons in that vehicle. **Harrington v. Stevens**, 586.

§ 527 (NCI4th). Underinsured coverage generally

Several principles have evolved from the interpretation of G.S. 20-279.21(b)(3) and G.S. 20-279.21(b)(4): the statutory scheme for liability coverage is essentially vehicle oriented while uninsured and underinsured coverage is essentially person oriented, and G.S. 20-279.21(b)(3) provides for two classes of insureds. Insureds of the first class are covered whether or not they are injured while in the insured vehicle while insureds of the second class are insured only when in the vehicle and only for coverage provided for persons in that vehicle. **Harrington v. Stevens**, 586.

§ 528 (NCI4th). Underinsured coverage; extent of coverage

A plaintiff was allowed to stack underinsured motorist coverage both inter-policy and intrapolicy where he was injured in an automobile accident with an underinsured motorist and, although defendant contended that the owner must share some benefit before an insured of the first class may be covered, the statute says that a relative living in the same household with the owner of the policy is a "person insured." If a person is a "person insured" under a policy, then he or she should have all the rights of a person insured by the policy. **Harrington v. Stevens**, 586.

Plaintiff was not prevented from stacking underinsured motorist coverage from his brother's and father's policies by the fleet policy provision of G.S. 20-279.21(b)(4) even though six vehicles would be stacked and a fleet policy is defined as a policy covering five or more vehicles. Defendant does not contend that any policy in this case was a fleet policy. **Ibid.**

§ 530 (NCI4th). Underinsured motorist coverage; reduction of insurer's liability

An underinsured motorist carrier was not entitled by the terms of the policy to a credit under the underinsured motorist coverage section for a payment it made to its insured under the medical payments section of the policy. **Baxley v. Nationwide Mutual Ins. Co.**, 1.

Defendant Nationwide may not reduce its payments arising from an automobile accident for anything paid under the underinsured motorist coverage on the policy owned by the plaintiff where plaintiff was allowed to stack the coverages owned by his father and brother, with whom he lived, and Nationwide contended that whatever plaintiff receives through those coverages must be reduced by what he received from the tortfeasor's liability coverage and from the underinsured motorist coverage on his own vehicles. **Harrington v. Stevens**, 586.

§ 598 (NCI4th). Automobile insurance; effect of lack of permission of vehicle owner

The insured's son was excluded from coverage under an automobile liability policy while driving the insured's vehicle by the "entitlement" exclusion of the

JURY

MORTGAGES AND DEEDS OF TRUST — Continued

deed of trust, the condition precedent could not occur. **In re Foreclosure of Goforth Properties, Inc.**, 369.

§ 119 (NCI4th). Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust

Provisions of a supplemental deed of trust purporting to provide additional security for a purchase money note violated the anti-deficiency judgment statute and were not enforceable. **In re Foreclosure of Goforth Properties, Inc.**, 369.

MUNICIPAL CORPORATIONS

§ 30.1 (NCI3d). Power of municipality to zone; delegation of power to board or official

A provision of the amended Mecklenburg landfill zoning ordinance concerning approval of permit applications by the Charlotte-Mecklenburg Zoning Administrator is facially constitutional because the conditions which must be met prior to issuance of a permit are objective standards which can reasonably be applied by the Zoning Administrator with the assistance of the Director of Engineering if necessary. **County of Lancaster v. Mecklenburg County**, 496.

There was no impermissible conflict of interest where Mecklenburg County applied for a landfill permit to the Charlotte-Mecklenburg Zoning Administrator. Absent a showing of undue influence, the fact that an application is made by an employing unit of government does not in and of itself constitute impermissible bias for administrative zoning decisions. **Ibid.**

§ 30.6 (NCI3d). Special permits and variances

An unappealed summary judgment in 1988 declaring Mecklenburg County's 1985 landfill zoning ordinance unconstitutional was not dispositive of this case because the 1988 judgment is binding only as to the procedure under the ordinance as it existed prior to the 1989 amendments, the amendments followed the directives of the 1988 judgment, and the fact that the 1988 judgment held that the County had failed to make a sufficient showing to support the findings of compliance with the then effective state regulations has no bearing upon the 1990 permit application. **County of Lancaster v. Mecklenburg County**, 496.

§ 30.8 (NCI3d). Construction and interpretation of zoning regulations

A superior court determination that petitioner's proposed duplexes constituted duplexes rather than rooming houses under the Chapel Hill Development Ordinance was reinstated where there was no functional description in the ordinance of a "single housekeeping unit" other than the sharing of a single culinary facility and, given that the proposed duplexes include only one such facility per unit, the proposed tenants were not excluded from "family" as defined in the ordinance. **Capricorn Equity Corp. v. Town of Chapel Hill**, 132.

§ 154 (NCI4th). Municipal governing bodies and meetings; power of council

A town board of commissioners has the authority to abolish a board of adjustment and to thereafter create a new board of adjustment and make appointments thereto. The statutory prohibition against reduction in the length of the terms of the members of the existing board of adjustment does not diminish the authority of the board of commissioners to abolish the board of adjustment; however, the board of commissioners cannot abolish and reestablish the board of adjustment at its whim. **Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro**, 421.

NEGLIGENCE

§ 19 (NCI4th). Factors to be considered on question of foreseeability of emotional distress arising from concern for another

Plaintiff mother could not recover for negligent infliction of emotional distress when she suffered mental anguish upon being informed that her child was in a car accident caused by defendant's negligence, rushing to the hospital where she observed resuscitation efforts by emergency personnel upon her child, and later learning of the child's death because plaintiff's injury was not reasonably foreseeable by defendant. **Gardner v. Gardner**, 662.

The possibility that defendant's negligence in serving alcohol to plaintiffs' son would combine with the son driving while intoxicated to result in a fatal accident which would cause the son's parents (if he had any) not only to become distraught, but also to suffer severe emotional distress as defined in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, simply was a possibility too remote to permit a finding that it was reasonably foreseeable. **Sorrells v. M.Y.B. Hospitality Ventures of Asheville**, 669.

PENALTIES

§ 7 (NCI4th). Disposition of proceeds of penalties, fines, and forfeited property generally

N.C. Const. art. IX, § 7 requires that the clear proceeds from the sale of RICO forfeited property be paid to the public school fund. **State ex rel. Thornburg v. House and Lot**, 290.

PUBLIC OFFICERS AND EMPLOYEES

§ 57 (NCI4th). Privacy of employee personnel records

Applications for the position of county sheriff sought by a board of county commissioners seeking to fill a vacancy in that office pursuant to G.S. 162-3 are governed by G.S. 153-98 rather than by the Public Records Law, and under that statute the applications are not subject to disclosure to the public. **Durham Herald Co. v. County of Durham**, 677.

§ 59 (NCI4th). Compensation and salaries generally

The superior court lacked jurisdiction to enter an order awarding a specific amount of back pay to a State employee. **Harding v. N.C. Dept. of Correction**, 414.

§ 63 (NCI4th). Employee grievances and grievance procedures generally

The superior court has only appellate jurisdiction over final decisions of the State Personnel Commission on State employee grievances. **Harding v. N.C. Dept. of Correction**, 414.

§ 65 (NCI4th). Disciplinary actions generally

Where a State employee was informed during an internal investigation that refusal to answer questions about his employment could result in his dismissal and the State did not seek a waiver of the employee's immunity from the use of his answers in any criminal action against him, the State did not violate the employee's Fifth Amendment right against self-incrimination by terminating him for refusing to answer questions without advising him that his answers could not be used against him in any criminal prosecution or that the questions would relate specifically and narrowly to the performance of official duties. **Debnam v. N.C. Dept. of Correction**, 380.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

There was sufficient evidence that defendant committed a robbery with a dangerous weapon. **State v. Wiggins**, 18.

§ 4.4 (NCI3d). Attempted armed robbery cases where evidence held sufficient

There was sufficient evidence of attempted armed robbery where defendant and his accomplices went to the residence of Sheila Twiggs to rob Mexicans of money and drugs. Although defendant contended that illegal drugs and money from the sale of illegal drugs are not protected property and that the attempt to steal such property is not a crime, contraband may be the subject of armed robbery. **State v. Oliver**, 513.

§ 5.2 (NCI3d). Instructions relating to armed robbery

The trial court in a prosecution for felony murder did not commit plain error by instructing that, in order to find defendant guilty of the underlying felony of armed robbery, the jury must find that defendant took "property" from the person or presence of the victim rather than charging that the jury must find that he took U.S. currency and a pistol as alleged in the indictment. **State v. Palmer**, 104.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

Although a complaint filed prior to the amendment of Rule 11 on 1 January 1987 may not be the basis for sanctions under the legal sufficiency prong of Rule 11, "other papers" filed subsequent to the amendment may be the basis for sanctions if they are interposed for an improper purpose. **Brooks v. Giesey**, 303.

Discovery responses are not properly the subject of sanctions under Rule 11 since Rule 26(g) is the proper avenue for sanctioning improper conduct relating to discovery responses. **Ibid.**

Assuming that affidavits filed by plaintiffs in opposition to defendants' motion for summary judgment are "other papers" within the meaning of Rule 11, the trial court's finding that the affidavits "contain conclusory and nonfactual statements" did not support the court's general conclusion that "other papers" were interposed for an improper purpose. **Ibid.**

While a brief filed by plaintiffs in opposition to defendant's motion for summary judgment constituted a "paper" within the meaning of Rule 11, the trial court's findings were insufficient to support a conclusion that the brief constituted a paper interposed for an improper purpose. **Ibid.**

STATE

§ 1.2 (NCI3d). Public records

Although it appears that the Public Records Act provides that recordings of communications or reports by two officers during a disturbance in which one of the officers was killed are public records which should be subject to inspection and copying by the plaintiff, Article 48 of Chapter 15A of the General Statutes, which provides specifically for discovery in criminal actions, governs in this case because the copies of recordings the plaintiff seeks to obtain were unquestionably gathered by the Winston-Salem Police Department in the course of a criminal

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